595 P.2d 1196

Oscar W. STEPHENS,
Petitioner-Appellee,

v.

Joyce STEPHENS,
Respondent-Appellant.

No. 11985.

Supreme Court of New Mexico.

May 15, 1979.

Coors, Singer & Broullire, Robert N. Singer, Albuquerque, for respondent-appellant.

Rowley, Hammond, Rowley & Tatum, Richard R. Rowley, II, Clovis, for petitioner-appellee.

Margaret Young, Martha C. Salvant, Washington, D.C., for amicus curiae WEAL Fund.

OPINION

McMANUS, Senior Justice.

This appeal arises from a judgment granting a dissolution of marriage and a division of property.

Colonel Stephens, petitioner-appellee, and Mrs. Stephens, respondent-appellant, were married on June 26, 1954 in Coldwater, Michigan. At the time of the marriage, Colonel Stephens was attending the University of Tennessee Dental School. He entered the United States Air Force after graduation, and, except for a brief period, has been so employed ever since. The trial court found that if Colonel Stephens were to retire at the present time, he would receive 67.5% of his base monthly pay of $2,670.00, or $1,802.25 each month for life. The trial court also determined that Colonel Stephens had completed 327 months in the Air Force and that 54 of these months were spent in New Mexico. From these figures, the trial court concluded that the community interest in Colonel Stephens' tour of duty in the service was 16.5% and that Mrs. Stephens' interest was 8.25%. Colonel Stephens was ordered to pay Mrs. Stephens the sum of $148.68 per month (8.25% of $1,802.25) if and when he receives his retirement benefits.

Mrs. Stephens contends that the trial court should have awarded her an equal share of Colonel Stephens' retirement benefits. Mrs. Stephens argues that an equal division is mandated by the law of New Mexico, or alternatively, by the law of Ten-

nessee. We hold that under the facts of this case, the law of Tennessee must govern the distribution of Air Force retirement benefits.

This Court first discussed the division of military retirement benefits in *LeClert v. LeClert*, 80 N.M. 235, 453 P.2d 755 (1969). In that case, the Court held that retirement benefits were a mode of employee compensation and that the portion of the benefits earned during coverture became community property.

In *Otto v. Otto*, 80 N.M. 331, 455 P.2d 642 (1969), this Court set forth the general rule that the character of retirement pay is determined by the law of the state where it is earned. If the retirement benefits were earned in a community property state during coverture, they are community property. However, if the retirement benefits were earned in a non-community property state during coverture, they are the separate property of the retired employee.

In *Hughes v. Hughes*, 91 N.M. 339, 573 P.2d 1194 (1978), this Court recognized that separate property as defined in common-law jurisdictions is not the same creature as separate property under community property law. *See, e. g., Burton v. Burton*, 23 Ariz.App. 159, 531 P.2d 204 (1975); *Rau v. Rau*, 6 Ariz.App. 362, 432 P.2d 910 (1967); *Berle v. Berle*, 97 Idaho 452, 546 P.2d 407 (1976). In *Hughes*, the Court stated:

> There are two distinct interpretations. Although wives in common-law states have no *legal title* to property purchased with the husband's earnings, the case law in those states has created many benefits, incidents, and immunities in favor of wives that attach themselves to such separate marital property. Therefore the wife, in many common-law states * * has inchoate equitable rights to her husband's separate property where she has made contributions to preserving and bettering that property, whereas in a typical community property state she has no such rights since she has community property rights instead. There is an obvious difference between property which *first* acquires its separate nature while the husband is domiciled in a community property state and his separate property that can be traced to property acquired in a common-law state where the wife has inchoate equitable rights in that property.

91 N.M. at 344, 573 P.2d at 1199. In *Hughes* the parties were originally domiciled in Iowa, a common-law state, where a wife has no vested legal interest in the wages of the husband or in property purchased with those wages. The parties later became domiciliaries of New Mexico, and money accumulated solely from the wages of the husband while the parties were in Iowa was used as the down payment on some ranch property and apartments located in New Mexico. The Court was asked to determine what the wife's interests were in the earnings from her husband's separate estate. The Court ruled:

> Although the property traceable to Col. Hughes' earnings was clearly his separate property, we hold that the characterization of this property as separate must be made under the applicable laws of the State of Iowa and therefore the property is subject to all the wife's incidents of ownership, claims, rights and legal relations provided in any and all of the laws of the State of Iowa that affect marital property.

91 N.M. at 346, 573 P.2d at 1201.

Mrs. Stephens argues that the community property legislation and the announced public policy of this state require an equal division of Colonel Stephens' retirement benefits.

Section 40–3–8, N.M.S.A. 1978 defines separate and community property as follows:

> A. "Separate property" means:
>
> (1) property acquired by either spouse before marriage or after entry of a decree of dissolution of marriage;
>
> (2) property acquired after entry of a decree entered pursuant to Section 40–4–3 NMSA 1978 unless the decree provides otherwise;
>
> (3) property designated as separate property by a judgment or decree of any court having jurisdiction;

(4) property acquired by either spouse by gift, bequest, devise or descent;

(5) property designated as separate property by a written agreement between the spouses; and

(6) each spouse's undivided interest in property owned in whole or in part by the spouses as cotenants in joint tenancy or as cotenants in tenancy in common.

B. "Community property" means property acquired by either or both spouses during marriage which is not separate property.

Mrs. Stephens argues that since the statute does not differentiate between property acquired in New Mexico and property acquired in other states, New Mexico courts are directed to presume that *all* property acquired during coverture, regardless of the situs of acquisition, is community property.

Mrs. Stephens also argues that an equal division of the retirement benefits is necessary to effectuate the policies announced by this Court in *Hughes*:

> Under community property law no distinction is made between husband and wife in respect to the right each has in the community property. The husband receives no higher or better title than does the wife. The plain public policy that this law expresses is that the wife shall have equal rights and equal dignity and shall be an equal benefactor in the matrimonial gain. "It is altogether fitting and proper that woman should be thus esteemed by the law in fixing her status if she is to be considered in fact as well as in theory an essential factor in the economy of the marital community." *La Tourette v. La Tourette*, 15 Ariz. 200, 137 P. 426, 428 (1914).

91 N.M. at 343, 573 P.2d at 1198. Mrs. Stephens submits that the fact of acquisition of property during coverture, and not the place or circumstances of acquisition, must take paramount consideration. She argues that the New Mexico courts should stand upon their own social and judicial principles and avoid the complex conflicts of law problems the court is presently forced to resolve.

Mrs. Stephens is asking this Court to adopt the same concept espoused in California's "quasi-community property" legislation. Cal.Civ.Code §§ 4800 and 4803 (West) (Supp.1977) designates property acquired by a person domiciled outside California, which property would be separate property by the law of that domicile but which would have been community property if acquired while in California, as quasi-community property. Upon divorce, quasi-community property is to be divided the same way as community property. The California Supreme Court held this statute constitutional in *Addison v. Addison*, 62 Cal.2d 558, 43 Cal.Rptr. 97, 399 P.2d 897 (1965).

While the California lawmakers seem to have found a very desirable solution for avoiding conflicts of law problems, our Legislature has not yet done so. Therefore, we must follow the law set forth in *Hughes*. Mrs. Stephens' interest in her husband's retirement benefits must be determined according to the law of the state where the benefits were acquired.

The record indicates that throughout the course of their marriage, the parties have been stationed in various places in the United States and foreign countries. However, Colonel Stephens has always named Tennessee as his designated home state. In *Blessley v. Blessley*, 91 N.M. 513, 577 P.2d 62 (1978) this Court stated that the domicile of armed forces personnel is not, in the absence of any intent to effect a change of domicile, affected or changed by reason of his entering the military. A member of the armed forces "does not, merely by reason of entry into the service, abandon or lose the domicile which he had when he entered, or acquire a new one at the place where he serves. [Citations omitted.]" *Id.* at 514, 577 P.2d at 63. In this case, the record does not show any intent on Colonel Stephens' part to affirmatively establish domicile in a state other than Tennessee. Therefore, we must apply Tennessee law in determining Mrs. Stephens' interest in her husband's retirement benefits.

By statute, a Tennessee court may decree to the wife such part of the husband's real and personal estate as it may think proper. Tenn.Code Ann. § 36–821, 1955 (Repl. 1977). In dividing property under § 36–821, Tennessee courts have awarded all or any part of the husband's estate according to the facts and circumstances of each particular case. *Williams v. Williams*, 146 Tenn. 38, 236 S.W. 938 (1922); *Rains v. Rains*, 58 Tenn.App. 214, 428 S.W.2d 650 (1968); *Mount v. Mount*, 46 Tenn.App. 30, 326 S.W.2d 493 (1959). Property rights are settled upon equitable principles. *Trimble v. Trimble*, 224 Tenn. 571, 458 S.W.2d 794 (1970); *Langford v. Langford*, 220 Tenn. 600, 421 S.W.2d 632 (1967); *Kittrell v. Kittrell*, 56 Tenn.App. 584, 409 S.W.2d 179 (1966). When determining what portion of the husband's separate estate will be awarded to the wife, courts consider to what extent the wife has contributed to the production, care, and maintenance of the husband's estate, to what extent the wife has contributed to the care and support of the children, each party's present financial condition, and in rare cases, the husband's misconduct. *Langford, supra; Williams, supra; Newberry v. Newberry*, 493 S.W.2d 99 (Tenn.App.1973); *Kittrell, supra; Mount, supra.*

In this case, the record indicates that during the course of their marriage, Mrs. Stephens directed her efforts to serving her husband and children as a wife, mother and homemaker. Colonel Stephens achieved his own financial stature in large part as a result of the labor of Mrs. Stephens on his behalf. The record also indicates that Colonel Stephens has a high earning capacity and an ability to earn in the future, but that Mrs. Stephens has a very limited present and future earning capacity.

When the facts of this case are viewed in light of Tennessee statutory and case law, it is our opinion that Mrs. Stephens is entitled to a one-half interest in Colonel Stephens' retirement benefits. Therefore, we reverse the trial court's decision insofar as it pertains to Colonel Stephens' retirement benefits. We remand this case to the trial court for entry of judgment in accordance with this opinion.

IT IS SO ORDERED.

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

595 P.2d 1199

Albert MARKS and Virginia Marks, Husband and Wife, and McFarland Brothers Bank, a New Mexico Corporation, Plaintiffs-Appellees,

v.

The CITY OF TUCUMCARI, New Mexico, a municipal corporation, Defendant-Appellant.

No. 12255.

Supreme Court of New Mexico.

June 5, 1979.

Robert M. Rowley, Tucumcari, for defendant-appellant.

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

OPINION

FEDERICI, Justice.

Plaintiffs-appellees Marks and plaintiff-appellee McFarland Brothers Bank (Bank) brought this action against appellant City of Tucumcari (City) seeking a declaration of their rights to certain real estate in Quay County. The trial court entered judgment for Marks and Bank. The City appeals. We affirm.

The stipulated facts are: On April 11, 1974, Marks purchased the property in question from Robert and Rose Mary Goldenstein (judgment debtors) by real estate contract. On May 1, 1976, the contract of sale was recorded in the office of the Quay County Clerk. On September 14, 1976, the City obtained a judgment against Goldensteins. On that date a transcript of the judgment was filed in the office of the Quay County Clerk. On August 16, 1977, a deed to the property from Goldensteins to Marks, which deed had been held in escrow by the Bank, was delivered to Marks by the Bank and filed with the County Clerk. On the same date, Marks executed and delivered to the Bank a mortgage on the property. The mortgage was recorded on August 16, 1977. Marks and the Bank all had actual knowledge of the City's recorded transcript of judgment.

The City contends that the trial court erred in holding that Marks and the Bank acquired title free and clear of the City's judgment lien. The City claims that the judgment debtors (vendors) were vested with legal title on September 14, 1976, when the City's judgment lien was perfected, and therefore, the judgment lien attached to that legal title, and Marks and the Bank took their title subject to that judgment lien.

Marks and the Bank contend that the judgment lien did not attach to the interest of the judgment debtors in this case, because the judgment debtors, as vendors under the contract of sale, retained only a bare legal title, held in trust as security for payment of the purchase price; that through the doctrine of equitable conversion the interest retained by the vendors was converted to personalty. We agree with Marks and the Bank.

In New Mexico the rule is that a *vendee*, under an executory contract for the sale of realty, acquires an equitable interest in the property. By application of the doctrine of equitable conversion, the *vendee* is treated as the owner of the land and holds an interest in real estate. On the other hand, the *vendor* holds the bare legal title as a trustee for the vendee. The *vendor's* interest is considered personalty. *Gregg v. Gardner*, 73 N.M. 347, 388 P.2d 68 (1963); *Mesich v. Board of County Com'rs of McKinley Co.*, 46 N.M. 412, 129 P.2d 974 (1942).

In *Gregg* the Court said:

> It is equally clear from our decisions that in equity a contract for sale of real estate results in the purchaser acquiring an equitable interest in the land which he may devise by will, and in case of intesta-

> cy the same passes to his heirs and not to his administrator. Whereas, legal title remains in the vendor, it is held in trust as security. * * * It must follow that when testatrix entered into contracts to sell certain of her real estate, the equitable interest in the land passed to the purchasers although legal title remained in her. Through the doctrine of equitable conversion, her interest is considered as personalty.

73 N.M. at 359, 388 P.2d at 77 (citations omitted).

In *Mesich*, this Court stated:

> 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, 1 Pomeroy's Equity Jurisprudence, § 367. 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. He may convey it or encumber it, devise it by will and on his death it descends to his heirs and not to his administrators. The legal title is held by the vendor as a naked trust for the vendee . . . . The vendor, before payment, holds the title as trustee for security only.

46 N.M. at 416–17, 129 P.2d at 976.

Section 39–1–6, N.M.S.A.1978 provides that upon the filing of a transcript of the docket of judgment in the county clerk's office, the judgment becomes a lien on the *real estate* of the judgment debtor. It reads:

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

In *Mutual Building & Loan Ass'n of Las Cruces v. Collins*, 85 N.M. 706, 516 P.2d 677 (1973), the Court held that under § 39–1–6 the equitable interest of a *vendee* under an executory contract of sale was real estate and subject to a judgment lien. The Court reviewed applicable authorities, stating:

> Ordinarily an equitable interest in real estate is not subject to execution or judgment lien, 46 Am.Jur.2d Judgments § 260 (1969), 49 C.J.S. Judgments § 479a (1947), unless there exists a statute broad enough to include equitable interests. Annot. 1 A.L.R.2d 727. Under statutes broad enough to include equitable interests, a judgment debtor's interest in real property is subject to the judgment lien recovered against him. [Citations omitted.] * * * We, however, prefer and adopt the more liberal rule * * * that *both legal and equitable interests in real estate are subject to judgment liens.* Therefore, *Warren v. Rodgers*, [82 N.M. 78, 475 P.2d 775 (1970)] is overruled insofar as it held that judgment liens cannot attach to equitable interest. (Emphasis added.)

Id. at 707, 516 P.2d at 678.

Concerning § 39–1–6 and § 39–4–13, N.M.S.A.1978, the Court stated:

> Both provisions broadly refer to "real estate" of the judgment debtor and, therefore, seem broad enough to include equitable interests within their purview.

Id. at 707–8, 516 P.2d at 678–79.

We note that in *Mutual Building & Loan* the Court held that both *legal and equitable interests* in real estate were subject to judgment liens. If the Court, by that statement, intended to include within the term "*real estate*" the interest of a *vendor* in an executory contract for the sale of realty, then that specific language is hereby expressly overruled.

We are committed to the rule expressed in *Gregg* and *Mesich* that the inter-

est retained by a vendor under an executory contract of sale is personalty and not real estate. Since § 39–1–6 permits a judgment lien only upon real estate and since the judgment debtors' interest in the property was converted to personalty, the City's judgment did not ripen into a lien on the real estate involved.

The judgment of the district court is affirmed.

IT IS SO ORDERED.

McMANUS, Senior Justice, and EASLEY, J., concur.

595 P.2d 1204
597 P.2d 1178

Santiago S. MAREZ, Plaintiff-Appellee,

v.

KERR-McGEE NUCLEAR CORPORATION, Defendant-Appellant.

No. 3487.

Court of Appeals of New Mexico.

Dec. 19, 1978.

Rehearing Denied Jan. 8, 1979.

Lowell E. McKim and George W. Koze-liski, Glascock, McKim & Head, Gallup, for defendant-appellant.

Melvin L. Robins, Albuquerque, for plaintiff-appellee.

OPINION

LOPEZ, Judge.

Defendant-appellant appeals a judgment in a workmen's compensation case awarding benefits to plaintiff-appellee. We affirm.

Appellee was employed by appellant in 1969 to work in appellant's acid plant. On June 1, 1971, appellee accidently injured his back while working in the course and scope of his employment. However, he continued to work until 1975. At the beginning of that year, appellee transferred to appellant's rubber shop. In June of 1975, appellee again injured his back. Shortly thereafter, appellee underwent surgery for this back condition. After returning to work in March, 1976, appellee continued to have pain in his lower back. Upon examination by his surgeon, conservative treatment was recommended. On April 11, 1977, while opening and closing a vulcanizer door, appellee again injured his back but continued to work for two more days. On April 14, 1977, appellee failed to appear for work and did not return to appellant's plant until May 2, 1977. Upon his return, appellant assigned him to less strenuous tasks. Appellee continued to work on these tasks until June 15, 1977. Because of his back pain and the onset of more strenuous work, appellee again ceased working and this action followed.

Appellant relies upon the following five points for reversal: (1) the finding of total permanent disability is not supported by substantial evidence; (2) the finding that appellee suffered an accidental injury on April 11, 1977, is not supported by substantial evidence; (3) the finding that appellant had actual knowledge of the April 11, 1977 accident is not supported by substantial evidence; (4) the trial court erred in retaining jurisdiction and reserving its decision on the first cause of action; and (5) the award of attorney fees was excessive. We will discuss each point *seriatim.*

Total Permanent Disability

Under this point, appellant challenges the trial court's findings of fact no. 5 which reads as follows:

> "As a result of the compensable accidental injury sustained by plaintiff, plaintiff is wholly unable to perform the usual tasks in the work he was performing at the time of his injury, and is wholly unable to perform any work for which he is fitted by age, education, training, general physical and mental capacity, and previous work experience.

It is well settled in New Mexico that the findings of a trial court in a workmen's compensation case will not be disturbed on appeal if they are supported by substantial evidence. *Gammon v. Ebasco Corporation,* 74 N.M. 789, 399 P.2d 279 (1965); *Moorhead v. Gray Ranch Co.,* 90 N.M. 220, 561 P.2d 493 (Ct.App.), *cert. denied,* 90 N.M. 254, 561 P.2d 1347 (1977). Substantial evidence is relevant evidence which a reasonable mind accepts as adequate to support the conclusion. *Shirley v. Venaglia,* 86 N.M. 721, 527 P.2d 316 (1974); *Cave v. Cave,* 81 N.M. 797, 474 P.2d 480 (1970); *Tapia v. Panhandle Steel Erectors Company,* 78 N.M. 86, 428 P.2d 625 (1967). In deciding whether a finding has substantial support, we must view the evidence, together with all inferences reasonably deducible from such evidence, in the light most favorable to support the finding. *Gallegos v. Duke City Lumber Co., Inc.,* 87 N.M. 404, 534 P.2d 1116 (Ct.App.1975). We will reverse only if convinced that the evidence thus viewed cannot sustain the finding. Furthermore, only favorable evidence will be considered; any unfavorable evidence will not be considered. *United Veterans Organization v. New Mexico Property Appraisal Department,* 84 N.M. 114, 500 P.2d 199 (Ct.App. 1972). We will not weigh the evidence or determine the credibility of witnesses. *Platero v. Jones,* 83 N.M. 261, 490 P.2d 1234 (Ct.App.1971). The trier of facts is the sole judge of the credibility of witnesses and the weight to be given their testimony. *State ex rel. Reynolds v. Lewis,* 84 N.M. 768, 508 P.2d 577 (1973).

After reading the record and applying the foregoing principles, we rule that there is substantial evidence to support the trial court's finding that appellee is totally and permanently disabled as per § 59–10–12.18, N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 1, 1974). *See Maes v. John C. Cornell, Inc.,* 86 N.M. 393, 524 P.2d 1009 (Ct.App.1974). In *Quintana v. Trotz Construction Company,* 79 N.M. 109, 440 P.2d 301 (1968), the Su-

preme Court stated that the following tests must be met in order for a claimant to be totally disabled: "(1) complete inability 'to perform the usual tasks in the work he was performing at the time of his injury'; and (2) absolute inability 'to perform any work for which he is fitted by age, education, training, general physical and mental capacity, and previous work experience.'" *Id.* at 111, 440 P.2d at 303. We note, in passing, that the court's finding essentially contains these two tests.

With respect to the first of these tests, the testimony of appellee's doctor, Dr. Allan Wilson, and supervisor establish that appellee is unable to perform the usual tasks required of an employee in appellant's rubber shop. Thus the first test was met. With respect to the second test, the testimony of various witnesses on direct, cross, redirect and recross examination can be interpreted as containing certain inconsistencies. On direct examination, appellee's doctor testified that appellee could probably do work which allowed alternative periods of setting and standing. Appellee's doctor then testified on cross-examination that appellee could do sedentary work and light work with accompanying pain. However, on redirect examination, the doctor modified his previous testimony by stating that, with respect to the above types of work, appellee would have to attempt to do this work before he would be able to give an opinion concerning appellee's capacity to do the work. Likewise, appellee testified on cross-examination that he did not know whether he could do any other jobs. On redirect examination, he testified that, based on his past work experience and training and because of his injury, he could no longer do that work which he was capable of doing before he was injured. However, on recross examination, appellee stated that there might be portions of work in appellant's rubber shop and acid plant which he might be able to do.

Before analyzing the import of the above testimonies, we note that opinion testimony of a medical expert may be considered as substantial evidence upon which a finding of disability may be made. *Roybal v. County of Santa Fe,* 79 N.M. 99, 440 P.2d 291 (1968); *Ortega v. New Mexico State Highway Department,* 77 N.M. 185, 420 P.2d 771 (1966); *Casaus v. Levi Strauss & Co.,* 90 N.M. 558, 566 P.2d 107 (Ct.App. 1977). In addition, once causation is established by appropriate medical evidence, the extent of disability may be established by the plaintiff. *Garcia v. Genuine Parts Company,* 90 N.M. 124, 560 P.2d 545 (Ct. App.), *cert. denied,* 90 N.M. 254, 561 P.2d 1347 (1977). Whether the second test can be established by the testimony of appellee's doctor or appellee, therefore, depends upon the effect the above inconsistencies have upon this establishment. With respect to this issue, *Tapia v. Panhandle Steel Erectors Company,* supra, and *Montano v. Saavedra,* 70 N.M. 332, 373 P.2d 824 (1962) govern.

In the former case, the Supreme Court was faced with certain inconsistencies in plaintiff's testimony and stated:

> We are not required to determine whether there are in fact contradictions in Tapia's testimony. If there are, they only affect the credibility of the witness. It has been firmly established in this jurisdiction that only the trier of the facts may weigh the testimony, determine the credibility of witnesses, reconcile inconsistent or contradictory statements of a witness, and say where the truth lies.

Id. at 89, 428 P.2d at 628; *accord, Ortiz v. Mason,* 89 N.M. 472, 553 P.2d 1279 (1976); *Curtiss v. Aetna Life Insurance Company,* 90 N.M. 105, 560 P.2d 169 (Ct.App.), *cert. denied,* 90 N.M. 7, 558 P.2d 619 (1976). In *Montano,* a workmen's compensation case, the medical witness testified on direct examination that the accident was the probable cause of the disability. On cross-examination, he admitted it would be difficult to say with any degree of probability that the accident was the cause of the condition; on redirect, he again stated that the accident was the most probable cause of the disability but was subject to argument. The Supreme Court ruled there was evidence from which the trial court could have found that

the accident was the probable cause of the condition. However, it upheld the refusal to so find and held it was the function of the trial court to evaluate all the evidence and determine where the truth lay. *See also, Martinez v. Flour Utah, Inc.,* 90 N.M. 782, 568 P.2d 618 (Ct.App.1977); *Moorhead v. Gray Ranch Company,* supra.

Applying the reasoning of these two cases to the case at bar, we rule that the trial court was justified in disregarding that testimony which was inconsistent with a finding that appellee is wholly unable to perform any work for which he is fitted by age, education, training, general physical and mental capacity, and previous work experience. In addition, we hold that appellee's testimony is substantial evidence to support this finding. Thus the second test for the establishment of total disability was met. In so holding, we point to the language of the Supreme Court in *Ideal Basic Industries, Inc. v. Evans,* 91 N.M. 460, 575 P.2d 1345 (1978):

> The determination of the degree of disability in workmen's cases is generally a matter for the trial court, and absent misapplication of the law or a lack of substantial evidence, an appellate court should not substitute its judgment for that of the trial court.

Id. at 1346. We also note that appellant's witness, Abraham Mackler, testified that appellee could perform various jobs despite his disability. However, as stated before, the trier of facts is the sole judge of the credibility of witnesses and the weight to be given their testimony. *State ex rel. Reynolds v. Lewis,* supra. Therefore, the trial court was justified in disregarding this testimony.

Accidental Injury on April 11, 1977

Under this point, appellant contends that the trial court's findings of fact no. 2 is not supported by the required evidence. This finding reads as follows:

> On or about the 11th day of April, 1977, plaintiff sustained a compensable accidental injury arising out of and in the course of his employment by the defendant, Kerr-McGee Nuclear Corporation.

Appellant's argument that the trial court erred in finding the occurrence of an accidental injury on this date is based primarily upon two grounds: first, appellant contends that the testimony reveals that appellee's pain related back to the 1971 accident and continued until the last day of his employment and, second, the testimony shows that the occurrence was only a continuation of painful incidents appellee had previously experienced while working on the vulcanizer can. Therefore, appellant asserts that April 11, 1977, has no major significance. In response, appellee argues that the court's finding has substantial support in the evidence, as the word "accident" has been interpreted by New Mexico case law. We agree.

In *Webb v. New Mexico Pub. Co.,* 47 N.M. 279, 141 P.2d 333 (1943), the Supreme Court, addressing itself to the issue of accidental injury, stated:

> After all it is a question of accident or no accident, and the precise second, minute, hour or day that it occurred is but evidence to be considered with the other facts and circumstances of the case in deciding whether the injury was in fact accidental. True, there must be a time when it can be said with certainty that a compensable accidental injury has been inflicted; but the cause, and the coming into existence of the evidence characterizing it as a compensable one, need not be simultaneous events. An injury may be gradual and progressive, and not immediately discoverable; yet certainly and definitely progress to discovery and then to a compensable injury.

Id. at 285–86, 141 P.2d at 337. *See also Salazar v. County of Bernalillo,* 69 N.M. 464, 368 P.2d 141 (1962). Accidental injury was also defined in *Stevenson v. Lee Moor Contracting Co.,* 45 N.M. 354, 115 P.2d 342 (1941). In that case, the Supreme Court said:

> It is not necessary that the injury should result momentarily, to be accidental. It may be the result of hours, even a day or longer * * * depending upon the facts of the case.

Id. at 367, 115 P.2d at 350. Therefore, it is apparent that the meaning of "accident" is not limited to sudden injuries, nor is its meaning limited by any time test. *Salazar v. County of Bernalillo,* supra.

In addition, appellee's doctor, Dr. Allan Wilson, testified that after April 11, 1977, appellee began to experience some pain in his right buttock and leg. Dr. Wilson stated that this pain was new to appellee's pain syndrome. Furthermore, this witness testified that after the April incident, he found tenderness to palpation in appellee's left and right sciatic notches and pain going into appellee's right leg. This was also a new finding. Finally, Dr. Wilson testified that appellee was more symptomatic both by history and on physical examination in June, 1977, than he was in June 1976, and that the April incident could be said to be the cause in this increase in symptoms. Dr. Wilson's testimony, therefore, establishes that appellee's weakened back condition was accelerated by the April incident. Such an acceleration is enough to establish an accidental injury. As this court stated in *Lyon v. Catron County Commissioners,* 81 N.M. 120, 464 P.2d 410 (Ct.App.1969), *cert. denied,* 81 N.M. 140, 464 P.2d 559 (1970):

> Based upon the reasoning of these cases we take it that a malfunction of the body itself, such as a fracture of the disc or tearing a ligament or blood vessel, caused or *accelerated* by doing work required or expected in employment is an accidental injury within the meaning and intent of the compensation act. (Emphasis added.)

Id. at 125, 464 P.2d at 415. *See also Ortiz v. Ortiz & Torres Dri-Wall Company,* 83 N.M. 452, 493 P.2d 418 (Ct.App.1972); 1B A. Larson, Workmen's Compensation Law, § 38.00 at 7–9 (1978). Therefore, we hold that the trial court's findings of fact no. 2 is supported by substantial evidence.

Actual Knowledge of the April 11, 1977 Accident

Again appellant attacks one of the trial court's findings of fact. In this instance, appellant challenges findings of fact no. 6 and contends that it is not supported by substantial evidence. This finding reads:

> The plaintiff's superintendents and foreman at Kerr-McGee Nuclear Corporation had actual knowledge of the accidental injury.

In order to be entitled to benefits, a claimant must give written notice to his employer of the accident and injury within the statutory time period. § 59–10–13.4, N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 1, 1974). However, § 59–10–13.4B provides that written notice is not required in the following situation:

> 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.

It is well settled in New Mexico that verbal reporting of an accidental injury to an employer or its agent may possibly satisfy the requirement of this section. *Baca v. Swift & Company,* 74 N.M. 211, 392 P.2d 407 (1964); *Lozano v. Archer,* 71 N.M. 175, 376 P.2d 963 (1962). However, the fact that a verbal report has been made is not, in itself, determinative of whether the requirement has been satisfied. All of the circumstances of the case must be considered. *Gutierrez v. Wellborn Paint Manufacturing Company,* 79 N.M. 676, 448 P.2d 477 (Ct.App.1968). The record indicates that when appellee returned to appellant's plant on May 2, 1977, he spoke to his superintendents and mentioned specifically that opening and closing the vulcanizer door, along with the required bending and climbing, was bothering him too much. Appellee also testified that he thinks he told these superintendents at this meeting that this was the reason he had to take off from work. In response to this information, appellee's superintendents attempted to shelter him from strenuous activity and provide him with lighter work for the time being.

Under the particular facts of this case, it is difficult to distinguish and separate the injury from the accident that

caused it, i. e. the injury, the compression of the nerves going into the leg from the lower back by the L4–5 vertebrae, was the accident. In this situation, appellee gave the best notice he could. He described to his superintendents the activities which caused the acceleration of his weakened back condition and which gave him additional pain. By giving him lighter work, his supervisors understood the meaning of this notice. Under these circumstances, we rule that appellee's verbal report gave appellee's superintendents and foreman actual knowledge of the April 11, 1977 accidental injury and that, therefore, the court's findings of fact no. 6 is supported by substantial evidence.

In so ruling, we note that appellant's superintendents testified that appellee made no mention to them on May 2, 1977, of the April 11 activities or of his reason for leaving work. In addition, we note appellee's immediate supervisor testified that he had no record of appellee working with the vulcanizer on April 11. We repeat, the trier of facts is the sole judge of the credibility of witnesses and the weight to be given their testimony. *State ex rel. Reynolds v. Lewis*, supra. Therefore, the judge was free to take the evidence that seemed reasonable and truthful and make a finding based on that evidence. As long as the finding is based on substantial evidence, it will not be disturbed on appeal. *Gammon v. Ebasco Corporation*, supra; *Moorhead v. Gray Ranch Co.*, supra.

Retention of Jurisdiction on the First Cause of Action

Appellant argues that the trial court erred in retaining jurisdiction and reserving its decision on the first cause of action. We affirm the court's retention of jurisdiction with the following comments. Appellee's complaint contains two causes of action. One relates to an injury in 1971; the second, upon which final judgment was entered, relates to an injury sustained on or about April 11, 1977. Appellant's argument that the trial court committed error is based upon several contentions. We will respond specifically to only one. Appellant contends that the 1971 claim is barred by § 59–10–13.6, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 1, 1974). Inherent in this contention is the argument that the trial court should have dismissed this claim pursuant to § 59–10–13.6. The trial court did not choose to so act; instead the court, in its Judgment, chose to act pursuant to Rule 54(b)(1) of the New Mexico Rules of Civil Procedure. Section 21–1–1(54)(b)(1), N.M.S.A.1953 (Repl.Vol. 4, Supp.1975). Rule 54(b)(1) states:

> Judgment upon multiple claims. Except as provided in Rule 54(b)(2), when more than one [1] claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may enter a final judgment as to one [1] or more but fewer than all of the claims only upon an express determination that there is no just reason for delay.

The trial court's Judgment contains the required determination. Therefore, it has retained jurisdiction over the 1971 injury. Thus, the effect of the court's use of Rule 54(b)(1) is that its judgment is a final order only with respect to the 1977 claim. Under these circumstances, our review is limited to the 1977 claim. *See Quintana v. Quintana*, 82 N.M. 698, 487 P.2d 126 (1971); *Pacheco v. Pacheco*, 82 N.M. 486, 484 P.2d 328 (1971). Only when a final order with respect to the 1971 claim is appealed can the question of the propriety of the court's present retention of jurisdiction be appropriately considered. Appellant's other contentions on this point are at this time without merit. They are based on no legal authority and establish no reasonable basis for a ruling that the trial court's present, legitimate exercise of Rule 54(b)(1) is error.

Attorney Fees

Appellant argues that the trial court's award of attorney fees in the sum of $11,958.52 plus tax is excessive. Section 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 [30] 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.

To support its argument, appellant contends (1) that consideration must be given to the amount of work performed by the claimant's attorney, (2) that attorney fees should not be based on a percentage of the award made in the claimant's favor, and (3) that the possibility of a reduction in compensation benefits based upon a reduced degree of disability after the original trial should be considered. In making these contentions, appellant does concede, however, that the result obtained for the claimant by his attorney should be considered.

With respect to appellant's first contention, we note that § 59–10–23D does not include, among those considerations for determining a reasonable fee, the amount of work expended by a claimant's attorney. In addition, we have indicated in prior decisions that this factor is not determinative. *Gallegos v. Duke City Lumber Co., Inc., supra; Maes v. John C. Cornell, Inc.*, supra. However, even if the amount of effort expended were determinative, the facts of the present case indicate that the amount and caliber of work done by appellee's attorney is such that the present award is not excessive. That appellee's attorney expended much effort on his client's case is apparent by the complaint filed in this suit alleging two causes of action, the motion for a protective order against allowing a mental examination of appellee, the interrogatories filed, and the one pre-deposition conference and the seven depositions attended by appellee's attorney. In addition, at trial there were many complex issues involved covering questions such as the definition of "accident," the degree of disability, notice of accident and substantial evidence questions.

As to appellant's second contention, we note that the right to attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *Gallegos v. Duke City Lumber Co., Inc.*, supra; *Adams v. Loffland Brothers Drilling Company*, 82 N.M. 72, 475 P.2d 466 (Ct.App. 1970). Therefore, we cannot say as a matter of law that the trial court abused its discretion merely because its award was based on a percentage figure. *See Gallegos v. Duke City Lumber Co., Inc.*, supra, where an award based on 15% of the total recovery was held not to be an abuse of discretion despite the fact that the trial was brief and involved only simple issues.

With respect to appellant's last contention, we rule that the possibility of a future reduction in benefits cannot be a feasible consideration in the award of attorney fees since such a possibility cannot always be anticipated. In promulgating § 59–10–23D, the Legislature did not include such a possibility. Until the Legislature establishes guidelines to provide for this possibility, we choose not to utilize appellant's last contention as a basis for ruling that the trial court's award was excessive. Therefore, we hold that the award of attorney fees in the present case was not an abuse of discretion nor a violation of § 59–10–23D.

Based upon the foregoing, the judgment of the trial court is affirmed and the appellee is awarded $2,000.00 attorney fees on this appeal.

IT IS SO ORDERED.

SUTIN, J., specially concurs.

HERNANDEZ, J., dissents.

SUTIN, Judge (specially concurring).

I specially concur.

The purpose of this concurrence is to set the guidelines for proving total or partial

disability of a workman. Seldom does a workmen's compensation case appealed to this Court reflect a clear establishment of these results.

Section 52–1–24, N.M.S.A. 1978 reads:

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

Section 52–1–24 defines "partial disability" in identical language, except for the substitution of "some percentage-extent" for the word "wholly."

It is imperative that the "age, education, *training,* general physical and mental capacity and *previous work experience*" of a workman be proven. This proof encompasses a life history. Each fact must be delineated by competent evidence. This information must be established by a workman and made available to a medical expert and to an expert vocational analyst when both experts appear to testify. Expert witnesses should be requested to obtain the life history from the workman. The vocational analyst obtains this information in the ordinary course of his study of the problem, but generally lacks competence to express an opinion on the medical aspects of "general physical and mental capacity." The medical expert seldom obtains a life history of each factor involved. I am not satisfied with a disability rating by a medical expert. A workman may be 40% disabled medically, but totally disabled when coupled with the workman's education and experience. See, *Mabe v. North Carolina Granite Corporation,* 15 N.C.App. 253, 189 S.E.2d 804 (1972).

After the various factors have been proven, the workman and the experts should be asked:

> In your opinion, based upon (your) (the) age, education, training, general physical and mental capacity and previous work experience (are you) (is the workman) wholly unable to perform the usual tasks in the work (you) (he) was performing *at the time of (your) (his) injury*?
>
> In your opinion, based on those facts, (are you) (is the workman) wholly unable to *now* perform any work for *which (you) (he) is fitted*? [Emphasis added.]

The same questions can be asked on partial disability, and the percent of partial disability. To be totally or partially disabled both prongs must be answered affirmatively.

The life history of plaintiff follows:

At the time of trial, December 30, 1977, plaintiff was 32 years of age, with a wife and four children, living in a mobilehome and unemployed. In 1964, at the age of 18 years, he was graduated from Grants High School, Grants, New Mexico. While in high school, he worked as a shoeshine boy in a barber shop. After graduation, he was employed in the molding plant of Mount Taylor Mill Works at Milan, New Mexico. Thereafter, he was drafted into the United States Army and was discharged in 1968. He was then employed by United Nuclear as a "top-lander," one who drove an ore truck and delivered materials. In 1969, when the mine closed, plaintiff began his employment with Kerr McGee as a laborer, lifting heavy sacks of ammonium sulphate. A month and a half later, he was promoted to second class operator in the boiler room of the acid plant. This consisted of opening and closing valves, taking samples of water, treating the water with different chemicals and lifting materials for use in water.

Plaintiff was promoted to first class in the acid plant, and in 1971, while opening a valve in the boiler room, he was injured. He jerked to keep from burning his face and twisted his back, the forerunner of his future disability. He told his boss, continued working and saw a doctor or two.

In 1975, he was transferred from the acid plant to the rubber plant. This consisted of heavy lifting, climbing in and out of leech tanks, applying rubber to pipes, lifting pipes and pump bowls and vulcanizing them. It required bending, lifting and squatting. In June and July of 1975, the annual "turn-around" of the plant took place. The mill was shut down and all necessary repairs were to be made. While repairing a conveyor belt, plaintiff and another laborer lifted a 400 pound portable vulcanizer and plaintiff's back injury was aggravated, resulting in much pain and limping. On returning from a trip to California, plaintiff was attended by a chiropractor for 10 days without relief. He returned to work for three days but had to quit. He was again attended by the chiropractor and Dr. Allan Wilson in Albuquerque who suggested surgery. In August 1975, a laminectomy was performed.

In March 1976, seven months later, plaintiff returned to work. In April, his back pain returned. After notifying his employer he was sent to the company's doctor and was off work until May 2, 1976. The company doctor referred plaintiff to an Albuquerque doctor who suggested further surgery to perform a fusion atop the laminectomy. The company doctor did not recommend it. Plaintiff sought to do lighter work along with his pain and disability but nothing was available. He continued to work until June 16, 1977, but he was compelled to quit because he could not perform his duties.

At the time of trial, plaintiff had pain "like the stretching or pulling of the nerve." He attended the New Mexico State Branch College in Grants, New Mexico for one semester under the G. I. Bill and studied mathematics, speech, psychology and english. Since June of 1977 he was unable to work at all. Thereafter, under Dr. Wilson's recommendation, he lay down and lifted his leg toward his chest, two or three times a day for about two hours every day, to relieve the pain in his back.

An injured employee is "totally disabled" if he is unable to pursue any gainful employment without experiencing substantial pain. *Rachal v. Highlands Ins. Co.,* 355 So.2d 1355 (La.App.1978).

The foregoing evidence of plaintiff's age, education, training, general physical and mental capacity and previous work experience constituted sufficient evidence for the trial court to find that plaintiff was totally disabled at the time of the injury and at the time of trial.

To rebut plaintiff's total disability, defendant produced as a witness, Abraham Mackler, a vocational analyst, a well qualified expert to determine vocational disability. See, *Getz v. Equitable Life Assur. Soc. of U. S.,* 90 N.M. 195, 561 P.2d 468 (1977), an action on an insurance policy, in which Mackler testified.

Mackler spent two days interviewing plaintiff and secured information of the age, education, training, general physical and mental capacity and previous work experience. *However, he admitted he was not qualified to judge plaintiff from a medical point of view.* He was asked a hypothetical question to render an opinion as to what kind of job plaintiff could do. He testified to a list of twenty-six. One pertinent question was asked:

> Q. In any event based upon this listing of jobs that you gave, there's twenty-six of them, most of these he could do immediately, is that correct?
>
> A. He could do it right now based on your hypothetical.

This question and answer did not comply with § 52–1–25 that defines partial disability. It did not establish a percentage-extent of disability at the time of trial, and it did not establish a "percentage-extent to perform the usual tasks in the work he was performing at the time of his injury." This is the two prong test, both of which are essential to recovery of workmen's compensation benefits. *Medina v. Zia Company,* 88 N.M. 615, 544 P.2d 1180 (Ct.App.1975); *Medina v. Wicked Wick Candle Co.,* 91 N.M.

522, 577 P.2d 420 (Ct.App.1977). Furthermore, Mackler's opinion did not include plaintiff's nerve-racking pain as a disabling factor in the performance of work, *nor that such work was actually available.*

Defendants usually rely on my *Medina* opinions. Before doing so, they must discern the facts in each case. In *Zia Company, the employer offered plaintiff work that he was fitted to do, wholly able to perform, and at the same wage,* but plaintiff left his work, went home and did not return. In *Wicked Wick Candle,* at the time of trial, *plaintiff had full-time employment as a clerk typist.* Neither case discussed a workman's ability to perform outside work, sedentary or otherwise. To attempt to make the two prong test applicable here on partial disability is an attempt to pole vault without a pole.

I should like to state my interpretation of the following language in the definition of disability.

> . . . and is wholly unable to perform any work for which he is fitted . . .

A misconception exists on the meaning of this phrase. Lawyers believe that read strictly as stated, an injured workman employed as an electrical engineer, plant foreman supervisor, department head or second class operator in a boiler room of an acid plant is not totally disabled if he has the capacity to perform ANY WORK. These words are given the broadest meaning, such as performing janitorial services, working as a filling station attendant, driving a truck on smooth highways, raking leaves for the city, selling pencils, and 25 other sedentary jobs. Affirmative answers by expert witnesses to questions put to them is considered to be sufficient to establish partial disability. This testimony is insufficient. These tasks are far removed from the workman's usual tasks, his physical and mental capacities, the risks involved and the unavailability of employment. They are not jobs "for which he is fitted."

The phrase "any work for which he is fitted" must be reasonably interpreted and liberally construed. Otherwise a man must be a helpless invalid or physical or mental basket case to be entitled to benefits. Total disability does not mean that a workman must be a helpless invalid. *E. R. Moore Co. v. Industrial Com'n,* 71 Ill.2d 358, 17 Ill.Dec. 207, 376 N.E.2d 206 (1978); *Wilson v. Weyerhaeuser Co.,* 30 Or.App. 403, 567 P.2d 567 (1977). "Any work" means a workman's ordinary employment, or such other employment, if any, approximating the same livelihood the workman might be expected to follow in view of his circumstances and capabilities. An injured workman is totally disabled if he cannot perform the same or similar work to that performed before the accident without unusual difficulty or danger. A skilled worker, although he may be able to obtain other types of skilled work, is totally disabled if he cannot perform a substantial portion of the work incident to his special occupation. By reason of the work-caused disability, the employee is placed at a disadvantage in securing employment in the labor market. *Thomas v. Holland,* 345 So.2d 1000 (La.App.1977). See, *Thompson v. Argonaut Ins. Co.,* 28 Or.App. 697, 560 P.2d 684 (1977). *Select Ins. Co. v. Boucher,* 551 S.W.2d 67, 76 (Tex.Civ.App.1977) says:

> The term "total incapacity" does not imply an absolute disability to perform any kind of labor. A person disqualified from performing the usual tasks of a workman in such a way as to enable him to procure and retain employment is considered totally disabled. The term implies disability to perform the usual tasks of a workman and not merely the usual tasks of any particular trade or occupation. . . .

To conclude that an electrical engineer is partially disabled because he is capable of raking leaves or performing janitorial services destroys the spirit of the Workmen's Compensation Act. He has no other skills or training to draw upon. Each case must be considered on its peculiar facts for the reasons that what may be totally disabling to one workman would be only slightly disabling to another of a different age, back-

ground and experience. A workman 60 years of age with a fifth grade education doing hard labor may be totally disabled, whereas a young man with a football career may not be.

A total disability award must not be an inducement to malingering. A workman should have the burden of proving that reasonable efforts were made to obtain work within work capabilities and failed to obtain work; that similar work was unavailable. A workman should search for employment and mention the different places where application was made to determine whether employers would undertake the risks of a disabled workman. To answer one newspaper advertisement and apply directly to one employer is not sufficient, *Oliver v. Wyandotte Ind. Corporation,* 360 A.2d 144 (Me.1976), but where applications for work are made with fourteen employers, of course, the efforts made were sufficient. *Bowen v. Maplewood Packing Co.,* 366 A.2d 1116 (Me.1976).

The employer also has a duty to prove not only what the jobs might be, but more importantly, that such jobs be comparable or similar to the workman's skills and training and that these jobs were reasonably available to a person in the workman's position. This burden requires the employer to search for comparable available employment and assist the workman in obtaining work to support his family. "It is much easier for the defendant to prove the employability of the plaintiff for a particular job than for plaintiff to try to prove the universal negative of not being employable at any work." *Brown v. Safeway Stores, Inc.,* 82 N.M. 424, 427, 483 P.2d 305, 308 (Ct.App.1970). To justify this burden, the employer can, as this employer does, engage a private investigator to put the injured workman under surveillance. If a workman dawdles, the employer can test total disability every six months.

"Wholly unable to perform any work for which he is fitted" means:

1. unable to perform comparable or similar work to that which he performed before the accident occurred;

2. suitable to his skills, experience and training as a workman during his lifetime career;

3. for which employment is not presently or readily available in a stable labor market.

In the instant case, plaintiff was totally disabled.

The secondary purpose of this concurrence is to determine the reasonableness of an attorney's fee awarded a workman. Section 52–1–54(D), N.M.S.A. 1978, provides that "the compensation to be paid the attorney for the claimant shall be fixed by the court trying the same . . . *in such amount as the court may deem reasonable and proper* . . . provided, however, that the trial court in determining and fixing a reasonable fee must take into consideration . . . (2) the present value of the award made in the workman's favor." [Emphasis added.]

A contingency fee award is not acceptable as a standard for fixing the reasonable attorney fee. *Trujillo v. Tanuz,* 85 N.M. 35, 508 P.2d 1332 (Ct.App.1973); *Baghramain v. MFA Mutual Insurance Company,* 315 So.2d 849 (La.App.1975); *Salmon v. Salmon,* 395 S.W.2d 29 (Tex.1965).

The amount of recovery, being the present value of the award, is only a factor to be considered in determining the amount of the fee to be allowed the claimant's attorney. *Trujillo, supra; Seal v. Blackburn Tank Truck Service,* 64 N.M. 282, 327 P.2d 797 (1958).

In workmen's compensation cases, *Elsea v. Broome Furniture Co.,* 47 N.M. 356, 376, 143 P.2d 572, 584 (1943) says:

> . . . Many considerations enter into the matter of fixing attorney fees, not the least important of which are: the ability, standing, skill and experience of the attorney; the nature and character of

the controversy; the amount involved, the importance of the litigation and the benefits derived therefrom. [See *Williams v. Dockwiller,* 19 N.M. 623, 145 P. 475 (1914).] We observed also in the case last cited that the trial court which fixes the fee supposedly has a superior knowledge of the actual services rendered and the charges usually prevailing in the particular locality for such services . . . .

Elsea was adopted as the rule in *Michelson v. Michelson,* 89 N.M. 282, 551 P.2d 638 (1976), a divorce case in which an award of an attorney fee of $26,000.00 was upheld where the wife's attorney submitted a time card showing approximately 400 hours spent in preparation for trial and where the trial consumed two full days.

Elsea and *Michelson* stand for the proposition that "The reasons which would call for a disturbance of the amount so fixed by a trial court must be very persuasive." [47 N.M. at 376, 143 P.2d at 584.]

Neither the Workmen's Compensation Act nor judicial rule requires proof by expert witnesses or documentary evidence to establish the reasonableness of an attorney fee. "The award is for an amount the trial court deems 'reasonable and proper.'" *Salazar v. Kaiser Steel Corporation,* 85 N.M. 254, 259, 511 P.2d 580, 585 (Ct.App.1973). The amount deemed "reasonable and proper" varies from district judge to district judge. A review of New Mexico cases discloses vast variations. 5B West's New Mexico Digest, Workmen's Compensation, Section 1983 (1966) and 1978 Supplement.

To me, a reasonable attorney fee should not depend upon the idiosyncratic attitudes of a district judge or an appellate court. It should be based upon the considerations set forth in *Elsea, supra.* We do not disturb the amount awarded unless the amount is so large that it is shocking; that the district judge acted beyond the bounds of reason. Compared with the inadequate awards heretofore given, the amount awarded in the instant case appears to be atop a mountain. To me, it was reasonable.

HERNANDEZ, Judge (dissenting).

I respectfully dissent.

There is substantial evidence in the record that the plaintiff is wholly unable to perform the usual tasks in the work he was performing at the time of his injury. However, the evidence presented by the plaintiff that he is wholly unable to perform any work for which he is fitted by age, education, training, general physical and mental capacity, and previous work experience, is unsubstantial. The record shows that the plaintiff was 32 years old, of average to above average intelligence, highly motivated and hard working. He was a high school graduate who had some additional training in the army as an automobile mechanic. At the time of trial he was taking courses in English, mathematics and psychology at the branch college of New Mexico State University at Grants. Dr. Wilson, one of the doctors who had operated on him in 1975 and had continued to treat him, testified that the plaintiff could do sedentary work but that he could not give a percentage figure as to the degree of plaintiff's disability, however, "I would guesstimate that it would probably be somewhere in the area of forty percent at this point." The plaintiff testified that he did not know what he could do. The plaintiff failed to carry the burden of proof as to this element.

Defendant's fourth point of error is well taken. Any claim that the plaintiff might have arising out of the accident in 1971 is barred by the limitation period. See Section 59–10–13.6 of the act. The trial court should have ruled that the claim was barred as a matter of law and dismissed it.

Defendant's fifth point of error is also well taken. Considering the issues, the proceedings, etc., it is my opinion that the trial court abused its discretion in awarding attorney's fees on a percentage basis and in the amount that it did.

595 P.2d 1212

TIPPERARY CORPORATION, Appellant,

v.

NEW MEXICO BUREAU OF REVENUE, Appellee.

No. 3442.

Court of Appeals of New Mexico.

March 15, 1979.

Writ of Certiorari Denied May 1, 1979.

James H. Bozarth, Hinkle, Cox, Eaton, Coffield & Hensley, Roswell, for appellant.

Jeff Bingaman, Atty. Gen., Santa Fe, Sarah Bennett, Sp. Asst. Atty. Gen., Sante Fe, for appellee.

OPINION

LOPEZ, Judge.

Pursuant to § 7–1–25, N.M.S.A.1978 [formerly § 72–13–39, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1975)], Taxpayer-appellant appeals a Decision and Order of Bureau-appellee's Commissioner affirming the Bureau's assessment of corporate income taxes on the sale of Taxpayer's Wyoming coal leases. The Bureau determined the proceeds from the sale to be business income under § 7–4–2 A, N.M.S.A.1978 [formerly § 72–15A–17 A, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1975)] and, accordingly, apportioned this income to New Mexico pursuant to §§ 7–4–10 through 7–4–18, N.M.S.A.1978 [formerly §§ 72–15A–25 through 72–15A–33, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp. 1975)] of the Uniform Division of Income for Tax Purposes Act (§§ 7–4–1 to 7–4–21, N.M.S.A.1978) [formerly §§ 72–15A–16 to 72–15A–36, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1975)]. We affirm.

The primary issue on appeal is whether the Commissioner's Order and Decision was arbitrary, capricious or an abuse of discretion, not supported by substantial evidence, or otherwise not in accordance with the law. Section 7–1–25 D(1), (2), (3), N.M.S.A.1978 [formerly § 72–13–39(1), (2), (3), N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp. 1975]). If the Order and Decision is of such a nature, this Court has the power to set it aside. Section 7–1–25 D(1), (2), (3). In order to determine this issue, two secondary issues must be decided: (1) whether the gain on the sale of Taxpayer's Wyoming leases is business income as it is defined under § 7–4–2 A; and (2) whether a tax on this gain by the State of New Mexico violates the Due Process Clause or the Commerce Clause of the United States Constitution.

I. *Facts*

Taxpayer was incorporated in 1967 as Tipperary Land Corporation under the laws of Texas. Its original purpose was to engage in agricultural business operations in Australia. It is currently engaged in business in New Mexico and several other states. In 1969, Taxpayer was involved in a reorganization. After negotiations with the other parties to this reorganization, Stoltz & Company, Inc. and Burro Pipeline Corporation, Taxpayer exchanged 990,000 shares of its common stock for the stock of Stoltz & Company, Inc., and Burro Pipeline Corporation. In addition, Taxpayer acquired from the partnership of Stoltz, Wagner & Brown, a fifty percent interest in undeveloped mineral acreage in New Mexico and Wyoming in exchange for 90,000 shares of Taxpayer's common stock. The remaining fifty percent continued to be owned by the Stoltz, Wagner & Brown partnership. The mineral interests that Taxpayer acquired in this exchange consisted of eighty coal leases in Wyoming and several uranium and sulphur leases in New Mexico. The coal leases covered 86,000 acres and a number of them consisted of a single isolated section of land surrounded

by Federal land. The sale of certain of these contiguous leases is the subject of this appeal.

In April 1974, Taxpayer and the Stoltz, Wagner & Brown partnership granted Mobil Oil Corporation an option to acquire their interest in those Wyoming coal leases covering approximately 20,000 acres. Taxpayer was to receive an advance royalty of $12,500,000 plus a retained escalating royalty of up to 2½ percent of gross coal sales. In May 1974, Mobil exercised its option and paid Taxpayer $2,660,000 and agreed to pay $9,846,000 in installments to January 15, 1980, if the leases were successfully renewed by April 1975. In April 1975, Mobil was notified that the leases had been renewed. In 1975, Taxpayer received a second payment from Mobil. Taxpayer reported the gain on the sale as nonbusiness income. On June 16, 1976, the Bureau, after conducting an audit of Taxpayer, issued an assessment classifying the gain as apportionable business income.

II. *Gain on the Sale of Taxpayer's Wyoming Coal Leases*

Any assessment of taxes made by the Bureau is presumed to be correct. Section 7–1–17 C, N.M.S.A.1978 [formerly § 72–13–32 C, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1975)]. In protesting the Bureau's assessment, Taxpayer has the duty to present evidence tending to dispute its factual correctness. *Champion International Corporation v. Bureau of Revenue*, 88 N.M. 411, 540 P.2d 1300 (Ct.App.), *cert. denied*, 89 N.M. 5, 546 P.2d 70 (1975); *McConnell v. State ex rel. Bureau of Revenue*, 83 N.M. 386, 492 P.2d 1003 (Ct.App.1971). Therefore, Taxpayer has the burden to overcome this presumption. *Champion International Corporation v. Bureau of Revenue, supra*; *Mears v. Bureau of Revenue*, 87 N.M. 240, 531 P.2d 1213 (Ct.App.1975).

Section 7–4–2 A reads:

> A. "business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations;

This definition of business income can be divided into two parts: (1) transactions and activity in the regular course of the taxpayer's trade or business, and (2) situations where the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations. *McVean & Barlow, Inc. v. New Mexico Bureau of Revenue*, 88 N.M. 521, 543 P.2d 489 (Ct.App.), *cert. denied*, 89 N.M. 6, 546 P.2d 71 (1975). In affirming the Bureau's assessment, the Commissioner's Decision and Order relies on both parts of the definition.

A. *The First Part of § 7–4–2 A*

At the hearings before the Commissioner and on appeal, Taxpayer argues that the gain from the sale of the coal leases falls under neither part of the definition. With respect to the first part, Taxpayer claims that the evidence supports the following conclusions:

(1) From 1969 to 1975, Taxpayer was primarily in the business of exploring, developing and processing oil and gas. During this period, Taxpayer was minimally engaged in agriculture, fishing, canning shrimp and several "hard-rock" minerals activities.

(2) Taxpayer's coal leases were acquired in order to "round out" a major reorganization in which taxpayer obtained a corporation owning oil and gas properties.

(3) Both Taxpayer and the Stoltz, Wagner and Brown partnership lacked the two essential ingredients of cash and expertise necessary to develop independently a mining operation or other viable facility. Not until after the sale of the coal leases did Taxpayer have any employee possessing any expertise in the coal area.

(4) Taxpayer never incurred expenses for a feasibility study of its coal leases nor did it accept any proposals for such studies. It never operated the leases nor were they ever used for financing purposes. The leases were acquired and held solely for investment purposes.

(5) Thus, the regular course of Taxpayer's trade or business has never included the sale of coal leases.

In response, the Bureau contends that the evidence supports the conclusion that Taxpayer is in the business of exploration and development of oil, gas and minerals and that the sale of the leases was in the regular course of this business. We agree.

The seminal case in New Mexico construing the first part of § 7–4–2 A is *Champion International Corporation v. Bureau of Revenue, supra.* Three construals of business income resulted from this case. Judge Sutin, the authoring judge, defined the phrase, "transactions and activity in the regular course of the taxpayer's trade or business," as:

> Business deals and the performance of a specific function in the normal, typical, customary or accustomed policy or procedure of the taxpayer's trade or business.

Id. at 414, 540 P.2d at 1303. Judge Sutin also concluded that, in the light of previous cases, the use to which income is put determines whether it is business income. *See Sperry and Hutchinson Company v. Department of Revenue,* 270 Or. 329, 527 P.2d 729 (1974); *Great Lakes Pipe Line Company v. Commissioner of Taxation,* 272 Minn. 403, 138 N.W.2d 612 (1965). Rejecting *Champion's* narrow view of the meaning of trade or business, Judge Wood said in his special concurrence:

> As I read § 72–15A–17A [now § 7–4–2 A], supra, it makes no difference whether the income derives from the main business, the principal business, the occasional business or the subordinate business so long as the income arises from the "regular course" of business.

Champion, supra, 88 N.M. at 417, 540 P.2d at 1306. Judge Wood further stated:

> [A]ll income of a business organization is not "business income"; business income must arise from the regular course of business.
>
> Pertinent in determining whether income arises from transactions in the regular course of business is "the nature of the particular transaction" and "former practices" of the business entity. *Western Natural Gas Company v. McDonald,* [202 Kan. 98, 446 P.2d 781] supra. Also pertinent is how the income is used. *Sperry and Hutchinson Co. v. Department of Revenue,* supra.

Id. at 418, 540 P.2d at 1307. In my special concurrence, I grounded the definition of business income upon the legal principles developing around the unitary business concept. Based upon these principles, I ruled that the relationship of the income source to the business activities of the taxpayer determined whether income was business in nature. If the source were independent of these activities, the income was nonbusiness as defined in § 7–4–2 D, N.M.S.A.1978 [formerly § 72–15A–17 D, N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Supp.1975)]. *See,* e. g., *Great Lakes Pipe Line Company v. Commissioner of Taxation, supra; Webb Resources, Inc. v. McCoy,* 194 Kan. 758, 401 P.2d 879 (1965); Keesling & Warren, The Unitary Concept in the Allocation of Income, 21 Hastings L.J. 42, Example 2 at 52 (1960) for guidance to the meaning of "independent." Based upon a reading of the record and the applications of the above interpretations of business income, we hold that the gain from the sale of Taxpayer's coal leases is business income as it is defined in the first part of § 7–4–2 A. In so holding, we reaffirm our agreement with the Bureau's contention that Taxpayer is in the business of exploration and development of oil, gas and minerals.

This holding is based upon the following evidence:

(1) Taxpayer's Articles of Incorporation lists as one of the purposes for which it was incorporated the engaging "*in the business of* owning, holding, buying, *selling,* leasing and otherwise acquiring and disposing of oil, gas, petroleum and *all other mineral properties of every kind, and interests and estates therein* . . ." (Emphasis added.)

(2) In 1969, Taxpayer changed its name from Tipperary Land Corporation to Tipperary Land and Exploration Corporation. The president of Taxpayer testified that

this change was done to reflect the acquisition of oil and gas properties and other mineral interests in 1969. He also testified that Taxpayer, during the period in question, was involved in mineral exploration. The record contains abundant examples of this involvement. Prior to 1971, Taxpayer was engaged in an exploration program involving Australian copper, lead and zinc. Sometime during the period in question, Taxpayer entered into an option agreement with Amoco Minerals Co. involving the exploration of Taxpayer's molybdenum and copper prospects in certain Alaskan islands. By the end of 1973, Taxpayer's mineral interests included the Wyoming coal leases, Australian bauxite and Alaskan copper. In 1975, it acquired uranium prospects in Utah and initiated core drilling on these prospects. In this same year, Taxpayer expanded its oil, gas and mineral leaseholds to 250,000 acres. Taxpayer's president testified that these leaseholds included some of the following minerals: copper, lead, zinc, tin, silver, molybdenum, nickel and antimony. After the Mobil sale, Taxpayer continued to drill on its remaining Wyoming coal acreage and in its 1974 Annual Report stated: "As a corporate objective, the Company will seek to increase its coal position as an important means of adding to its reserves for both coal conversion to natural gas and in the mining of steam coal for industry." In addition, Taxpayer stated in its 1975 Annual Report: "Looking to the future our participation in the frontier projects of coal, bauxite, and uranium should provide a broadened base for continuing revenue and earnings growth." In 1976, taxpayer acquired and operated through a wholly owned subsidiary a coal mining operation in West Virginia. Finally, in response to a question addressed specifically to mineral exploration, Taxpayer's president testified that, between 1969 & 1974, Taxpayer was interested in exploring or developing "[a]nything that we might have found that would have had commercial value . . . ."

(3) From 1969 to 1974, Taxpayer was involved in a continued effort to develop and exploit its Wyoming coal acreage and to acquire additional coal acreage. Shortly after the reorganization and acquisition of the leases, a memorandum addressed to Taxpayer's Executive Committee stated: "[I]t is imperative that we stay abreast of all technical developments pertinent to exploitation of our mineral potential. I feel this is particularly true with regard to the coal leases." Attempts to exploit the coal leases included core drilling and water drilling tests to verify the existence of coal reserves and water supplies. In 1970, inquiry was made into railroad freight rates for coal shipments from Wyoming to the Chicago area. During the same year, a report, issued after conferring with an engineering consulting firm, presented various development prospects among which were mining and selling coal from the leased properties with subsequent transition to a gas and liquefication plant or the generation of electric power. Also in 1970, Taxpayer contacted Reynold Metals about the possibility of expanding its coal interests in Wyoming. A year later, an employee of Taxpayer issued a report concerning the availability of coal lands in Utah and recommended the acquisition of a particular tract. This recommendation resulted in an offer to purchase this tract. During the same year, Taxpayer entered into negotiations with American Metal Climax (Amax) which resulted in Amax obtaining the right to drill on the Wyoming acreage in order to determine if it was interested in acquiring an option on the property. After drilling, Amax made an offer for the leases which Taxpayer rejected. In 1973, Taxpayer requested from at least two companies proposals for feasibility studies concerning the possibilities of developing the coal leases. Shortly thereafter, it entered an option agreement involving the leases with Transcontinental Gas Pipe Line Corporation (Transco). As a result of this agreement, Taxpayer received approximately $291,666. In 1972 and 1973, Taxpayer contacted various companies to propose joint ventures for the development of the coal reserves. Taxpayer's president testified that if these contacts had produced any firm commitments, Taxpayer would

have tried to get the financial backing necessary to participate in these ventures. In 1974, Mobil Oil Corporation and Taxpayer entered into an agreement resulting in the gain which is the subject of this appeal.

(4) After determining that it had neither the expertise nor capital to develop the coal acreage by itself, Taxpayer, in conjunction with its various joint venture proposals, contacted at least thirty-three companies in an effort to sell the leases. Taxpayer's only employee possessing any expertise in the coal area testified that it was general knowledge in the industry that the leases were for sale.

(5) Taxpayer's management of its leases indicates that the coal acreage was part of Taxpayer's total business enterprise. The revenues generated by the leases were used for the general operating needs of Taxpayer's various business endeavors. Taxpayer's Annual Reports for the years 1970 to 1974 list the leases as assets and state that substantially all of its assets are used to secure its long-term debt. During the period material to this case, the regular operational, managerial and executive personnel of Taxpayer conducted the effort to develop and exploit the coal properties. The expenses incurred in core and water drilling on the property and the payments of lease rentals were paid out of general funds. Taxpayer continues to pay rentals on the 66,000 acres of retained Wyoming leases.

(6) Taxpayer's management of its coal leases is consistent with the management of certain other properties owned by it. For example, Taxpayer has attempted to develop and exploit its bauxite holdings in Australia. When it was determined that such attempts were not feasible, Taxpayer continued to hold on to this property in anticipation of its future increase in value. Taxpayer's president testified that when this increase occurs, the possibility of selling these holdings to a company wishing to develop them exists. Taxpayer maintains an inventory of oil and gas interests. Some of these it develops independently or in conjunction with other companies; others are held for certain periods of time and others are disposed of. For example, in 1970, Taxpayer subleased its Alaskan oil and gas holdings and retained an overriding royalty; in 1972, it sold its Canadian oil and gas properties. Taxpayer's president testified that the revenue from such transactions is used for general operating needs.

(7) Taxpayer's Annual Reports for the years 1969 to 1975 contain numerous statements representing its Wyoming coal leases as an integral part of its business endeavors. The following is a sampling of those representations:

> . . . We visualize the Company as one with steady long-term growth potential in agriculture, livestock and marine operations, coupled with exciting exposure and opportunity in the mineral resources of the Continental United States, Australia, Canada and Alaska.
>
> Tipperary will continue to expand its search for and development of the real assets of land and minerals during the 1970's. (1969 Annual Report)
>
> As the new year begins management foresees the opportunity for a dramatic increase in the value of your Tipperary investment as the Company expands it activities in oil and gas exploration, coal, gas processing and other related energy projects. (1973 Annual Report)
>
> Tipperary has 175,000,000 tons of strippable coal under its remaining 66,000 acres of State of Wyoming coal leases, in addition to a 2½% gross royalty on future production from the property traded to Mobil.
>
> *We plan to use these reserves as a foundation for the expansion of Tipperary's investment in coal. Coal is America's most secure energy resource for the future.* (1975 Annual Report) (Emphasis not added.)

As stated previously, we rule this evidence supports a holding of business income under any of the interpretations of business income found in *Champion International Corporation v. Bureau of Revenue, supra.* Judge Sutin's interpretation is based upon

(1) whether the transaction was customary in the taxpayer's business and (2) the use to which the income was put. Although there is evidence that Taxpayer had never sold coal leases prior to the Mobil sale, there is substantial evidence to support the conclusions that Taxpayer is in the business of exploring and developing oil, gas and mineral properties and that it is customary for Taxpayer to dispose of its property interests through transactions similar to the Mobil sale. In addition, the fact that Taxpayer is in the business of exploring and developing oil, gas and mineral properties and Judge Wood's rejection of a narrow meaning of trade or business further supports the conclusion that the lease sale was an accustomed procedure in Taxpayer's business. Furthermore, the evidence is substantial that the monies from the Transco option agreement and Mobil sale were used for Taxpayer's general operating needs. Thus, the use test for business income has been met.

Taxpayer argues that *Sperry and Hutchinson Company v. Department of Revenue, supra,* and *Commonwealth v. ACF Industries, Incorporated,* 441 Pa. 129, 271 A.2d 273 (1970) stand for the proposition that, not use, but need is a major consideration in determining the nature of the income, i. e. only if the income is needed for future business activity, is it business income. We do not agree with Taxpayer's reading of these cases; rather we conclude that the decisions in these cases were based more on the use to which the income was put than the business need for it. In reaching this conclusion, we are aware that the *ACF* court did not agree that the use of the proceeds from the sale of stock for general business purposes justified taxing the sale. However, in this case, the use of the proceeds did not justify taxation because (1) there was no other use available for the proceeds once ACF ruled out the possibility of a corporate acquisition or merger with the company whose stock it sold and (2) there was no evidence that "this asset—the stock—was used in any way which contributed to ACF's business . . ." *Id.* 271 P.2d at 281. These two facts are not present in the case at hand and, therefore, *Commonwealth v. ACF Industries, Incorporated, supra,* is not controlling.

Taxpayer argues that the gain on the Mobil sale is not business income because the evidence supports the conclusion that it is not in the business of selling coal leases. A similar argument was made by the taxpayer in *Champion.* As indicated before, Judge Wood rejected this argument and stated that such a narrow view of business "is not supported by the *wording* of UDITPA." *Champion,* 88 N.M. at 417, 540 P.2d at 1306. We agree and rule that Taxpayer's argument is without merit. Central to Judge Wood's interpretation of business income was that the income arise from the regular course of business. Judge Wood listed three pertinent considerations in making this determination. We conclude that, when the evidence is viewed in light of these considerations, there is substantial support to make the determination that the gain on the Mobil sale is business income.

The nature of the Mobil sale is similar to Taxpayer's management of its oil and gas interests. Some of these interests it develops independently or with other companies. Although the evidence indicates that Taxpayer could never develop the coal leases independently, there is evidence which supports its willingness to enter into joint ventures. Taxpayer sometimes holds its oil and gas interests and, at other times, it disposes of them. Examples of this are Taxpayer's sublease of its Alaskan oil and gas holdings in 1970 and the sale of its Canadian properties in 1972. The Mobil sale follows this pattern of holding an interest and then disposing of it. The sale is also similar to the former practices of Taxpayer. These practices include acquiring property containing potential development, researching alternative potentials and then acting upon the results of this research. Examples of these practices are the management of Taxpayer's bauxite holdings and its interest and motives in acquiring additional coal acreage in Wyoming and Utah and other mineral properties in general. Finally, the revenues from the Transco

option agreement and Mobil sale were used for Taxpayer's general operating needs. Thus, because these revenues were so used and because the Mobil sale is similar in nature to Taxpayer's management of its oil and gas interests and its former practices in the mineral area, we hold that the sale was in the regular course of business and is, therefore, business income.

In addition, by rejecting Taxpayer's narrow view of the meaning of trade or business, we have necessarily concluded that Taxpayer's management and sale of the coal leases were not independent of its other business endeavors. This conclusion is supported by a reading of Taxpayer's Annual Reports for the years 1969 to 1975, by the use of the revenues from the Transco option agreement and the Mobil sale itself and by the use of the coal acreage as security for Taxpayer's long-term debt. Supporting evidence also includes the facts that (1) expenses to research the development potential of the coal interests and to maintain Taxpayer's hold on these interests were paid out of general funds and (2) the effort to develop and exploit these interests was conducted by Taxpayer's regular personnel. Thus, the management and maintenance of the coal leases were interrelated with Taxpayer's general endeavors and these endeavors were, in turn, benefitted by the revenues generated from the coal acreage. Furthermore, this acreage was not an isolated mineral holding of Taxpayer but part of a larger mineral inventory. In such a situation, we hold that the Mobil sale was not independent of Taxpayer's other business efforts and, thus, the gain from the sale is business income under my interpretation of this term.

In holding that the gain from the sale of Taxpayer's coal leases is business income under the first part of § 7–4–2 A as it has been variously interpreted, we are aware that the Mobil payments were treated as non-recurring income for financial reporting purposes and that this treatment was determined by Taxpayer's certified public accountants to be consistent with generally accepted accounting principles. Taxpayer argues that this treatment indicates that the Mobil sale was not a typical part of its business. The implication of this argument is that Taxpayer's business is limited to the exploration and development of oil and gas. However, for the purposes of taxation, this treatment is not dispositive in determining the nature of Taxpayer's business. *Cf. Butler Brothers v. McColgan, Franchise Tax Commissioner of California,* 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991 (1942). In addition, we note that Taxpayer's accountant testified that the treatment of income as recurring or non-recurring is based upon the accountant's opinion of the nature of the business, the circumstances of each transaction and a concept called "materiality." This concept was defined by Taxpayer's accountant as a variable which, depending upon an item's impact on the trend of earnings, contributes to determining the treatment of the income generated by the item. From this testimony, it is apparent that the treatment of income as recurring or non-recurring is dependent upon various subjective factors. We choose not to decide the nature of a business based upon an accounting procedure involving such factors. Furthermore, we note that the income from the Transco option agreement was listed in Taxpayer's 1974 and 1975 Annual Reports under general revenues and in the 1975 Annual Report under non-recurring income. This conflict in treatment reaffirms our decision not to decide the nature of Taxpayer's business based upon this accounting procedure.

B. *The Second Part of § 7–4–2 A*

Taxpayer argues that the gain received from the Mobil sale is not business income as it is defined in the second part of § 7–4–2 A. The Bureau contends that the gain is business income under this part. Since we hold that the gain is business income under the first part of § 7–4–2 A, we are not compelled to decide whether it is business income under the second part. *See McVean & Barlow, Inc. v. New Mexico Bureau of Revenue, supra.* Accordingly, we make no decision regarding this issue. However, we note that, under this part of

§ 7–4–2 A, Taxpayer argues that it did not liquidate its coal business in 1974 since it had never been in the coal business. Taxpayer ingeniously claims that it first got into the coal business in 1976 when it acquired and began mining coal properties in West Virginia and acquired an employee with expertise in the coal area. This claim is without merit. The evidence clearly shows that Taxpayer is in the business of gas, oil and mineral exploration and development. The sale of its coal leases was part of this business. Taxpayer's argument is based upon a narrow meaning of trade or business. Such a meaning has been rejected in New Mexico. *Champion International Corporation v. Bureau of Revenue, supra.*

III. *Taxing the Gain and the Due Process and Commerce Clauses*

Taxpayer argues that a tax on the gain from the Mobil sale by the State of New Mexico violates the Due Process or Commerce Clauses of the United States Constitution. Taxpayer's argument is based upon its contention that this gain is not business income under § 7–4–2 A but instead is nonbusiness income under § 7–4–2 D. Because it is nonbusiness income, Taxpayer claims that it is not apportionable to New Mexico under the Uniform Division of Income for Tax Purposes Act (UDITPA). Taxpayer concludes that any New Mexico taxation of the gain, therefore, violates the Due Process or Commerce Clauses. Essentially, Taxpayer is arguing that New Mexico is taxing an out-of-state activity and because this taxation is not justified under UDITPA, it violates federal law. While making this argument, Taxpayer concedes that it is a unitary business.

The Bureau claims that Taxpayer's objections are not valid since Taxpayer is a unitary business and the gain from the Mobil sale is business income under § 7–4–2 A. Because of this situation the Bureau contends that New Mexico's taxation of the gain under the UDITPA apportionment formula is justified since the tax is only on that portion of Taxpayer's income that fairly represents the extent of Taxpayer's business activities in New Mexico. Therefore, the Bureau concludes that the tax is not violative of the Due Process or Commerce Clauses. We agree.

Taxpayer concedes that it is a unitary business. Since it makes this concession, there is no need to analyze Taxpayer's business according to the legal principles developing around the unitary business concept. We agree with Taxpayer's characterization of its business. *See Commonwealth v. ACF Industries, Inc., supra; Great Lakes Pipe Line Company v. Commissioner of Taxation, supra; Webb Resources, Inc. v. McCoy, supra; Superior Oil Company v. Franchise Tax Board,* 60 Cal.2d 406, 34 Cal.Rptr. 545, 386 P.2d 33 (1963); *Edison California Stores, Inc. v. McColgan,* 30 Cal.2d 472, 183 P.2d 16 (1947); *Butler Bros. v. McColgan,* 17 Cal.2d 664, 111 P.2d 334 (1941); Keesling & Warren, The Unitary Concept in the Allocation of Income, *supra;* Rudolph, State Taxation of Interstate Business: The Unitary Business Concept and Affiliated Corporate Groups, 25 Tax L.Rev. 171 (1970).

Since Taxpayer's business is unitary and since we hold that the gain from the sale of its coal leases is business income under § 7–4–2 A, New Mexico, as a party to the Multistate Tax Compact, can tax a percentage of this income under UDITPA. *Champion International Corporation v. Bureau of Revenue, supra; see generally Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959); *Norfolk & Western Railway Co. v. North Carolina, ex rel. Maxwell, Commissioner of Revenue,* 297 U.S. 682, 56 S.Ct. 625, 80 L.Ed. 977 (1936); and *Bass, Ratcliff & Gretton, Limited v. State Tax Commission,* 266 U.S. 271, 45 S.Ct. 82, 69 L.Ed. 282 (1924). Taxpayer has not attacked the UDITPA apportionment formula as unfair. We, therefore, sustain New Mexico's taxation of the gain under this formula. *See Hans Rees' Sons, Incorporated v. North Carolina,* 283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879 (1931). Thus, we hold that Taxpayer's constitutional arguments are groundless and that the tax on the gain by the State of New Mexico does not violate the Due Process or Commerce Clauses of the United

States Constitution. We further hold that, after reading the record and considering the legal arguments of the parties, the Commissioner's Order and Decision, insofar as it is based on the first part of § 7–4–2 A, was not arbitrary, capricious or an abuse of discretion, was supported by substantial evidence and was otherwise in accordance with the law.

Based upon the foregoing, the Commissioner's Order and Decision is affirmed.

IT IS SO ORDERED.

WALTERS and ANDREWS, JJ., concur.

595 P.2d 1221

STATE of New Mexico, Plaintiff-Appellee,

v.

John DOE, Defendant-Appellant.

No. 3830.

Court of Appeals of New Mexico.

May 8, 1979.

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

Jeff Bingaman, Atty. Gen., Sammy Lawrence Pacheco, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

This appeal involves the dispositional aspect of a children's court proceeding. Two issues are dispositive, they are: (1) was there a violation of Children's Ct. Rule 49(b); and (2) if this rule was violated, what is the consequence of the violation? References to rules in this opinion are to the Children's Court Rules.

On June 26, 1978, the child admitted the delinquent act alleged in each of the two petitions; the admissions were accepted by the court on that date. The court adjudged the child to be delinquent and in need of care or rehabilitation. See *Doe v. State*, 92 N.M. 74, 582 P.2d 1287 (1978). The child was committed to a diagnostic center in Albuquerque for 60 days to undergo a psychiatric evaluation. The court's orders specified that the child was not to be held more than four days after the evaluation and, upon completion of the evaluation, was to be returned to Carlsbad. The court also ordered that the child remain in detention until transported to Albuquerque.

The child was detained from June 26 until July 6, 1978, when he was taken to Albuquerque. The evaluation was completed by August 15th; however, in violation of the court's orders, the child was not returned to Carlsbad until September 9, 1978. The violation of the court's orders, in holding the child in Albuquerque more than four days after the evaluation was completed, is not an issue in this appeal.

The court's orders did not specify whether the child was to be detained upon being returned to Carlsbad. Upon the child's return to Carlsbad, the child was released to his mother.

A dispositional hearing on both petitions was held on September 20, 1978. At the hearing, the child maintained that he was entitled to be released because there was no disposition within 75 days of his admissions. The court disagreed and committed the child to the Boys' School. The child appeals. *Children's Court Rule 49(b)*

This rule states:

> (b) *Time Limits.* When the respondent is in detention, the dispositional hearing shall begin within twenty days from the date the adjudicatory hearing was concluded or an admission of the factual allegations of the petition was accepted by the court, except as provided herein. The court may order that the respondent be transferred to an appropriate facility of the Department of Corrections for a period of not more than sixty days for purposes of diagnosis. If the respondent is so transferred, the dispositional hearing shall begin within seventy-five days from the date the adjudicatory hearing was concluded or an admission of the factual allegations of the petition was accepted by the court.

The State contends this rule was inapplicable. Under Rule 7(a), the day of the child's admissions, June 26th, is not to be counted. The 75th day, from June 26th, was September 9th. However, September 9, 1978 was a Saturday and, thus, not to be counted under Rule 7(a). The 75th day was the following Monday, September 11, 1978.

The child was not in detention on September 11, 1978, having been released on September 9, 1978. Because not in detention on the 75th day, the State contends the time provision in Rule 49(b) does not apply. We disagree.

The first sentence of Rule 49(b) refers to a child in detention; the dispositional hearing "shall begin" within 20 days of the child's admission "except as provided herein."

The exception is stated in the second and third sentences of Rule 49(b). The second sentence authorizes a 60-day diagnostic evaluation. The third sentence states a 75-day time limit when there has been a diagnostic evaluation. When there has been a diagnostic evaluation, the dispositional hearing "shall begin" within 75 days from the date the child's admissions were accepted.

Rule 49(b) implies that a court-ordered diagnostic evaluation is a form of detention. When that form of detention occurs, under the rule, the 75-day period applies. The

rule does *not* state that the dispositional hearing must begin before the child has been in detention for 75 days; rather, the rule states a 75-day time limit when there has been a court-ordered diagnostic evaluation regardless of the number of days in detention. This view is supported by the Committee Commentary to Rule 49(b) which distinguishes between detention and a court-ordered diagnostic evaluation. The commentary states: "Rule 49(b) establishes time limits for beginning the dispositional hearing if the respondent is in detention *or* if the respondent is transferred to a corrections division facility for diagnosis. . . The fifteen-day leeway [75 days minus 60 days for evaluation] is allowed to provide adequate time for receipt and examination of diagnostic reports." (Our emphasis.)

The dispositional hearing, held September 20, 1978, did not begin within the 75-day period provided by Rule 49(b). The time provision of the rule was violated.

The Consequence of the Rule Violation

There is no express provision, either in the Children's Code or in the Children's Court Rules, which states the consequence of a violation of Rule 49(b). A comparison of other time limit provisions provides little assistance because the treatment of time limit provisions is not uniform. In the following comparisons, our concern is not with differing time periods but with the consequence of a violation of the time periods.

(a) Section 32–1–14(B), N.M.S.A.1978 states a time limit for completing the preliminary inquiry. Rule 19(a) also states time limits for a preliminary inquiry. Neither the statute nor the rule states a consequence for a violation of the time limit.

(b) Section 32–1–14(D), N.M.S.A.1978 states a time limit for filing the petition; Rule 22(c) states a time limit for filing the petition. The statute provides for dismissal with prejudice if the time provision is violated. The rule does not state a consequence for a violation of its time limits. Inasmuch as the statute provided for dismissal, and the rule was silent, the statutory dismissal provision was applied. *State v. Doe*, 91 N.M. 393, 574 P.2d 1021 (Ct.App. 1978).

(c) Section 32–1–28, N.M.S.A.1978 and Rule 46 state time limits for commencing an adjudicatory hearing; both provide for dismissal if the adjudicatory hearing is not commenced within the time limits.

(d) The statute provides no time limits for a dispositional hearing. Section 32–1–31(F) and (H), N.M.S.A.1978 authorize postponed dispositional hearings. Rule 49(b) provides a time limit for a dispositional hearing only when the child is in detention or when there is a court-ordered diagnostic evaluation; if neither of these two situations apply, the rule does not impose a time limit.

Although the above comparisons show a lack of uniformity as to the consequence of a violation of time requirements, the comparison also shows that time is considered important in the processing of a delinquency petition to a conclusion. The importance of the time requirement is emphasized for dispositional hearings by stating the time requirement in mandatory terms—the hearing "shall" begin in a specified time.

The State, disregarding the mandatory aspect of the time requirement for dispositional hearings, suggests that dismissal for violation of the time requirement in Rule 49(b) should only occur when the child affirmatively demonstrates prejudice. This argument, if accepted, would deprive the time requirement of all meaning; relief from demonstrated prejudice is available under constitutional due process, regardless of time requirements. Consistent with its claim that dismissal should occur only for demonstrated prejudice, the State fails to suggest that any consequence results from violating the time requirements of Rule 49(b).

The purpose of time requirements is to insure prompt handling of children's court matters. See *Doe v. State*, 88 N.M. 644, 545 P.2d 1022 (Ct.App.1976). Rule 2

requires the rules to be construed to secure simplicity in procedure and the elimination of unjustifiable delay. Consistent with Rule 2, and giving effect to the mandatory aspect of the time requirements, we hold that the consequence of violating Rule 49(b) is dismissal. See *State v. Doe*, 91 N.M. 393, 574 P.2d 1021, supra. There is no issue of waiver because the child raised the mandatory time requirement of Rule 49(b) at the dispositional hearing.

The children's court's judgments and dispositions are reversed; the cause is remanded with instructions to dismiss the petitions.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

596 P.2d 248

In the Matter of Robert R. RICKARD, Attorney at Law.

No. 12383.

Supreme Court of New Mexico.

Feb. 21, 1979.

ORIGINAL DISCIPLINARY PROCEEDINGS

FINAL JUDGMENT

THIS MATTER came on for hearing before the full Court upon the report and recommendations of the Disciplinary Board and the record of the Hearing Committee which considered the matter. The Disciplinary Board was represented by William W. Gilbert, Santa Fe, its Chief Counsel, and the respondent was represented by Bruce G. Stafford, Albuquerque. The Court having heard the presentations of counsel and having considered the record and being fully advised,

FINDS that the respondent, Robert R. Rickard, is guilty of unprofessional conduct involving fraud upon his insurance company in excess of $2,500.00 (a third degree felony) and surrounding circumstances all in violation of Disciplinary Rules 1–102(A)(3), 1–102(A)(4), 1–102(A)(6) and § 18–1–17, New Mexico Statutes 1953 annotated.

NOW IT IS ORDERED AND ADJUDGED that the respondent, Robert R. Rickard, be and he hereby is disbarred from the practice of law in all courts in the State of New Mexico, and that pursuant to the provisions of Rule 19(a), Rules Governing Discipline, he may not apply for reinstatement except upon special leave of this Court first obtained.

IT IS FURTHER ORDERED AND ADJUDGED that the Disciplinary Board have and recover its costs herein which are hereby assessed at $257.04.

596 P.2d 248

SECURITY TRUST, Personal Representative of the Estate of Robert Earl Johnson, Jr., Deceased, Plaintiff,

v.

Ellis J. SMITH, d/b/a Ellis J. Smith, General Contractor, Ellis J. Smith, d/b/a Ellis J. Smith & Associates, Chase Development Company, American Star Theater Corporation and Commercial Union Insurance Company, d/b/a Commercial Union Assurance Companies, Insurer, Defendants.

Michael J. GOMEZ, Plaintiff,

v.

Ellis J. SMITH et al., Defendants.

No. 12213.

Supreme Court of New Mexico.

March 20, 1979.

Branch, Coleman & Perkal, Turner W. Branch, Rhonda P. Backinoff, Stephen A. Slusher, Albuquerque, for plaintiff.

Roy F. Miller, Jr., Rodey, Dickason, Sloan, Akin & Robb, Charles B. Larrabee, Shaffer, Butt, Jones, Thornton & Dines, K. Gill Shaffer, Albuquerque, for defendants.

OPINION

McMANUS, Senior Justice.

Plaintiffs, Security Trust, the Personal Representative of the Estate of Robert E. Johnson, Jr., and Michael J. Gomez, brought negligence actions against their employer, Ellis J. Smith, et al., in the United States District Court for the District of New Mexico. Smith answered both complaints, alleging as a defense that the New Mexico Workmen's Compensation Act (the Act) was plaintiffs' exclusive remedy and barred any common law tort action. Smith filed motions for summary judgment. The cases were consolidated, and the following question was certified to this Court pursuant to § 34–2–8, N.M.S.A. 1978 [formerly § 16–2–7, N.M.S.A. 1953 (Supp.1975)]:

> Does the late filing of a policy of insurance or a certificate of proof thereof with the Clerk of the District Court, as required by N.M.S.A. § 59–10–3 (Supp.1975) [§ 52–1–4, N.M.S.A. 1978], constitute substantial compliance, *Williams v. Montano,* 89 N.M. 252, 253, 550 P.2d 264 (1976), with the Workman's Compensation Act where such filing occurred after the date of plaintiffs' injuries and also after the date of the commencement in the federal court of plaintiffs' actions seeking common law and statutory remedies other than those provided for by the Workman's Compensation Act?

We accepted certification on October 16, 1978.

Section 52–1–4, N.M.S.A. 1978 [formerly § 59–10–3, N.M.S.A. 1953 (Supp.1975)] sets forth the Act's filing requirements. The applicable part of § 52–1–4 provides:

> Every employer subject to the Workmen's Compensation Act [52–1–1 to 52–1–69 NMSA 1978] *shall file* in the office of the clerk of the district court for the county in which such workman is, or it is contemplated at the time of such agreement, such workman is to be employed, previous to or within thirty days after having made any such agreement, express or implied, with such workman, . . . *good and sufficient undertaking in the nature of insurance or, evi-*

dence thereof in the form of a certificate, or security for the payment to . . . such injured workmen, or, in case of death, to the person appointed by the court to receive the same . . . . (Emphasis added.)

Section 52–1–8, N.M.S.A. 1978 [formerly § 59–10–5, N.M.S.A. 1953 (Repl. 1974)] reads in part:

Any employer *who has complied with the provisions of the Workmen's Compensaton Act [52–1–1 to 52–1–69 NMSA 1978], relating to insurance,* . . . . 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 . . . . (Emphasis added.)

Section 52–1–6(D), N.M.S.A. 1978 [formerly § 59–10–4(D), N.M.S.A. 1953 (Supp.1975)] provides:

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 or death of such employee than as provided in the Workmen's Compensation Act . . . . (Emphasis added.)

The stipulated facts indicate that Smith failed to file his compensation policy, or a certificate of proof, until almost six weeks after the first tort action was filed and over eleven months after the accident. Plaintiffs argue that Smith has not substantially complied with § 52–1–4 and is, therefore, subject to tort liability. We agree.

Section 12–2–2, N.M.S.A. 1978 [formerly § 1–2–2, N.M.S.A. 1953 (Repl. 1970)], sets forth rules of statutory construction. Subsection I provides:

[T]he words "shall" and "will" are mandatory and "may" is permissive or directory. . . .

The Court of Appeals also recognized in *Montano v. Williams,* 89 N.M. 86, 547 P.2d 569 (Ct.App.1976), *aff'd, Williams v. Montano,* 89 N.M. 252, 550 P.2d 264 (1976), that "shall" is mandatory, in statutory use, unless inconsistent with the manifest intent of the Legislature or repugnant to the context of the statute. Since the *Montano v. Williams* decision, this Court, as well as the Court of Appeals, has continually held "shall" to be mandatory. *Mountain States Tel. v. New Mexico State Corp.,* 90 N.M. 325, 563 P.2d 588 (1977); *State v. Lujan,* 90 N.M. 103, 560 P.2d 167 (1977).

Nevertheless, the mandatory provisions of the Act have been eroded by the doctrine of "substantial compliance". This Court first addressed the question of compliance with § 52–1–4 in *Mirabal v. International Minerals & Chemical Corp.,* 77 N.M. 576, 425 P.2d 740 (1967). In that case, the plaintiff was injured on September 17, 1964, but the policy actually covering the period from July 1, 1963 to July 1, 1966 was not filed until October 22, 1964. The plaintiff filed a common law tort action on June 25, 1965. This Court held that the filing of a policy after the date of the accident, but before any common law negligence action has been filed, constituted substantial compliance with the Act and would bar the negligence action.

The Court of Appeals reviewed a similar situation in *Quintana v. Nolan Bros., Inc.,* 80 N.M. 589, 458 P.2d 841 (Ct.App.1969). In *Quintana,* the plaintiff was injured on October 31, 1967 and the policy covering that day was filed on January 15, 1968. After the policy was filed, the plaintiff filed both a workmen's compensation claim and a wrongful death action. The Court of Appeals, following *Mirabal,* affirmed the district court's dismissal of the wrongful death action.

Montano v. Williams is the most recent case which addresses this question. The plaintiff sued Williams for damages resulting from the wrongful death of decedent. The defendants filed a motion to dismiss, contending that they were covered by workmen's compensation insurance at the

time decedent received his injuries. Certain payments under the Act had been made, but the policy was never filed. The trial court dismissed the wrongful death action on the grounds that the defendants had substantially complied with the Act. The Court of Appeals reversed, holding that the employer's failure to comply with the provisions of the Act relating to insurance gives an employee the right to bring a common law action against the employer. The Court of Appeals, in distinguishing *Montano v. Williams* from the earlier *Quintana* and *Mirabal* decisions, perceived the filing of a common law tort action to be the dividing line:

> When the employer actually files an insurance policy *before a workman seeks common law relief,* the workman is not prejudiced. Compliance with the statute is effected. . . .
>
> On the other hand, when an employer does not file an insurance policy, it may constitute a waiver, express or implied, of his right to protection of the statute. . . . The statute gives the workman a right to choose which road to take for relief. (Emphasis added.)

Id. at 90, 547 P.2d at 573.

Certiorari was granted in *Williams v. Montano* because it was not clear whether the Court of Appeals was requiring strict compliance or substantial compliance with § 52–1–4. This Court set forth the standard to be applied:

> The standard in New Mexico for foreclosure of an employee's common law remedies is whether the employer has substantially complied with the Workmen's Compensation Act. Strict compliance is not necessary.

Id. at 253, 550 P.2d at 265. The Court went on to say that defendant Williams did not substantially comply with the Act because he neither filed the policy or proof of it, nor made any other attempt to comply with § 52-1-4.

Although in *Williams v. Montano* this Court upheld the doctrine of "substantial compliance", we also recognized that there is a point beyond which the mandatory provisions of the Act cannot be ignored. If the mandatory provisions are disregarded altogether it is clear that the intention of the Legislature would be totally frustrated. As the Court of Appeals noted in *Montano v. Williams,* the Legislature did not say that simply procuring a policy complied with the provisions of the Workmen's Compensation Act. The language of § 52–1–4 clearly requires something more; it requires the filing of the policy, or proof of coverage, with the district court.

The Workmen's Compensation Act is remedial and should be liberally interpreted so as to accomplish its purposes. *Lucero v. C. R. Davis Contracting Co.,* 71 N.M. 11, 375 P.2d 327 (1962), *overruled on other grounds, Mascarenas v. Kennedy,* 74 N.M. 665, 397 P.2d 312 (1964). At the same time, however, the statute should not be construed in such a way as to nullify certain of its provisions. *Boggs v. D & L Construction Company,* 71 N.M. 502, 379 P.2d 788 (1963), *overruled on other grounds, Am. Tank & Steel Corp. v. Thompson,* 90 N.M. 513, 565 P.2d 1030 (1977). Allowing the Compensation Act to stand as a bar to a tort action when the employer failed to file anything, or otherwise to comply with § 52–1–4, until after commencement of the tort action, would abrogate this section. An employer would have no reason to file policies, since no real penalty would be inflicted for his failure to do so.

In order to give § 52–1–4 its full effect as contemplated by the Legislature, it is our opinion that the question certified to us by the U. S. District Court must be answered in the negative. Filing proof of coverage after commencement of a tort action does not constitute substantial compliance with the requirements of § 52–1–4. Therefore, as indicated by § 52–1–8 and § 52–1–6(D), plaintiffs are entitled to seek common law and statutory remedies other than those provided for in the Workmen's Compensation Act.

IT IS SO ORDERED.

SOSA, C. J., and PAYNE, J., concur.

EASLEY and FEDERICI, JJ., respectfully dissenting.

FEDERICI, Justice (dissenting).

I cannot agree with the result reached by the majority of the Court in this case.

The New Mexico Workmen's Compensation Act provides the exclusive remedy against the employer and insurance carrier for the injury suffered by the employee under the facts in this case.

In *Williams v. Montano,* 89 N.M. 252, 550 P.2d 264 (1976), the Court held that failure to file the policy *at any time,* even after injury or filing of suit was not substantial compliance with the Workmen's Compensation Act and therefore the common law action could be brought. We note that in *Williams,* although the policy was in effect, *it was never filed and no other proof was offered that the policy was in fact in existence at any time.*

In *Mirabal v. International Minerals & Chemical Corp.,* 77 N.M. 576, 425 P.2d 740 (1967), this Court held that the filing of a workmen's compensation policy after injury and before actions were commenced was substantial compliance with the Act and therefore no common law negligence action could be brought. The Court said:

> The purpose of depriving a non-complying employer of the common-law defenses under an elective act such as ours is to cause the employer to obtain compensation protection. . . . It would seem contrary to legislative intent that any technical delay which in no way prejudices a claimant would give rise to a common-law suit.

Id. at 578, 425 P.2d at 742. The Court said this purpose is met when the policy is acquired and that the late filing did not proscribe the employer's rights under the Workmen's Compensation Act. Further the Court said that under these circumstances the employee could show no prejudice to his rights under the Act.

In *Quintana v. Nolan Bros., Inc.,* 80 N.M. 589, 458 P.2d 841 (Ct.App.1969), the court held that a policy obtained prior to the accident, and filed afterwards, but before suits had been filed, was substantial compliance with the Act. The court again reiterated that since the insurance had been provided there could be no contention that the workmen's compensation claim for death benefits was prejudiced by the delay in *filing* the policy. The prohibition in the Act against common law negligence actions prevailed since there was substantial compliance.

In the present case, the accident happened on August 8, 1977. The employer had taken out workmen's compensation insurance but the insurance policy was not filed with the clerk's office until July 18, 1978. The suits were filed in the United States District Court on June 9 and June 17, 1978.

The purposes of the requirement that a policy be obtained and filed were met: *providing insurance coverage* for a workman; *securing payment of benefits* to the injured workman; and providing the employee with the name of the insurance company so that it could be named in the workmen's claim under the Workmen's Compensation Act. Furthermore, the injured workman is protected by the policy whether or not the policy is on file. Since these purposes were fulfilled, no prejudice resulted to plaintiff because of the employer's failure to file the policy.

The only penalty prescribed in the Workmen's Compensation Act for the failure to file a policy or certificate of insurance is possible criminal prosecution for a misdemeanor punishable by $1,000.00 fine. Section 52–1–56(D), N.M.S.A. 1978 (formerly § 59–10–25, N.M.S.A. 1953). The Act does not grant to an injured workman the right to file a common law negligence action against an employer for failure of the employer to file a policy or certificate of insurance. If the Legislature had intended such a result, it could have easily provided appropriate language in the Act.

Substantial compliance with the law in these cases is sufficient. In determining what constitutes substantial compliance, all of the provisions of the Workmen's Compensation Act should be taken into consideration. In this case the employer had provided the insurance, had paid weekly com-

pensation, had furnished medical treatment, had negotiated with the plaintiff and his lawyer, and had done everything the Act called for except for filing the policy or certificate in the district court clerk's office. There was no prejudice unless the preclusion of the common law negligence action can, taken alone, be so categorized.

When the policy filing requirement is read along with the other provisions of the Workmen's Compensation Act, the Act indicates that it was not the legislative intent to penalize the employer by denying him access to all the defenses available under the law for his mere failure to file the policy or certificate. *See Meyer v. Noble Drilling, Incorporated,* 259 F.Supp. 110 (1966), and *House v. John Bouchard & Sons Co., Inc.,* 495 S.W.2d 541 (Ct.App.Tenn. 1972).

I would certify the following answer to the United States District Court for the District of New Mexico: Based upon the specific facts in this case and the failure of plaintiff to show prejudice, the filing of a policy of insurance or a certificate of proof thereof with the Clerk of the District Court after the date of a claimant's injuries and after claimant filed suit in federal court seeking common law and statutory remedies other than those provided by the Workmen's Compensation Act constitutes substantial compliance with § 52–1–4, N.M.S.A. 1978 (formerly § 59–10–3, N.M.S.A. 1953 (Supp.1975)).

Since a majority of my colleagues do not agree, I respectfully dissent.

EASLEY, J., concurs.

596 P.2d 253

Cliff ANDERSON and Jill Anderson, d/b/a Nob Hill Restaurant and St. Paul Insurance Company, Petitioners,

v.

Connie MACKEY, Respondent.

No. 12370.

Supreme Court of New Mexico.

May 16, 1979.

Rehearing Denied June 5, 1979.

Durrett, Conway, O'Reilly & Jordon, John E. Conway, Alamogordo, for petitioners.

Morris D. Stagner, Albuquerque, for respondent.

OPINION

FEDERICI, Justice.

Connie Mackey, respondent (plaintiff) was employed as a waitress at petitioners' (defendants') restaurant. Plaintiff fell while at work and allegedly was injured. Plaintiff brought this action for benefits under the Workmen's Compensation Act. At the close of plaintiff's case the trial court granted defendants' motion to dismiss plaintiff's complaint for failure to show that as a medical probability there was a causal connection between plaintiff's injury and her disability. The Court of Appeals reversed, Judge Sutin dissenting, and remanded the case for a new trial. We granted certiorari.

The only question presented is whether there was direct testimony that, as a medical *probability*, plaintiff's psychological disability was a natural and direct result of the accident.

Section 52–1–28(B), N.M.S.A.1978 of the Workmen's Compensation Act relating to compensable claims requires that:

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

The only evidence in the record relating to the causal connection which plaintiff was required to prove was the deposition of Dr. Frank Maldonado:

Q [By Mr. Conway] Doctor, do you have an opinion as to whether or not Mrs. Mackey has suffered any disability as a result of the alleged fall that took place on June 25, 1977 at the Nob Hill Restaurant?

A Yes, I think there is some disability, yes.

Q What would that disability be? Any physical disability is what I am talking about.

A I don't think there is any physical disability, no.

Q So she is in no way physically impaired from continuing her same duties that she was doing prior to the time of this fall?

A In regards to the low back and legs, and that is the only areas I checked, I could find no physical disabilities.

Q Did she complain to you of any other areas?

A No.

Q You then, Doctor, would give her no disability whatsoever as to a back injury?

A That's correct.

. . . . .

Q [By Mr. Stagner] And what is that disability, Doctor?

A I think she has a psychological disability.

Q And what is that psychological disability?

A Well, I am not properly—not properly trained—I am not trained in psychological diagnosis or psychology to put a name on it exactly, but it is some type of hysteria or conversion reaction.

In ruling on defendants' motion, the trial judge said:

> But I am unable to find anything there which even expresses an opinion as to any causal connection between the disability which he narrates, and the injury in the case. Of course, he finds there is no physical disabilities, so he doesn't even get into that aspect of the thing. He acknowledges that she does have pain and that she does have a psychological disability, and so far as I can find the record is totally silent as to even a fair inference from his testimony, that he's saying that there is a causal connection. In fact, I think he just expresses no opinion as to the cause of the psychological disability.

Further, the doctor stated that he was not trained in psychological diagnosis or psychology. Under those circumstances the doctor was not qualified to state an opinion based upon a medical probability.

This Court discussed the applicability of § 52–1–28(B) in *Yates v. Matthews*, 71 N.M. 451, 453, 379 P.2d 441, 442 (1963):

> The language of the statute is clear and unambiguous in its requirement that medical testimony be produced to establish causal connection between an accident and disability. The requirement is not that this be established by direct and uncontroverted evidence, but as a medical probability. This would seem to envisage opinion evidence of a medical expert. In other words, where causal connection is denied by an employer, in order to prevail, *it is now encumbent upon a claimant to present one or more qualified medical experts to testify that in his or their opinion there is a causal connection as a medical probability as opposed to possibility. Montano v. Saavedra*, 70 N.M. 332, 373 P.2d 824. (Emphasis added.)

In this case, viewing the evidence in the light most favorable to support the trial court's finding, *Corzine v. Sears, Roebuck and Company*, 80 N.M. 418, 456 P.2d 892 (Ct.App.1969), *cert. denied*, 80 N.M. 388, 456 P.2d 221 (1969), there is no showing that as a *medical probability* plaintiff's psychological disability was caused by the accident.

The decision of the Court of Appeals is reversed. The trial court's dismissal of plaintiff's complaint is affirmed.

IT IS SO ORDERED.

McMANUS, Senior Justice, and EASLEY, J., concur.

PAYNE, J., dissenting without opinion.

SOSA, Jr., Chief Justice, specially concurring.

I concur with the result reached by the Court in this case. It is my opinion that the district court reached the correct result, but for the wrong reason.

596 P.2d 255

SISTERS OF CHARITY OF CINCINNATI, OHIO, a corporation, Petitioner,

v.

COUNTY OF BERNALILLO, State of New Mexico, Respondent,

and

Property Tax Department of the State of New Mexico, Respondent.

No. 12329.

Supreme Court of New Mexico.

May 21, 1979.

Rehearing Denied June 12, 1979.

Johnson & Lanphere, John M. Kirk, Albuquerque, for petitioner.

Hunter L. Geer, Albuquerque, for County of Bernalillo.

Jeff Bingaman, Atty. Gen., John C. Cook, Asst. Atty. Gen., Santa Fe, for respondent Property Tax Dept.

OPINION

PAYNE, Justice.

Petitioner, Sisters of Charity, paid 1974 and 1975 ad valorem taxes, under protest, on its office building and parking structure. In 1975 petitioner brought suit in the Bernalillo County District Court for a refund of the portion of taxes attributable to those parts of the properties used for charitable purposes. The district court granted judgment for petitioner, the Court of Appeals reversed and we granted certiorari.

Petitioner is a religious order which owns and operates schools and hospitals around the country. St. Joseph Hospital, Inc. is a

New Mexico non-profit corporation and a wholly owned subsidiary of petitioner. St. Joseph operates a hospital in Albuquerque.

The properties in question in this case are adjacent to the hospital, and consist of a medical office building and a parking structure next to it. These properties, like the hospital, are owned by petitioner. Petitioner leases the office building and the parking structure to St. Joseph. St. Joseph's payments under this lease correspond exactly with the payments that are made by petitioner to retire the indebtedness incurred in acquiring the properties.

The office building and parking structure are used both for hospital purposes and for rental to medical tenants. The portion of the office building used for hospital purposes amounts to 40.7 percent, and 59.3 percent is occupied by rent-paying medical tenants. The parking structure is used to the extent of 57.9 percent for hospital purposes, while 42.1 percent is assigned to the building's tenants. The parties agree that the hospital uses are charitable purposes.

The trial court held that petitioner was entitled to a proportionate exemption from property taxation for those portions of its medical building and parking structure that are used exclusively for charitable purposes.

The Court of Appeals reversed on two grounds. First, it held that petitioner, as a lessor, is not entitled to a charitable deduction for leased property, even if the lessee uses the property for charitable purposes. Second, the Court of Appeals held that a charity is not entitled to a partial tax exemption for that portion of its property which is used exclusively for charitable purposes.

In addition to these two holdings, we also address other issues raised before the trial court or on appeal.

I.

Is a lessor, which is a charitable organization, entitled to a charitable exemption for property put to a charitable use by a lessee?

It has been held in New Mexico that the charitable use for which an exemption is given must be the use to which the property is put by the owner, rather than by the tenant. *Chapman's Inc. v. Huffman*, 90 N.M. 21, 559 P.2d 398 (1975); *Rutherford v. Cty. Assessor for Bernalillo Cty.*, 89 N.M. 348, 552 P.2d 479 (Ct.App.1976), *cert. denied*, 90 N.M. 8, 558 P.2d 620 (1976). It has also been held that even if the owner-lessor is using the rental income from the property for charitable purposes, the leased property does not qualify for a charitable exemption. *Church of the Holy Faith v. State Tax Commission*, 39 N.M. 403, 48 P.2d 777 (1935).

We are now asked to reconsider those rules to determine their applicability where (1) the lessee is a wholly owned subsidiary of the lessor; (2) no positive cash flow accrues to the lessor as a result of the lease arrangements, except reduction of its loan and the corresponding increase in its equity; and (3) both the lessor and lessee are charitable organizations.

Petitioner argues that where these three circumstances are present, the "no exemption for leased property" rule should not apply. Respondents concede the attractiveness of this argument, but they contend that "vague and amorphous exceptions" should not be engrafted onto the present well-defined rule. They assert that it would "inexorably lead to the unravelment of the intelligible and objective criterion by which applicants for charitable exemptions are judged and would be opening the door to disorder."

We must exercise judicial restraint to avoid such dangers as respondents suggest. However, if this Court holds that the lessor rule will not apply to situations where these three factors are present, then the exception is as well-defined and easy to apply as the general rule of no exemption.

It is also important for the law to retain sufficient flexibility to adjust to changing circumstances. We must inquire as to the purposes served by the present rule and whether those purposes are served by application of the rule in situations such as that

presented in this case. "It is a cardinal rule of construction that statutes are to be construed so that they carry out the intent of the legislature." *Hartford Hosp. v. City and Town of Hartford*, 160 Conn. 370, 279 A.2d 561, 563 (1971). This Court has held that Article VIII, Section 3 of the New Mexico Constitution is to be subject to "reasonable construction * * * to the end that the probable intent of the provision is effectuated and the public interests to be subserved thereby are furthered. (Citations omitted.)" *Benevolent & P. Ord. of Elks v. New Mexico Prop. A. D.*, 83 N.M. 445, 447, 493 P.2d 411, 413 (1972).

The purpose of the charitable exemption is to encourage charitable activities by providing them with tax relief, and to thereby promote the general welfare of society. The countervailing consideration is to limit the exemption within reasonable bounds so as to minimize the shift of the tax burden to non-exempt property owners. Another consideration in limiting exemptions is to avoid inequitable competition in the name of charity with non-exempt entities. Taxation is the rule, and exemption is the exception. *Flaska v. State*, 51 N.M. 13, 177 P.2d 174 (1946).

"Foremost among the reasons why exemption from taxation is denied to property leased out by an otherwise tax exempt body is that the property is put to a profitmaking or revenue-producing use. . . . (Footnote omitted.)" Annot., 54 A.L.R.3d 402, § 11 at 471 (1974). "Normally, also, the property under lease serves the profitmaking purposes of some private [non-exempt] person or organization." *Id.* at 422.

In this case both the lessor and lessee are charitable organizations. The lessee is a wholly owned subsidiary of the lessor, and the lessor's lease is not primarily "a profitmaking or revenue-producing" arrangement. The lessee has put a definable portion of the properties to the same charitable use for which the lessor-parent organization was created. In these circumstances the rationale for denying an exemption in a lease situation has disappeared and the rule should not be applied. We hold that under the facts in this case petitioner's lease to St. Joseph does not disqualify petitioner from exemption.

The recent trend in the United States is consistent with our holding. The notion that ownership and operation of the subject property must coincide in a single legal entity in order for property to qualify for a charitable exemption has been rejected in recent years in a number of other jurisdictions. *Christ The Good Shepherd, Etc. v. Mathiesen*, 81 Cal.App.3d 355, 146 Cal.Rptr. 321 (1978); *Childrens Development Center, Inc. v. Olson*, 52 Ill.2d 332, 288 N.E.2d 388 (1972); *Department of Revenue v. Cent. Medical Lab.*, 555 S.W.2d 632 (Ky.App. 1977); *Community Hospital Linen v. Com'r of Taxation*, 309 Minn. 447, 245 N.W.2d 190 (1976).

II.

Does Article VIII, Section 3 of the New Mexico Constitution permit a portion of the assessed value of property to be exempt from taxation to the extent that it is used for charitable purposes?

Article VIII, Section 3 of the New Mexico Constitution states that "all property used for educational or charitable purposes * * shall be exempt from taxation."

Respondents contend, and the Court of Appeals held, that this provision does not permit a partial tax exemption for properties of which an ascertainable portion is used for charitable purposes. We do not agree with the arbitrary rule that property is taxable or non-taxable in its entirety.

The majority of jurisdictions in the United States have adopted the principle that where one portion of a piece of property is used for an exempt purpose and another portion for a non-exempt purpose, only the value of the non-exempt portion is subject to taxation. *See* Annot., 159 A.L.R. 685 (1945); 71 Am.Jur.2d *State and Local Taxation* § 371 (1973), and cases cited therein. This rule has been applied to hospitals which rent a portion of their premises to rent-paying medical tenants. *Milton Hospital & Conv. Home v. Board of Assessors*, 360 Mass. 63, 271 N.E.2d 745 (1971); *Gene-*

see Hospital v. Wagner, 47 A.D.2d 37, 364 N.Y.S.2d 934 (1975), *aff'd*, 39 N.Y.2d 863, 386 N.Y.S.2d 216, 352 N.E.2d 133 (1976).

None of the considerations, which we previously stated should be referred to in determining the scope of Article VIII, Section 3, mandate the "all or nothing" approach adopted by the Court of Appeals in this case.

First, there is no practical reason why the taxing authorities cannot arrive at a just valuation of that portion of a building which is used for non-exempt purposes, in relation to the value of the entire property, and assess the property on that amount. In this case the parties have stipulated that a mathematically ascertainable portion of petitioner's properties were used for a charitable purpose. In such a case, the apportionment approach can be easily applied and enforced.

Second, this approach, consistent with the policy of the charitable exemption, encourages charitable activities by providing tax relief for those activities which are directly and actually of a charitable nature, while, at the same time, it taxes those activities which are not directly charitable and which compete with non-tax exempt entities.

Therefore, we hold that where one substantial part of a building that is owned by a charitable institution is directly and actually occupied and used for charitable purposes, and another substantial portion is primarily used for commercial leasing, such building is pro rata taxable according to its separate uses. *See Christian Business Men's Committee v. State*, 228 Minn. 549, 38 N.W.2d 803 (1949). Petitioner is entitled to a tax exemption as to 40.7 percent of the value of the office building and 57.9 percent of the value of the parking structure.

III.

Was the claim for refund of 1974 taxes timely filed?

Petitioner's first cause of action in its complaint was for a refund of taxes paid for the 1974 tax year pursuant to § 72–5–4, N.M.S.A.1953 (Repl.1961) (repealed by N.M. Laws 1973, ch. 258, § 156, as amended by N.M. Laws 1974, ch. 92, § 34). Respondents contend that the time limitations in § 72–5–5, N.M.S.A.1953 (Repl.1961) (repealed by N.M. Laws 1973, ch. 258, § 156, as amended by N.M. Laws 1974, ch. 92, § 34) apply to suits brought under § 72–5–4, and that petitioner's first cause of action was untimely under § 72–5–5.[1] Respondents also contend that the claim for 1974 taxes is barred by reason of petitioner's failure to exhaust its administrative remedies. We need not reach either issue because we have concluded that petitioner's claim was not timely filed under § 72–5–4.

Section 72–5–4 provided that claims for refund of taxes which were erroneously assessed must have been filed in the district court within ninety days of the date on which the taxes were paid.

The 1974 tax assessment was paid on November 19, 1975. The suit for refund of these taxes was filed one week later. Petitioner contends that it therefore complied with the time limits of § 72–5–4. We do not agree.

We hold that the term "payment" in § 72–5–4 means "timely payment" of taxes. Any other interpretation would permit a taxpayer to ignore time limitations on the payment of taxes and claim a refund after the taxes were eventually paid so long as the claim was filed within ninety days of the late payment. We cannot accept this proposition.

Under the statutory scheme applicable to the 1974 tax assessment, one-half of the tax assessment became delinquent in December of the tax year, and the other half became delinquent on May 1 of the following year. § 72–7–3, N.M.S.A.1953 (Repl.1961) (repealed by N.M. Laws 1973, ch. 258, § 156 and N.M. Laws 1974, ch. 92, § 34). Petitioner's payment of 1974 taxes

1. The effective date of the repeal of §§ 72–5–4 and 72–5–5 was January 1, 1975. N.M. Laws 1974, ch. 92, § 36. N.M. Laws 1973, ch. 258, § 153, as amended by N.M. Laws 1974, ch. 92, § 33, provided that §§ 72–5–4 and 72–5–5 would apply to the 1974 tax year.

in November 1975 was not timely. Recovery of those taxes was therefore barred by § 72–5–4.

IV.

Can relief be given in a tax refund suit not only for years mentioned in the complaint but for subsequent years?

The trial court awarded petitioner a partial refund of the taxes it paid for the 1976 tax year, despite the fact that petitioner's original complaint had not sought such relief, and despite the failure of petitioner to file a supplemental or amended complaint asserting a claim as to 1976 taxes.

Respondents contend that a claim for 1976 taxes must have been filed by December 15, 1976 under § 7–38–40, N.M.S.A.1978 (formerly § 72–31–40, N.M.S.A.1953 (Supp. 1975)). They argue that the failure of petitioner to file a supplemental complaint prior to that date deprived the trial court of jurisdiction to refund the 1976 taxes.

This issue is controlled by our decision in *Dale Bellamah Land Co. v. Bernalillo County*, N.M., 592 P.2d 971 (1978). In that case we held that a claim for 1976 taxes, asserted in a supplemental complaint in an action for a refund of 1975 taxes, was not timely where the supplemental complaint was filed six weeks after the deadline under § 7–38–40(A)(1) for claiming a refund of 1976 taxes.

In this case no supplemental complaint was ever filed. Although the parties did stipulate that the facts applicable to the 1974 and 1975 tax years also applied to 1976, this stipulation did not amount to a waiver of the time limitations contained in § 7–38–40(A)(1).

Therefore, the trial court erred in awarding petitioner a partial refund of 1976 taxes.

The judgment of the Court of Appeals is reversed. The judgment of the trial court is affirmed as to the 1975 tax year, and reversed as to the 1974 and 1976 tax years.

IT IS SO ORDERED.

SOSA, C. J., EASLEY and FEDERICI, JJ., and McMANUS, Senior Justice, concur.

596 P.2d 260

NEW MEXICO LIFE INSURANCE GUARANTY ASSOCIATION, Plaintiff-Appellant,

v.

Kenneth C. MOORE, Superintendent of Insurance of the State of New Mexico, New Mexico Blue Cross-Blue Shield, Inc., Lovelace-Bataan Health Program, and New Mexico Health Care Corporation, Defendants-Appellees.

No. 12138.

Supreme Court of New Mexico.

June 11, 1979.

Rodey, Dickason, Sloan, Akin & Robb, Victor R. Marshall, William C. Briggs, Albuquerque, for plaintiff-appellant.

Robert W. Botts, Thomas A. Levin, Sutin, Thayer & Browne, Ronald Segel, Albuquerque, for defendants-appellees.

OPINION

SOSA, Chief Justice.

The issue presented in this appeal is whether defendant health plans are engaged in "health insurance" so as to subject them to New Mexico's Life Insurance Guaranty Act (hereinafter referred to interchangeably as Guaranty Act and Act).

The New Mexico Life Insurance Guaranty Association (hereinafter referred to as Association) brought suit in the District Court of Santa Fe County seeking a judgment declaring defendants subject to the Guaranty Act. Defendants denied that they were subject to the Act. The case was tried on the stipulated record.

The district court concluded that defendants did not write any kind of "insurance" to which the Guaranty Act applies, that defendants were not "member insurers" within the meaning of the Act, and that defendants were, therefore, not liable for any assessments levied by the Association. The Association appeals. We affirm.

The Association is organized pursuant to the Guaranty Act, §§ 59–22–1 to 17, N.M.S.A. 1978. Section 59–22–2 states that the purpose of the Act is to

> provide a mechanism to facilitate the continuation of coverage, the payment of covered claims under certain insurance policies, to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies and to provide an association to assess the cost of such protection among insurers.

Section 59–22–3 provides that the Guaranty Act applies to

> all direct life insurance policies, health insurance policies, annuity contracts and contracts supplemental to life and health insurance policies and annuity contracts. It also applies to reinsurance of such contracts which does not provide for liability without diminution because of the insolvency of the ceding company.

All insurers are required to be members of the Association as a condition of their authority to transact insurance business covered by the Act. § 59–22–5. Section 59–22–4(G) defines a "member insurer" as any person who

> (1) writes any kind of insurance to which the Life Insurance Guaranty Act applies; and
>
> (2) is licensed to transact insurance in this state[.]

When a "member insurer" becomes insolvent, the Association guarantees or reinsures all the covered policies of the insolvent insurer and provides money, notes, guarantees or other means to assure payment of the contractual obligations of the insolvent insurer. § 59–22–7.

Defendants are nonprofit health care plans organized and operating under the Nonprofit Health Care Plan Act, §§ 59–19–1 to 48, N.M.S.A. 1978. The purpose of this Act is to

> provide for the reasonable regulation of membership corporations organized for the purpose of making health care expense payments on a service benefit basis or on an indemnity benefit basis, or both, for persons who become subscribers under contracts with such corporations.

§ 59–19–2. Section 59–19–3(K) defines a "health care plan" as

> a nonprofit corporation which is authorized by the superintendent of insurance to enter into contracts with subscribers and to make health care expense payments; all health care plans shall be governed by the provision of this act regulating nonprofit health care plans[.]

The question we address in this appeal is whether defendants are engaged in the "kind of insurance to which the . . . Guaranty Act applies." The difficulty in answering this question arises because the Act does not define the terms "insurance" or "health insurance." This is a case of first impression in New Mexico.

The New Mexico Legislature enacted the original nonprofit hospital service plan enabling legislation in 1939. *See* N.M. Laws 1939, ch. 66, § 1 (601) to (611). This legislation provided a mechanism for a nonprofit health care plan to exist and operate.

Subsequently, Hospital Service, Inc., was incorporated by the Board of Directors of what was then the Presbyterian Hospital. The purpose of Hospital Service was to

> furnish hospital care to Subscribers or such of the public as shall become Subscribers; to provide for such hospitalization in hospitals or hospital with which this Corporation has a contract; to operate as a nonprofit corporation in order to secure hospital protection at a minimum cost to its Subscribers . . .

Concurrent with the development of Hospital Service, the New Mexico Medical Society developed a physician prepayment plan known as the New Mexico Physicians Service. The plan existed independently of any enabling legislation. The New Mexico Legislature enacted the Physicians Service Plans Act in 1947. *See* N.M. Laws 1947, ch. 157, § 1. Surgical Service, Inc. was formed in October 1947. Its purpose was to

> establish, maintain, and operate a voluntary, nonprofit medical-surgical plan . . whereby the services of any Doctor of Medicine are provided, at the expense of the Corporation, in the manner specified in the contract with Subscribers. Such medical and surgical care, may be provided in their entirety or in part as the Corporation may determine and as set out and as set forth in such contracts.

In 1960, Surgical Service became an approved Blue Shield Plan and began using the Blue Shield symbol. It contracted with doctors to accept payment from Surgical Service as payment in full for covered services.

The New Mexico Legislature enacted the Nonprofit Health Care Plan Act in 1963. *See* N.M. Laws 1963, ch. 288, § 1. On July 1, 1972, Hospital Service and Surgical Service merged into New Mexico Blue Cross & Blue Shield, Inc. (hereinafter referred to as Blue Cross). Blue Cross assumed all the obligations and assets of Hospital Service and Surgical Service.

Lovelace-Bataan Health Program (LBHP) is organized and functioning as a health maintenance organization (HMO). As an HMO, LBHP represents an alternative health care system which has developed in response to public concern about rising health care costs and lack of access by many people to high quality health care services. *See Huff v. St. Joseph's Mercy Hosp. of Dubuque Corp.*, 261 N.W.2d 695 (Iowa 1978). An HMO is distinguished from the "classic health care insurance system under which the patient chooses his own physician and other health care facilities." *Ludlam, Health Maintenance Organizations HMOS: Do They Really Work?*, 10 Forum 405, 406 (1974). Defendants assert that HMOs do not provide indemnity or security for loss or damage, but rather a convenient method of prepayment for health care services, with emphasis on preventive care. Members of LBHP are entitled to receive health care services upon the periodic payment of a fixed amount specified at the beginning of the term of LBHP Service Agreements.

New Mexico Health Care Corporation (Mastercare) is also organized and functioning as an HMO. It has entered into agreements with approximately 300 physicians and psychologists in the Albuquerque area, by which their services are made available to persons who are eligible to receive health care services.

Both LBHP and Mastercare pay medical providers directly for their services. Neither reimburses or indemnifies its members for the costs of such services, except to the extent that members have been required to pay non-participating providers directly for covered services performed by physicians and psychologists.

We note that Blue Cross has approximately 200,000 members who are eligible for various benefits. LBHP has approximately 2,700 members, while Mastercare has approximately 19,600 members who are eligible to receive health care services through their respective programs.

Insurance usually involves a contract whereby the insurer, for an adequate consideration, undertakes to indemnify the insured against loss arising from specified perils, or to reimburse him for all or part of an obligation he has incurred. *Barkin v. Board of Optometry*, 269 Cal.App.2d 714, 75 Cal.Rptr. 337 (1969). *See also* 43 Am.Jur.2d *Insurance* § 1 (1969).

Webster's Third New International Dictionary of the English Language 1173 (unabr. ed. 1976) defines "insurance" as:

> the action or process of insuring or the state of being insured usu. against loss or damage by a contingent event (as death, fire, accident or sickness) . . . coverage by contract whereby for a stipulated consideration one party undertakes to indemnify or guarantee another against loss by a specified contingency or peril . . . .

The United States Supreme Court has recently stated that "[t]he primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk." *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 211 99 S.Ct. 1067, 1073, 59 L.Ed.2d 261 (1979).

Generally, a nonprofit corporation which provides members of a group with medical services and hospitalization is considered not engaged in insurance and thus not subject to insurance laws. *See* 43 Am. Jur.2d *Insurance* § 11 (1969). In *Hospital Service Corp. of R. I. v. Pennsylvania Ins. Co.*, 101 R.I. 708, 227 A.2d 105 (1967), the Rhode Island Supreme Court upheld as valid a provision in a hospitalization policy that the company would be subrogated and succeed to the subscriber's right to recover. The court stated its opinion that Blue Cross "is not engaged in the insurance business and is therefore not an 'insurer.'" *Id.* at 111. Indeed, Blue Cross and Blue Shield organizations have historically taken the position that they are not insurance companies. *See* Denenberg, *The Legal Definitions of Insurance*, 30 J.Ins. 319 (1963).

In *Group Life, supra*, the Supreme Court cited *Jordan v. Group Health Ass'n*, 71 U.S. App.D.C. 38, 107 F.2d 239 (1939), as "illustrative of the contemporary view of health care plans." 440 U.S. at 227, 99 S.Ct. at 1081. Like defendants in the case at bar, Group Health was a nonprofit corporation organized to provide members who had paid a fixed annual premium with various medical services and supplies. Group Health contracted with physicians and hospitals to provide those services. The D.C. Court of Appeals held that Group Health was not engaged in the business of insurance. The court stated:

> Although Group Health's activities may be considered in one aspect as creating security against loss from illness or accident, more truly they constitute the quantity purchase of well-rounded, continuous medical service by its members. Group Health is in fact and in function a consumer cooperative. The functions of such an organization are not identical with those of insurance or indemnity companies. The latter are concerned primarily, if not exclusively, with risk . . . On the other hand, the cooperative is concerned principally with *getting service rendered* to its members and doing so at lower prices mad^ possible by quantity

purchasing and economies in operation. Its primary purpose is to reduce the cost rather than the risk of medical care; to broaden the service to the individual in kind and quantity; to enlarge the number receiving it; * * *. (Footnotes omitted.)

71 U.S.App.D.C. at 46, 107 F.2d at 247.

In *California Physicians' Service v. Garrison*, 28 Cal.2d 790, 172 P.2d 4 (1946), California Physicians' Service sought a declaratory judgment that it was not engaged in the business of insurance within the meaning of California's regulatory statutes. The Insurance Commissioner appealed from judgment for plaintiff. The California Supreme Court affirmed the trial court's judgment that Physicians' Service was not engaged in the business of insurance. The court stated:

There is another and more compelling reason for holding that the Service is not engaged in the insurance business. Absence or presence of assumption of risk or peril is not the sole test to be applied in determining its status. The question, more broadly, is whether, looking at the plan of operation as a whole, "service" rather than "indemnity" is its principal object and purpose. [Citations omitted.] Certainly the objects and purposes of the corporation organized and maintained by the California physicians have a wide scope in the field of social service. Probably there is no more impelling need than that of adequate medical care on a voluntary, low-cost basis for persons of small income. The medical profession unitedly is endeavoring to meet that need. Unquestionably this is "service" of a high order and not "indemnity."

172 P.2d at 16.

None of the parties were able to cite a case on point, and we were unable to find any such case in our research. However, we find the reasoning of the courts in *Jordan, supra*, and *California Physicians' Service, supra*, persuasive.

The Association asserts that because defendant health plans are subject to the Insurance Company Insolvency Act, §§ 59–6–31 to 35, N.M.S.A. 1978 and the Unfair Insurance Practices Act, §§ 59–11–9 to 22, N.M.S.A. 1978, it follows that they are also subject to the Guaranty Act. Section 59–6–32 provides that an insurance company includes "mutual nonprofit hospital service corporations" and "nonprofit medical service corporations." Section 59–11–11 states that "[f]or purposes of the Unfair Insurance Practices Act, health care plans shall be deemed to be engaged in the business of insurance[.]" We note that there is no specific mention in the Guaranty Act of nonprofit medical or hospital service corporations. Rather, the Legislature has elected to apply the Act only to "insurers" and "health insurance policies." We find that legislation impacting on health care plans requires specific reference to health plans or amendment of the Guaranty Act and Nonprofit Health Care Plan Act.

We conclude that defendants are not "member insurers" within the meaning of the Guaranty Act and that they are not engaged in "any kind of insurance" to which the Act applies. *See* 53 Yale L.J. 162 (1943). Our conclusion is based on the fact that defendant health plans are service benefit organizations, as distinguished from the indemnity benefit nature of commercial insurers.

McMANUS, Senior Justice, and EASLEY, J., concur.

596 P.2d 264

STATE of New Mexico,
Plaintiff-Appellee,

v.

John J. GARCIA, Defendant-Appellant.

No. 12136.

Supreme Court of New Mexico.

June 14, 1979.

Todd E. Farkas, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Charlotte H. Roosen, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

FEDERICI, Justice.

The State of New Mexico filed a petition in the children's court of Bernalillo County charging the delinquency of John J. Garcia (appellant) for voluntary manslaughter. An amended petition was later filed charging appellant with the delinquent acts of murder and, alternatively, felony murder and attempted armed robbery with firearm enhancement. A second amended petition was filed alleging murder, attempted armed robbery with a firearm enhancement, and conspiracy to commit robbery. A transfer hearing was held pursuant to § 32–1–30, N.M.S.A.1978 and Children's Court Rule 30. The children's court ordered that jurisdiction of appellant be transferred to the district court for trial as an adult on the

crimes charged in the second amended petition. After the case had been transferred to the district court the grand jury returned an indictment against appellant as an accessory to felony murder, an accessory and co-conspirator to attempted robbery with a deadly weapon (firearm), and for conspiracy to commit armed robbery.

Appellant moved to quash the indictment after it was returned on the grounds that the transfer order controlled any further proceedings in the district court and that there was no provision in the law for indictment following the transfer. The district court denied the motion and, after trial, appellant was convicted on all counts of the indictment. This appeal followed.

Appellant claims that the district court's jurisdiction was limited to the trial of the single offense of felony murder which was contained in the children's court transfer order. He argues that the trial court erred in refusing to quash the attempted armed robbery and conspiracy counts, since those crimes were not listed in the transfer order.

The children's court is a division of the district court for each county. § 32–1–4, N.M.S.A.1978. It has exclusive original jurisdiction of all proceedings under the Children's Code in which a child is under the age of 18 and is alleged to be a delinquent child. § 32–1–9, N.M.S.A.1978.

The children's court has discretion to transfer a matter to the district court for prosecution there as provided in § 32–1–30(A)(1), N.M.S.A.1978, if:

> the child was fifteen years of age or more at the time of the conduct alleged to be a delinquent act, and the alleged delinquent act is murder under Section 30–2–1 NMSA 1978, or when the child was sixteen years of age or more and the alleged act is assault with intent to commit a violent felony under Section 30–3–3 NMSA 1978, * * *

In this case the child was transferred on the delinquent acts of murder, and, alternatively, felony murder, with attempted robbery as the underlying felony.

The Children's Code and Rules of Procedure for the children's court do not affect proceedings in the district court when an individual is tried in the district court as an adult. A review of our statutes and rules of criminal procedure convinces us that the prosecution of appellant was validly initiated after transfer occurred.

Under the New Mexico Constitution, sole and exclusive jurisdiction for the trial of felony cases is in the district courts. N.M. Const., Art. VI, § 13; *State v. McKinley*, 53 N.M. 106, 202 P.2d 964 (1949). The rules of criminal procedure prescribe the manner in which a criminal prosecution must be commenced, conducted and terminated. § 31–1–3, N.M.S.A.1978.

Proper statutory construction requires this Court to interpret statutes in a way which will not render their application unreasonable nor defeat the intended objective of the Legislature. *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 568 P.2d 1236 (1977). It seems clear to us that the Legislature, in enacting §§ 32–1–11 and 32–1–30, N.M.S.A.1978, intended to create a mechanism which would allow both the children's court and the district court to exercise full subject matter jurisdiction in criminal matters. The only determination to be made in transferring individuals from the children's court to the district court is whether, because of the child's age and the type of delinquent act involved, the case should be tried in district court.

Under appellant's view, the children's court would retain jurisdiction over the underlying felony, armed robbery, aiding and abetting and conspiracy. If we were to apply appellant's interpretation of the Children's Code, appellant could be tried twice for offenses arising out of the same circumstances and requiring substantially the same evidence. Further, if appellant's interpretation were applied, he would be subject to rehabilitation as a juvenile, while at the same time he could be sentenced to prison as an adult offender.

If the children's court finds at the hearing on a transfer that the juvenile should be prosecuted as an adult, then the adult division obtains personal jurisdiction

over the child and subject matter jurisdiction over the entire case. This interpretation is consistent with the language in all sections of the Children's Code dealing with transfer hearings. *See* sections 32–1–11, 32–1–29 and 32–1–30.

In *State in Interest of R.L.P.*, 159 N.J.Super. 267, 387 A.2d 1223 (1978), the Superior Court of New Jersey addressed a similar issue and held that the state's juvenile statute permitted waiver of the entire criminal episode when jurisdiction was transferred to adult district court. The pertinent New Jersey statute, N.J.S.A. 2A:4–48, like the New Mexico statute, permitted transfer if the child was 16 years or older and committed an act which would constitute homicide or which would be a violent felony.

The New Jersey court stated that there were sound policy reasons for transfer of the entire matter rather than fragmenting trials on offenses arising from the same criminal charges:

> To require treatment of the same criminal episode partially in Juvenile Court and partially in adult court would serve no beneficial purposes believed to be derived from the creation of a system of juvenile courts. To permit fragmentation of the criminal transaction invites many possible problems, such as in sentencing, or with collateral estoppel, double jeopardy and merger. Fragmentation is also wasteful of prosecutorial, defense and judicial resources.

387 A.2d at 1226.

The policy against fragmentation of criminal proceedings set forth by the New Jersey court echoes that which was previously established by this Court in adult criminal cases. *See State v. Tijerina*, 86 N.M. 31, 519 P.2d 127 (1973), *cert. denied*, 417 U.S. 956, 94 S.Ct. 3085, 41 L.Ed.2d 674 (1974); *State v. Sandoval*, 90 N.M. 260, 561 P.2d 1353 (Ct.App.1977), *cert. denied*, 90 N.M. 637, 567 P.2d 486 (1977).

The court's original order transferring jurisdiction over appellant on the matters alleged in the second petition was proper. Although the corrected order did not specifically allege the offenses for which appellant was ultimately tried, the entire matter was transferred to the district court. It follows that the indictment which covered offenses arising from the same transaction was proper and the ruling of the trial court denying appellant's motion to quash was correct.

Appellant next contends that the trial court erred in denying his motions for a mistrial and his motion for a new trial, based on the prosecutor's failure to disclose evidence.

In his first motion for a mistrial appellant argued that the prosecutor had withheld information. The information in question was a supplemental police report which appellant's attorney became aware of while appellant was being cross-examined by the State. The police report had been in the prosecutor's file relating to Francisco Gomez, a principal involved in the felony murder, and was not within the prosecutor's control until after the trial had begun. Appellant was not named in the report. The trial court denied appellant's motion and instructed the prosecutor to give appellant's attorney a copy of the report. The trial then recessed until the following day.

When the trial resumed the next day appellant renewed his motion for a mistrial. He argued that the failure to disclose the supplemental police report prevented him from discovering an additional witness who could have corroborated his contention that he had no knowledge of a .38 caliber pistol which was allegedly connected with the offense. The basis for appellant's motion was that appellant was not mentioned by the witness, in her statement to a police investigator, as being one of those persons present when Francisco Gomez was showing her and others a .38 caliber pistol. This motion for mistrial was also denied but the court ruled that the allegedly exculpatory statement could be offered as testimony by appellant if the witness who gave it could not be subpoenaed. Appellant's attorney agreed to this procedure and the statement was subsequently read to the jury at the close of all evidence.

A motion for mistrial is addressed to the trial court's discretion and is reviewable only on the basis of an abuse of discretion. *State v. Johnson*, 91 N.M. 148, 571 P.2d 415 (Ct.App.1977); *State v. Padilla*, 86 N.M. 282, 523 P.2d 17 (Ct.App.1974), *cert. denied*, 86 N.M. 281, 523 P.2d 16 (1974). *See also Transwestern Pipe Line Company v. Yandell*, 69 N.M. 448, 367 P.2d 938 (1961). Based upon our review of the evidence in this case we find no abuse of discretion by the trial court.

Appellant relies on *Chacon v. State*, 88 N.M. 198, 539 P.2d 218 (Ct.App.1975) in arguing that he is entitled to a new trial. *Chacon* requires that appellant show he was prejudiced by the State's failure to disclose evidence material to the defense in order to allow a new trial. Appellant has failed to show prejudice in this case. The police report which he sought was made available to his attorney before the trial ended. In addition, appellant's motion for a new trial was not timely filed.

Appellant's motion for a new trial was filed on May 1, 1978, twenty days following his conviction on April 11, 1978. N.M.R.Crim.P. 45(c), N.M.S.A.1978 provides:

> *Time for making motion for new trial.* A motion for a new trial based on the ground of newly discovered evidence may be made only before final judgment, or within two years thereafter, but if an appeal is pending the court may grant the motion only on remand of the case. *A motion for a new trial based on any other grounds shall be made within ten days after verdict or finding of guilty* or within such further time as the court may fix during the ten-day period. (Emphasis added.)

Appellant's motion was not made within the ten-day period prescribed by Rule 45 and was properly denied.

The decision of the trial court is affirmed.

IT IS SO ORDERED.

SOSA and PAYNE, JJ., concur.

596 P.2d 268

STATE of New Mexico, Plaintiff-Appellee,

v.

Timothy RICHTER and Joseph Martinez, Defendants-Appellants.

No. 3761.

Court of Appeals of New Mexico.

April 5, 1979.

Anthony F. Avallone, Las Cruces, for defendants-appellants.

Jeff Bingaman, Atty. Gen., Michael A. Kauffman, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HERNANDEZ, Judge.

Defendants, who were jointly tried, appeal their conviction of burglary, Section 30–16–3(B), N.M.S.A. 1978 (formerly Section 40A–16–3(B), N.M.S.A. 1953 (2d Repl. Vol. 6)).

On December 6, 1977, defendants entered a pawn shop in Las Cruces, each carrying a tape deck that he offered to the saleslady. Whether for pawn or sale is not disclosed in the record. Detective Tafoya of the Las Cruces Police Department happened to be in the pawn shop at the same time checking pawn tickets. The saleslady refused the offer and the defendants left. After they departed she commented to the officer that it was unusual for two individuals to come in together with the same item. The officer went outside and approached the defendants, who were just getting into the same vehicle. After identifying himself, he requested their identification and questioned them concerning the tape decks. Their identification showed that they were students at the New Mexico State University. Each stated that he had purchased a tape deck at a flea market in Albuquerque. One of the tape decks had a social security number engraved on it which did not match that of either defendant. The officer, in addition to calling this to their attention, commented that one of the tape decks was brand-new. After advising them of their constitutional rights, he asked them to accompany him to the police station. A subsequent check disclosed that the tape deck with the social security number engraved on it had been stolen from an automobile on the campus of New Mexico State University. An investigator from the University Police Department was called to the station. After he arrived he questioned the defendant Richter in one room while Detective Tafoya questioned Martinez in another. Richter confessed that he and Martinez had stolen one of the tape decks. Martinez in turn confessed, after being told about Richter's confession, and in addition confessed to having stolen the other tape deck as well.

The defendants did not request separate trials and at trial, over objections, their statements were admitted.

Defendants allege four points of error. Point two will not be considered because a motion to amend the docketing statement was not granted because it was not timely filed. In spite of this, the point was briefed and a motion by the State to strike it from the brief was granted. The other points will be considered in sequence.

This first point is that: "Where there is no corroborating evidence, is it

prejudicial error violative of the sixth amendment to allow into evidence confessions from two joint defendants in their joint trial where neither defendant takes the witness stand." The defendants argue that the only witness whose evidence could provide corroboration of the corpus delicti was not transcribed. Defendants' counsel is charged with the duty of seeing that all parts of record necessary for a review of the errors claimed are included in the transcript. *State v. Duran*, 91 N.M. 756, 581 P.2d 19 (1978). Absent a showing in the record to the contrary it will be presumed that the trial was regularly conducted. *State v. Gilbert*, 78 N.M. 437, 432 P.2d 402 (1967). We therefore presume that corroborating evidence of the corpus delicti is in the missing portions of the record.

Defendants further contend that it was error to admit their confessions because the confession of the one was hearsay as to the other and violative of his Sixth Amendment right of confrontation, since neither took the stand. It is necessary to point out that the confessions established all of the elements of the crime of burglary and each defendant implicated the other. The defendants' contention is correct. There was a violation of the *Bruton* rule: The confession of a codefendant, who does not testify, is hearsay as to the other defendant but more importantly violates his right of confrontation guaranteed by the Sixth Amendment. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Not every constitutional error compels reversal if it can be said to be harmless. However, "before a federal constitutional error can be held harmless, the court must be able to declare the belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

This is a matter of first impression in the appellate courts of this State, i. e., the admission of the confessions of codefendants where neither takes the stand. Since the error was of a federal constitutional right, we look to the federal courts for guidance. Although we encountered some cases to the contrary we agree with the following:

> *United States ex rel. Catanzaro v. Mancusi*, 404 F.2d 296 (2d Cir., 1968): "The reasoning of *Hill* [*United States ex rel. Hill v. Deegan*, 268 F.Supp. 580 (S.D.N.Y. 1967)] and *Bruton* is not persuasive here. Both of those cases involved a defendant who did not confess and who was tried along with a codefendant who did. In our case Catanzaro himself confessed and his confession interlocks with and supports the confession of McChesney.
>
> "Where the jury has heard not only a codefendant's confession but the defendant's own confession no such 'devastating' risk attends the lack of confrontation as was thought to be involved in *Bruton*."
>
> *Metropolis v. Turner*, 437 F.2d 207 (10th Cir. 1971): ". . . the petitioners each made a complete confession and the evidence against each is also of such proportions as to render harmless any possible effect of admitting the codefendants confession."

We also believe that the following caveat must be kept in mind in situations such as this:

> *United States v. DiGilio*, 538 F.2d 972 (3d Cir. 1976): "The harmless error rule is not a predicate for the admission of evidence. We expressly disapprove of the suggestion that there is a 'parallel statements' exception to the *Bruton* rule in this circuit. Hearsay errors both of constitutional and of nonconstitutional dimensions will in appropriate cases be regarded as grounds for reversal . . ."

It is our opinion that the error in allowing into evidence that part of Martinez's confession that was incriminatory of Richter and the part of Richter's confession that was incriminatory of Martinez was harmless beyond a reasonable doubt considering the other parts of the confessions and the other evidence recited at the beginning of this opinion.

Defendants' third point is: "Was there an unreasonable seizure violative of

the fourth and fourteenth amendments rendering inadmissible evidence obtained as a result because: the detention for investigative purposes was unreasonable."

"A police officer may, in appropriate circumstances, approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. [Citation omitted.]

What are appropriate circumstances? Officers must have a reasonable suspicion that the law has been or is being violated. [Citation omitted.]

What is a reasonable suspicion? Officers must be 'aware of specific articulable facts, together with rational inferences from those facts,' and these facts and inferences must provide the basis for the suspicion. [Citation omitted.] Unsupported intuition is insufficient. [Citation omitted.] An inarticulate hunch is insufficient. [Citation omitted.]

How is reasonable suspicion to be judged? The facts and inferences are to be judged by an objective standard: Would the facts available to the officer warrant the officer, as a person of reasonable caution, to believe the action taken was appropriate?" [Citation omitted.] *State v. Galvan*, 90 N.M. 129, 560 P.2d 550 (Ct.App.1977).

It is our opinion that any other reasonably cautious police officer in the same circumstances as Detective Tafoya would have acted as he did.

Defendants' fourth point is: "Was there an unreasonable seizure violative of the fourth and fourteenth amendments rendering inadmissible evidence obtained as a result because: After identifying the property as stolen, the defendants were not charged or brought before a magistrate." The answer to this point is factual. They were taken before a magistrate. Rule 20(d) of N.M.R.Crim.Proc. provides: "A preliminary hearing shall be held within a reasonable time but in any event not later than ten days following the initial appearance if the defendant is in custody and no later than twenty days if he is not in custody." It was approximately 1:15 p. m. on December 6, 1977, when Detective Tafoya asked the defendants to accompany him to the police station. The defendant Richter's statement was completed at 3:35 p. m. and Martinez's was completed at 3:55 p. m. They were then released. On the following day they appeared before a magistrate and then released on their own recognizance.

We affirm.

IT IS SO ORDERED.

LOPEZ and ANDREWS, JJ., concur.

596 P.2d 271

Harold A. DEAKIN, Plaintiff-Appellant,

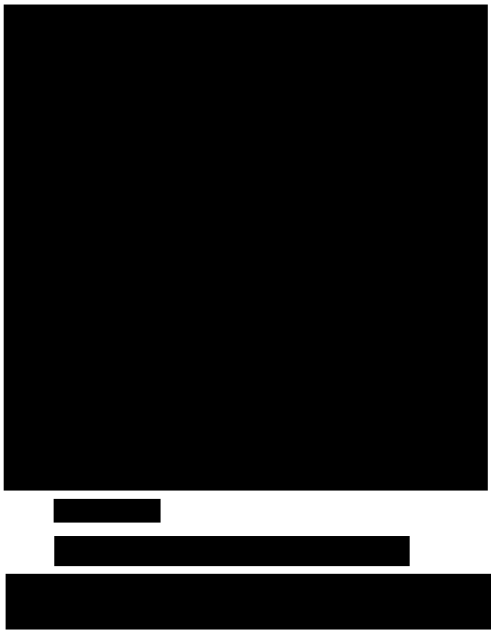
v.

Bobby Q. PUTT and Marjorie Putt, d/b/a Cuban Cafe, Defendants-Appellees.

No. 3546.

Court of Appeals of New Mexico.

April 10, 1979.



Kathleen Davison Lebeck; Civerolo, Hansen & Wolf, Albuquerque, for plaintiff-appellant.

Stephen M. Williams; Shaffer, Butt, Jones, Thornton & Dines, Albuquerque, for defendants-appellees.

OPINION

SUTIN, Judge.

Plaintiff sued defendant for damages arising out of an injury sustained in defendant's cafe. While defendant was pouring plaintiff a cup of hot coffee from a glass coffee pot, the bottom of the pot broke spilling hot coffee in plaintiff's lap. Plaintiff relied upon the doctrine of res ipsa loquitur. Summary judgment was granted defendant and plaintiff appeals. We reverse.

To make a prima facie case, defendant had the burden of establishing as a matter of law that (1) the coffee pot was not in defendant's exclusive control, and (2) this accident does not ordinarily happen in the absence of negligence. Defendant did not meet this burden.

The only witness able to establish these facts was defendant himself. His affidavit, recorded telephone conversation, and deposition vary in some respects. The affidavit was a formal production of the attorney. The recorded telephone conversation and deposition represent a fair presentation of the facts.

Defendant purchased the glass coffee pot from Farmer Brothers about four years prior to the accident. Labeled on it was a warning to be careful not to bump, scratch or boil dry. To prevent accidents like this from happening, defendant had instructed

his employees about the occurrence, if bumped, of cracks such as "stars" on the glass coffee pot. In defendant's opinion it does not take very much of a bump to make the pot break. It will "star" crack if bumped hard enough in the washing process. When asked whether the coffee pot had been cracked, defendant said that he could have hit the edge of another cup or dish on the table, or tapped the top of the cup as he reached over to pour the coffee for plaintiff. Any one of these events could have caused the glass to fall off the pot. Defendant did not inspect the pot. While pouring the coffee for plaintiff, a business invitee, glass from the side or bottom of the pot fell off and hot coffee spilled on plaintiff.

Plaintiff claims the accident occurred because defendant failed to keep his premises, fixtures and utensils in a reasonably safe condition. By use of the word "utensils," plaintiff included the glass coffee pot. Of course, defendant had a duty to keep the pot in a reasonably safe condition, primarily to keep the pot from being bumped, scratched or boiled dry to avoid a "star" crack. The parties appear to agree that a "star" crack in a hot coffee pot will cause the glass to fall out.

The first element of res ipsa loquitur is whether defendant had exclusive control of the coffee pot before or at the time of the accident. From the facts presented, we hold, as a matter of law, that defendant had exclusive control of the coffee pot.

The second element is whether the accident was one which ordinarily does not happen in the absence of negligence. We hold that a genuine issue of material fact exists.

The common experience of the average customer in a cafe subjected to an accident of this kind is one of bewilderment. All that he knows is that the owner spilled hot coffee on him while pouring it. His first impulse is to ask: Why did you spill the coffee on me? Did the pot break? It did? Why? Did you look at the pot before you poured the coffee? Accidents like this don't ordinarily happen without reason, do they? Please explain what caused you to spill the hot coffee on me. The owner has a duty to explain, and the customer has the right to an explanation.

Defendant's explanation was: When I poured the coffee, the glass fell off the pot. It was not "star" cracked. The pot had some hidden defect unknown to me and I am sorry.

Defendant did not testify that he inspected the pot before pouring the coffee nor that he knew "the hot pot was not fraught with a bad spot"; that it had not been bumped sufficiently to cause a "star" crack. As a result, defendant's explanation failed to establish, as a matter of law, that this accident was one which ordinarily does not happen in the absence of negligence.

We followed the guidelines suggested by the doctrine of res ipsa loquitur: (1) the common experience of mankind, (2) the knowledge of the cause of the glass falling off being accessible to defendant and not plaintiff, (3) the duty of defendant to exercise reasonable care not to "bump" the pot, (4) the duty of defendant to inspect the pot, and (5) the absence of an explanation by defendant that the accident did not arise from want of care. *Tapia v. McKenzie*, 83 N.M. 116, 489 P.2d 181 (Ct.App.1971), Sutin, J., Specially Concurring. A genuine issue of material fact exists.

Plaintiff is entitled to go to the jury under the doctrine of res ipsa loquitur. *Tapia, supra* (note error in headnote No. 7); *Chapin v. Rogers*, 80 N.M. 684, 459 P.2d 846 (Ct.App.1969) where a restaurant stool broke; *Tuso v. Markey*, 61 N.M. 77, 294 P.2d 1102 (1956) where a restaurant chair collapsed; *Lay v. Vip's Big Boy Restaurant, Inc.*, 89 N.M. 155, 548 P.2d 117 (Ct.App. 1976) where restaurant window shattered.

Defendant believes that *Rekart v. Safeway Stores, Inc.*, 81 N.M. 491, 468 P.2d 892 (Ct.App.1970) is analogous. We disagree. *Rekart* was not presented on the doctrine of res ipsa loquitur. Plaintiff was reaching for a carton of Dr. Pepper when a Pepsi Cola bottle fell and cut plaintiff. Plaintiff contended that defendant knew the soft

drink display area became disarranged during the course of business due to the public's mishandling of the soft drinks, some of them being placed in a precarious position; that with knowledge of these conditions defendant failed to inspect and remedy these conditions or notify business invitees that they existed. *Defendant made a prima facie showing that neither of plaintiff's two claims were the proximate cause of the bottle falling.* The burden then shifted to plaintiff to show there was a factual issue concerning proximate cause. The court said:

> * * * Here we have no evidence that a messy condition existed at the time of the accident. (Citations omitted.) If such a condition existed it must be inferred. For a messy condition to have been the cause for the bottle falling we must put inference on inference. This we may not do. (Citations omitted.)
>
> We have the fact that there was shelving in common use that was safer than the stacking method used by defendant. If we infer that the stacking method in use on the day of the accident was unsafe we must use that inference to infer such was the proximate cause for the fall of the Pepsi Cola bottle. Again we place inference on inference. [81 N.M. at 493, 468 P.2d at 894.]

Plaintiff did not meet her burden on the issue of proximate cause.

The only question in *Rekart* was whether a permissible inference can be drawn that the "messy condition" or the "stacking method" used was a proximate cause of the accident. There is a distinct difference between a permissible inference and the doctrine of res ipsa loquitur. If the circumstantial evidence touching the injury is sufficient to warrant an inference that some fault of the defendant caused plaintiff's injury, the jury is permitted to make a finding of negligence upon the facts adduced, *irrespective of the doctrine of res ipsa loquitur. Hepp v. Quickel Auto & Supply Co.*, 37 N.M. 525, 25 P.2d 197 (1933); *Tapia, supra*, Sutin, J., Specially Concurring. Under res ipsa loquitur, the question presented is not whether a permissible inference can be drawn, but whether the accident would have occurred if defendant had exercised due care.

Defendant has argued inferences as an essential element in the discussion of res ipsa loquitur cases. Defendant is mistaken.

Under *Tapia*, defendant contends that *plaintiff* must produce evidence *in the summary judgment stage* tending to establish the elements of res ipsa loquitur. Defendant has misread *Tapia. At the trial of the case*, plaintiff must, after pleading res ipsa loquitur, " 'fulfill the burden of satisfying the court, or the jury, that the accident was of a kind which ordinarily does not occur in the absence of someone's negligence,' " and that defendant has exclusive control. "If plaintiff fails to establish the essential elements of the doctrine, it would not be available to make a prima facie case of liability." [83 N.M. at 118–119, 489 P.2d at 183–184.] *Tapia* made it clear that at the summary judgment stage, *if defendant made a prima facie showing*, then, to defeat summary judgment, plaintiff must show a fact issue. The burden of establishing an absence of a material issue of fact on the question of defendant's due care was on defendant and defendant failed to meet that burden. Plaintiff did not have to present any evidence to establish a fact issue.

Defendant's discussion of other New Mexico cases does not require any comment.

Reversed.

IT IS SO ORDERED.

WALTERS, J., concurs.

HENDLEY, J., concurs in the result.

596 P.2d 275

STATE of New Mexico,
Plaintiff-Appellee,

v.

Brian STAHL, Defendant-Appellant.

No. 3813.

Court of Appeals of New Mexico.

April 12, 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.

Defendant was convicted of embezzling over $100. To have embezzled the money, defendant must have been entrusted with the money. Section 30–16–8, N.M.S.A.1978. Defendant contends there is no evidence that he was entrusted with over $100. We agree.

Defendant was a clerk at a store. The store had two cash registers and a drop-box. There was a slit in the counter; money pushed through this slit went into the drop-box. The drop-box was locked with two padlocks, the keys to which were retained by the manager. When money accumulated in the registers, portions of the accumulation were placed in the drop-box through the slit in the counter.

About 7:30 p. m. on the night in question, the manager removed the money from the drop-box. About 11:00 p. m. the clerk on duty closed down one of the registers, placing the money from that register into the drop-box. When defendant went on duty

at midnight, the one register being used contained $50 to $75. Defendant's shift was from midnight to 8:00 a. m. At 3:00 a. m., defendant was absent from the store. The drop-box had been pried open and its money removed. There is evidence that defendant took a total of $612 from the drop-box and the register being used.

Defendant was the only clerk on duty when the money was taken; he was "in charge of the whole store" and "responsible for the entire store." The register being used, and its contents, were for defendant's use in performing his duties. Defendant does not claim that he was not entrusted with the money in this register and does not contend that the money he took from this register was not embezzlement. However, there is no proof that the money taken from the register was over $100, and no proof that the amount of money in the register, plus money from sales after defendant went on duty, ever amounted to $100.

The State asserts that defendant was also entrusted with money which defendant took from the register and placed in the drop-box. We need not answer this contention because there is no evidence that defendant placed any money into the drop-box.

To reach a monetary amount over $100, the money taken from the drop-box must be included. Under the evidence, the money in the drop-box was put there by another clerk, and before defendant was on duty. Defendant did not have the keys to the drop-box, he had no permission or authority to get any money out of the box, he had no permission to have possession of the money in the drop-box, or "use it for change or anything . . . ." The only one supposed to take money from the drop-box was the manager. These facts are not disputed.

The trial court denied defendant's motion for a directed verdict on the charge of embezzlement over $100. Because defendant was in charge of the store, the trial court was of the view that defendant had been entrusted with "everything there on the premises" including the drop-box. We disagree; defendant had not been entrusted with the contents of the drop-box.

"Entrust" means to commit or surrender to another with a certain confidence regarding his care, use or disposal of that which has been committed or surrendered. *State v. Moss*, 83 N.M. 42, 487 P.2d 1347 (Ct.App.1971). The money in the drop-box would not have been entrusted to defendant unless the money came into defendant's possession by reason of his employment. *State v. Peke*, 70 N.M. 108, 371 P.2d 226 (1962); *State v. Konviser*, 57 N.M. 418, 259 P.2d 785 (1953).

2 Wharton's Criminal Law and Procedure, § 468 (1957) states:

> A clerk taking money or goods from his employer's safe, till or shelves is guilty of larceny unless he is authorized to dispose of such money or goods at his discretion. An employee who feloniously appropriates to his own use property of his master or employer to which he has access only by reason of a mere physical propinquity as an incident of the employment, and not by reason of any charge, care, or oversight of the property entrusted to him, may be guilty of larceny by such act the same as any stranger.

See also Wharton's Criminal Law and Procedure, supra, §§ 513, 524 and 525. In *State v. Peke*, supra, the defendant's employment duties involved checks, the proceeds of which defendant converted. In *State v. Konviser*, supra, the defendant was the manager of the property which he converted.

Although defendant was in charge of the entire store, the undisputed facts show that the money in the drop-box was not committed or surrendered to defendant's care, use or disposal; that money was to be handled exclusively by the manager. Defendant was excluded from having anything to do with that money. Defendant's offense, as to the money in the drop-box, was larceny, not embezzlement, because he had not been entrusted with that money. Compare *State v. Robertson*, 90 N.M. 382, 563 P.2d 1175 (Ct.App.1977); *State v. Rhea*, 86 N.M. 291, 523 P.2d 26 (Ct.App.1974).

Because of an absence of evidence showing that defendant was entrusted with over $100 of the money he took, his embezzlement conviction is reversed.

IT IS SO ORDERED.

LOPEZ and WALTERS, JJ., concur.

596 P.2d 277

STATE of New Mexico, Plaintiff-Appellant,

v.

Bernarr H. HOWELL, Jr., Defendant-Appellee.

No. 3941.

Court of Appeals of New Mexico.

May 22, 1979.

Jeff Bingaman, Atty. Gen., Sammy J. Quintana, Asst. Atty. Gen., Santa Fe, Wesley R. Bobbitt, Asst. Dist. Atty., Carlsbad, for plaintiff-appellant.

Tom Cherryhomes, Carlsbad, for defendant-appellee.

OPINION

WOOD, Chief Judge.

Defendant is charged with child abuse contrary to § 30–6–1(C)(2), N.M.S.A.1978 (Supp.1978). We do not consider the proposed amendment to the information because the record does not show that the trial court has allowed the amendment. The trial court ruled that defendant's wife would not be permitted to testify as a witness for the prosecution; the State appealed. We discuss: (1) the husband-wife privilege; and (2) an issue not raised in the trial court.

Husband-Wife Privilege

The mother of the child involved in this case arranged for defendant's wife to care for the child four and one-half hours a day, five days a week, while the mother was attending school. On April 3, 1978, the mother had fetched the child and returned to her home. Upon changing the child's diaper, the mother observed a large bruise on the child's buttocks "over his whole rear . . . ." This was reported to the police. When the police inquired about the bruise, defendant's wife made a statement which would permit an inference that defendant inflicted the bruise. The trial court ruled that the wife's testimony would be excluded, defendant having invoked the husband-wife privilege.

The pertinent portions of Evidence Rule 505 state:

> (b) *General rule of privileges.*
>
> (1) An accused spouse in a criminal proceeding has a privilege to prevent the other spouse from testifying against the accused. . . .
>
> (d) *Exceptions.* There is no privilege under this rule: (1) in proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either . . .

The trial court found that the child involved was neither the natural child, adopted child, nor stepchild of either defendant or his wife. The trial court ruled that the State failed to show that the exception in Evidence Rule 505(d)(1) was applicable.

The State contends the exception was applicable because defendant's wife "stood in loco parentis" to the child. The State asserts that defendant's wife "had and exercised plenary authority over the child to feed him, guide him with such love, attention, and chastisement as one gives an 8 month old baby, and to attend to such important matters as the baby's medical needs." This characterization of the evidence is in the light most favorable to the State; a fair inference from the evidence is simply that defendant's wife was a babysitter. However, the State's characterization of the evidence, even if accepted by us, does not show an in loco parentis relationship.

Fevig v. Fevig, 90 N.M. 51, 559 P.2d 839 (1977) states:

> A person is said to stand in loco parentis when he puts himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formalities necessary to a legal adoption. . . . However, the person must intend to assume toward the child the status of a parent.

The evidence does not permit an inference that defendant's wife intended to assume the status of parent to the child. The trial court properly ruled that the exception had not been established. Accordingly, we do not reach the question of whether an in loco parentis relationship is within the meaning of Evidence Rule 505.

The State points out that the husband-wife privilege has been severely criticized. It argues that the privilege should be narrowly construed, or more specifically in this case, that the exceptions to the privilege should be liberally construed. The State argues that a "rule of necessity," similar to that applied in common law proceedings to erode the extent of the privilege, should be applied.

We recognize the criticism of the privilege. See VIII Wigmore, Evidence, §§ 2227 and 2228 (McNaughton rev. 1961); 2 Weinstein's Evidence, ¶ 505[02] (1979). Wigmore, supra, page 221 states:

> This privilege has no longer adequate reason for retention. In an age which has so far rationalized, depolarized and dechivalrized the marital relation and the spirit of femininity as to be willing to enact complete legal and political equality and independence of man and woman, this marital privilege is the merest anachronism in legal theory and an indefensible obstruction to truth in practice.

Even with this criticism, various states, in addition to New Mexico, have adopted an evidentiary rule stating a husband-wife privilege. Weinstein, supra,

¶ 505[06] (Cum.Supp.1978). This Court is to apply the evidentiary rules adopted by the Supreme Court. *Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973). Thus, this Court is not free, under a concept of "necessity," to refuse to apply the rule as adopted. We recognize that there may be situations where we must determine whether the rule is applicable. See *State v. Scott,* 90 N.M. 256, 561 P.2d 1349 (Ct.App.1977). Here, the facts are insufficient to raise a question as to the applicability of the exception to the rule; accordingly, there is no question of construction.

Issue Not Raised in the Trial Court

In an effort to defeat the privilege conferred by Evidence Rule 505, the State contends that in child abuse cases, no privilege applies. The State relies on §§ 32–1–15(A) and 32–1–16(A), N.M.S.A.1978. This argument encompasses the meaning of these statutes, their relationship to Evidence Rule 505 and their validity under *Ammerman v. Hubbard Broadcasting, Inc.,* 89 N.M. 307, 551 P.2d 1354 (1976). See *State v. Herrera,* 92 N.M. 7, 582 P.2d 384 (Ct.App.1978). No issue concerning these statutes was raised in the trial court; the State interjected these statutes into the case, for the first time, on appeal. The applicability of these statutes will not be considered. N.M.Crim.App. 308; *State v. Brakeman,* 88 N.M. 153, 538 P.2d 795 (Ct. App.1975).

The order of the trial court is affirmed.

IT IS SO ORDERED.

WALTERS, J., specially concurring.

ANDREWS, J., specially concurring.

WALTERS, Judge (specially concurring).

I agree with the result reached and the conclusion of Chief Judge Wood that this court is without power or authority to disregard Rule 505 of the Rules of Evidence. I do not wish by my concurrence to intimate, however, that I agree with Professor Wigmore's apparent analysis that recent enactments of "complete legal and political equality and independence of man and woman" is in any way destructive of the marital relationship which the privilege originally was intended to protect. That analysis, it seems to me, suggests that so long as women remained legally and politically inferior, and dependent upon men, the privilege served a valid purpose, i. e., it helped to hold a marriage together. Or it might also mean that wives should not testify against their husbands if they are dependent, subordinate or unequal, because that inferior status should not be disturbed; whereas, if the wife achieves a status of equality, the marital relation is not worth protecting.

I think the true basis for considering rejection of the privilege is better stated by the rationale of Hutchins and Slesinger: there is no reason to sacrifice individual justice by pretending the privilege promotes family unity.

ANDREWS, Judge (specially concurring).

I agree with the opinion and the result reached, however, I have this further comment in regard to Rule 505.

While criticism of the husband wife privilege is fashionable, consideration of its abolition may be premature.

> The stresses of modern society make more attractive than ever before the prospect of a safe harbour of intimacy where spouses can confide in each other freely without fear that what they say will be published under compulsion. 2 Weinstein's Evidence ¶ 505[03] (1979).

The drastic remedy of abolition is not necessary. Rather, that portion of the rule not relating to "confidential communication" between husband and wife should be removed from Rule 505, New Mexico Rules of Evidence.

596 P.2d 510

Fryderyk FIBER, M. D., Petitioner-Appellee,

v.

NEW MEXICO BOARD OF MEDICAL EXAMINERS, Respondent-Appellant.

No. 11893.

Supreme Court of New Mexico.

June 6, 1979.

Rehearing Denied July 2, 1979.

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

Jones, Gallegos, Snead & Wertheim, J. E. Gallegos, Steven L. Tucker, Santa Fe, for petitioner-appellee.

OPINION

JOE ANGEL, District Judge.

This is an appeal by the New Mexico Board of Medical Examiners (Board) from a decision of the District Court of Santa Fe County ordering the licensure by endorsement of Dr. Fryderyk Fiber, as provided by § 61–6–12, N.M.S.A.1978.

Dr. Fiber is a medical doctor specializing in the field of otolaryngology, the branch of medicine and surgery related to the ear, nose and throat. Born in Russia in 1941,

Dr. Fiber received a Medical Doctor's Degree in Hungary in 1965. He came to the United States in 1972, after practicing his specialty for six years, and successfully passed the examination given by the Educational Counsel for Foreign Graduates. He did research at Harvard Medical School and later was accepted as a resident at Columbia Presbyterian Hospital in New York City where he served until 1976. In that same year, he came to New Mexico where he obtained a position as Assistant Professor of Surgery in the Division of Otolaryngology with the University of New Mexico Medical School. The Board granted Dr. Fiber an institutional license authorizing him to practice medicine under the auspices of the University.

In April of 1976, Dr. Fiber applied to the Board for licensure by endorsement as provided by § 61–6–12. A hearing was held before the Board on May 17, 1977; his application was denied. Dr. Fiber filed a Petition for Review in the District Court of Santa Fe County pursuant to § 61–1–17, N.M.S.A.1978. Based on the record, briefs and arguments of counsel, the court entered its decision and judgment reversing the Board's denial of Dr. Fiber's application. The Board appeals.

Section 61–1–20, N.M.S.A.1978 controls the scope of review of administrative procedures. It states:

> Upon the review of any board decision under the Uniform Licensing Act . . . *[t]he court* may affirm the decision of the board or remand the case for further proceedings; or it *may reverse the decision if the substantial rights of the petitioner have been prejudiced because the administrative findings,* inferences, *conclusions or decisions are:* in violation of constitutional provisions; or in excess of the statutory authority or jurisdiction of the board; or made upon unlawful procedure; or affected by other error of law; or *unsupported by substantial evidence* on the entire record as submitted; *or arbitrary or capricious.* (Emphasis added.)

Section 61–6–12, which vests the Board with authority to grant a license without examination and by endorsement, provides in part:

> All applicants for licenses of the classes referred to in Section 61–6–10 NMSA 1978 shall be examined in the English language on such subjects as the board may deem necessary to test the applicant's fitness to practice medicine. *An average of 75 percent must be obtained at such examination by each applicant;* provided, that such *board may grant licenses without examination and by endorsement to those applicants* who have been regularly licensed physicians in the District of Columbia, other states and territories, *having qualifications and requirements equivalent to those required in New Mexico,* when properly endorsed . . . . (Emphasis added.)

The sole reason advanced by the Board for refusing to grant Dr. Fiber a license is that the disparity in methodology between New York and New Mexico is such as to make New York's standards not equivalent to those in New Mexico and, therefore, less restrictive.

Both states use the Federal Licensing Examination (FLEX Test) to assess the qualifications of applicants. The FLEX Test covers the areas of basic science, clinical science, and clinical competence. Grades achieved on each of these sections are tabulated separately; they are not combined to obtain an average or total score. Grades from each section are weighted according to the importance placed on the area under consideration to demonstrate medical competency. Thus, basic science is given a weight of one; clinical science is given a weight of two; and clinical competence is given a weight of three. The score on each test is multiplied respectively by 1, 2 and 3, and the figure is then divided by 6 to arrive at a final weighted score.

Both New York and New Mexico require applicants to achieve a minimum score of 75 percent. The statutes, rules and regulations of both states do not provide any disparity. The only point of disparity is

contained in the unwritten practice or custom of the Board. The Board has adopted a policy of not extending licensure by reciprocity under § 61–6–12, if the other state, which granted a medical license after requiring a FLEX Test, permitted the averaging of the highest grades attained on more than one examination to attain the 75 percent weighted average. New York's licensing authority does not impose this additional requirement upon the standard of 75 percent.

The question arises whether this one item of disparity makes the standards of New York and New Mexico not equivalent within the meaning of § 61–6–12. "Equivalent" is defined as being "[e]qual in value, force, measure, volume, power, and effect or having equal or corresponding import, meaning or significance; alike, identical." Black's Law Dictionary 636 (Rev. 4th ed. 1968). *See also Nahas v. Nahas,* 59 Nev. 220, 90 P.2d 223, 224 (1939).

Things may differ one from the other and still be "equivalent," if they are of equal value, significance or import, in relation to a common standard, here the promotion and preservation of standards for practicing physicians in both states.

Dr. Fiber took the FLEX Test in December 1974, did not achieve a weighted score of 75 percent, and retook the test in September 1975. New York's licensing authority permitted the weighted scores of sections 1 and 2 taken in 1975 to be combined with the weighted score of section 3 taken in 1974, which together gave Dr. Fiber the required score. On this basis, he was granted a license to practice medicine in New York. The Board's decision in refusing to grant Dr. Fiber a license by endorsement was based solely on the fact that New York recognized Dr. Fiber's scores on two sittings of the FLEX Test and the Board, by custom, only recognizes scores obtained at one sitting. No comparison was made by the Board of the various considerations touching the composition of the standards under inquiry. The trial court found that the Board's decision was not supported by substantial evidence and that it was arbitrary and capricious. We agree.

A district court may not substitute its judgment for that of the Board. The court is limited in its review to determining whether the Board's order was reasonable and supported by substantial evidence. *Seidenberg v. New Mexico Board of Medical Exam.,* 80 N.M. 135, 452 P.2d 469 (1969). The court may give special weight to the decision of the Board where the issue before the Board is essentially one of a scientific or medical nature. *McDaniel v. New Mexico Board of Medical Examiners,* 86 N.M. 447, 525 P.2d 374 (1974). However, where the facts are not in dispute and the question is a legal one, our courts will not hesitate to overrule the decision of the licensing board. *See Young v. Board of Pharmacy,* 81 N.M. 5, 462 P.2d 139 (1969).

There is no question about Dr. Fiber's medical competency. The record is replete with testimonials lauding his qualifications. Clearly, this is not a case where we are asked to permit a person of questionable merit to practice medicine in our state when those who are better able to judge his medical competency have excluded him from their ranks. Rather, we have a case of a person of proven and established medical competency, even excellence, who is being denied a license on the narrow issue of methodology disparity of two states, which disparity fails to establish that the method of one is not equivalent to the method of the other. On this point, the court found in favor of Dr. Fiber. Its finding is based on substantial evidence. We affirm. *Boone v. Boone,* 90 N.M. 466, 565 P.2d 337 (1977).

Under the facts of this case, we hold that the district court could find, as it did, that the differences in methodology of examination scoring between New York and New Mexico do not rationally relate to the "equivalency" of the qualifications and requirements as to Dr. Fiber's competency to practice medicine. The judgment of the district court is affirmed.

IT IS SO ORDERED.

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

McMANUS, Senior Justice, and EASLEY, J., dissenting.

EASLEY, Justice, Dissenting.

Under § 61-6-12, N.M.S.A.1978, the Legislature has mandated that each applicant for licensure as a medical doctor by examination must attain a grade average of 75 per cent. The Board of Medical Examiners (the Board) was granted rule-making power by § 61-6-19, N.M.S.A.1978. The Board legally enacted a rule adopting the examination as prescribed by the Federation Licensing Examination Board (FLEX). FLEX has a rule, which was introduced by stipulation of the parties, without any question being raised by Fiber as to its existence or validity, that prohibits averaging the highest grades made on individual subjects on two examinations in order to attain the required 75 per cent, as was done in Fiber's case by New York authorities. The 75 per cent weighted average must be attained on *one* examination to meet the FLEX requirements.

The majority states that the Board was operating under an "unwritten practice or custom" in refusing to permit the averaging of grades from more than one examination to produce the required minimum grade. This is in error. The trial court also erroneously refused to find that the FLEX rules require that the grade be attained at one sitting, but Fiber does not dispute that FLEX has such a rule. We respectfully suggest that the rule of the New Mexico Board adopted the FLEX examination procedures in their entirety by reference thereto, which adoption unquestionably includes that portion prohibiting the type of action taken by the New York Board in Fiber's case.

Fiber was admitted in New York in clear violation of FLEX standards. He would not have been admitted in New Mexico if he had first taken this examination in New Mexico and had received the same grades he did in New York. To admit him is a patent violation of the law as contained in the statutes and the validly enacted rule and constitutes a classic example of transparent judicial legislation.

We are not to concern ourselves as to the wisdom of a policy that is plainly within the legislative prerogative to enact. *In re McCain,* 84 N.M. 657, 506 P.2d 1204 (1973); *Gruschus v. Bureau of Revenue,* 74 N.M. 775, 399 P.2d 105 (1965); *Petition of Sosa,* 74 N.M. 182, 392 P.2d 14 (1964); *Swallows v. City of Albuquerque,* 61 N.M. 265, 298 P.2d 945 (1956).

The main question proposed by the majority and answered in the affirmative is whether the requirements under the laws of New York and New Mexico are "equivalent" so as to permit the New Mexico Board to exercise its discretionary authority under § 61-6-12, N.M.S.A.1978, to allow Fiber to become licensed without examination. Note that the statute specifies that the "Board *may* grant licenses" (emphasis added) where the requirements are equivalent. The majority's decision here interferes with and overrules this discretion given the Board under the law.

To hold for Fiber means that we agree that the New York procedures are "equivalent" to ours. Fiber claims this means they are "equal in . . . effect". The true effect is that he is entitled to be licensed under one set of rules but is not so entitled under the other. The medical licensing requirements of the two states are unquestionably different. Fiber was admitted by the New York Board under its interpretation of the requirements of New York law. He definitely is not eligible for admission under the clear and unambiguous terms of New Mexico law. A court may disagree with a policy legally established by the Legislature, but it should not effect a change in that policy by judicial legislation.

McMANUS, Senior Judge, concurs.

596 P.2d 514

Josie R. ABERNATHY,
Plaintiff-Appellee,

v.

EMPLOYMENT SECURITY COMMISSION of New Mexico,
Defendant-Appellant.

No. 12166.

Supreme Court of New Mexico.

June 6, 1979.

Rehearing Denied July 2, 1979.

Jeff Bingaman, Atty. Gen., C. Reischman, Santa Fe, for defendant-appellant.

Ralph D. Wanek, Las Cruces, for plaintiff-appellee.

Clifford Martin Rees, Santa Fe, for amicus curiae.

OPINION

PAYNE, Justice.

Abernathy filed a claim for unemployment compensation with the Employment Security Commission. After administrative hearings, the Commission disqualified Abernathy from benefits on the ground that her discharge was for misconduct connected with her work. The district court granted Abernathy's petition for certiorari to review the decision. The Commission moved to dismiss the appeal because Abernathy did not join her last employer as a party to the district court action. The district court denied the motion, reversed the Commission's decision, and held that Abernathy was entitled to benefits. The Commission now appeals to this Court.

The Commission argues that Abernathy's last employer is an indispensible

party under the terms of § 51–1–8(K), N.M. S.A. 1978. It relies on that portion of the statute which states:

> The district court shall render its judgment after hearing and either the commission or any other party thereto affected may appeal from such judgment to the supreme court * * * *.

It is not disputed that the last employer may be affected by a Commission decision inasmuch as it could be required to increase its contributions under the Unemployment Compensation Law. However, § 51–1–8(K) does not purport to define who must be a party in the proceedings on certiorari before the district court. It merely allows the Commission, or any other party affected by the district court decision, to appeal to the Supreme Court.

The Commission argues in the alternative that the New Mexico Rules of Civil Procedure require joinder of the last employer. It asserts that N.M.R. Civ. P. 19, N.M.S.A. 1978 requires the joinder of an absent party with an interest in the subject matter of the action. We do not agree that Rule 19 is applicable in this case.

As a practical matter, the last employer is a party to the proceedings. Review of the Commission's ruling is by certiorari to the district court. The district court must make its decision based upon the record of the hearing before the Commission. At that hearing the employer, as well as the claimant, was afforded an opportunity to present evidence and to argue the merits of the case. *See* Rules and Regulations of the Employment Security Commission, HEARING PROCEDURE, § 517 *et seq.* Although § 51–1–8(K) provides that "the district court shall render its judgment after hearing," the taking of additional evidence by the district court is not contemplated by the statute.

N.M.R. Civ. P. 81(c)(4), N.M.S.A. 1978 provides:

> 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.

In addition, § 51–1–8(K) provides: "Such certiorari shall be heard in a summary manner and shall be given precedence over all other civil cases * * * *."

The last employer was a party to the proceedings in the district court by virtue of its participation in the adjudicatory hearing before the Commission. It was given every opportunity to develop evidence and to present the law through oral arguments and briefs. Therefore, we affirm the district court's decision denying the Commission's motion to dismiss for failure to join the last employer of the claimant.

■ The Commission next argues that the district court erred in reversing the Commission's decision on the merits because there was substantial evidence in the record to support its decision. This argument rests on the erroneous premise that the district court's review of a Commission decision is limited to a determination of whether the decision is supported by substantial evidence. N.M.R. Civ. P. 81(c)(4) provides that on review of a Commission decision, the district court "shall make findings of fact and conclusions of law and enter judgment therein upon the merits." The scope of review of the record by the district court was examined in *Wilson v. Employment Security Commission*, 74 N.M. 3, 389 P.2d 855 (1963). This Court stated:

> 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.

Id. at 8, 389 P.2d at 858. *See also Ribera v. Employment Security Commission*, 92 N.M. 694, 594 P.2d 742 (1979).

If the district court determines that the Commission's findings are supported by substantial evidence, those findings are binding on the district court. However, should the district court determine that they are not so supported, the district court must make its own findings from the evidence presented to the Commission.

Upon review of a district court decision overturning a Commission decision, this Court must address two questions: (1) Whether the district court was correct in finding the Commission decision to be unsupported by substantial evidence; and (2) assuming the district court was correct, whether the district court's independent findings are supported by substantial evidence.

We have reviewed the decision of the Commission and the findings of fact and conclusions of law of the district court in light of the evidence presented to the Commission. We hold that the evidence in the record reviewed by the district court was not sufficient to support the decision of the Commission. The district court properly made its own findings. Those findings are supported by substantial evidence.

The district court is therefore affirmed.

IT IS SO ORDERED.

SOSA, C. J., McMANUS, Senior Justice, and EASLEY, and FEDERICI, JJ., concur.

596 P.2d 516

STATE of New Mexico, Plaintiff-Appellee,

v.

James Delbert PERRIN, Defendant-Appellant.

No. 12238.

Supreme Court of New Mexico.

June 19, 1979.

Martha A. Daly, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Michael A. Kauffman, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

FEDERICI, Justice.

Appellant was convicted of felony murder in the District Court of Dona Ana County. The court found that appellant and James Kinslow had entered the Andrews' home for the purpose of committing burglary, and during the commission of this crime, shot and killed Mrs. Patricia Andrews.

Appellant argues two points on appeal: (1) the trial court committed jurisdictional error in failing to properly instruct the jury regarding an essential element of the felony-murder rule; (2) the trial court erred in not declaring a mistrial and by denying a new trial because the State presented appellant's previously undisclosed statement to the jury.

Erroneous Instruction.

Appellant contends that the trial court erred in failing to include in the jury instruction on felony murder specific language covering an element of that crime, namely, that the murder was committed "during the commission of burglary" as required by N.M.U.J.I.Crim. 2.04, ¶ 2, N.M.S.A. 1978 (Supp.1978).

The court instructed the jury that before appellant could be found guilty of felony murder the State had to prove beyond a reasonable doubt that:

1. The defendant committed the crime of burglary of the residence of Patricia Andrews.

2. The defendant caused the death of Patricia Andrews.

3. There is a *causal relationship* between the burglary and the death of Patricia Andrews.

4. The burglary was independent of or collateral to the death of Patricia Andrews. (Emphasis added.)

This instruction was apparently formulated by the trial court to comply with the result reached in *State v. Harrison*, 90 N.M. 439, 564 P.2d 1321 (1977). In *Harrison*, this Court stated:

> Despite the broad wording of the statute, felony murder has evolved to the point that today various limitations have been placed on it. Depending on the jurisdiction, those limitations, both statutory and judicial, include the following: (1) there must be a causal relationship between the felony and the homicide, (2) the felony must be independent of or collateral to the homicide, (3) the felony must be inherently or foreseeably dangerous to human life.

Id. at 441, 564 P.2d at 1323 (citations omitted).

In *State v. Adams*, 92 N.M. 669, 593 P.2d 1072 (1979), this Court reviewed *Harrison* and said:

> 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. (Emphasis added.)

Id. at 670, 593 P.2d at 1073.

The Court in *Adams* approved the instruction given, affirmed the conviction and concluded that:

> 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.

Id. at 670, 593 P.2d at 1073.

Appellant's contention that the jury instruction in this case was inadequate is foreclosed by *Harrison* and *Adams.*

Denial of New Trial.

Appellant contends under this point that the trial court erred in not declaring a mistrial and by denying a new trial because of the State's failure to disclose a statement previously given by appellant to third persons.

N.M.R.Crim.P. 27, N.M.S.A. 1978 requires disclosure of information which the State intends to introduce at a trial. *See also* N.M.R.Crim.P. 30, N.M.S.A. 1978. The record shows that in this case the State did not intend to introduce the statement since it did not know of the existence of the statement until the trial was in progress. In fact, knowledge of the statement was elicited during questioning of a witness by counsel for appellant. The State could not disclose the statement since it did not know it existed. Furthermore, appellant can claim no surprise as he was the person responsible for its discovery.

The record does not show that appellant was prejudiced by the nondisclosure as required by *Chacon v. State,* 88 N.M. 198, 539 P.2d 218 (Ct.App.1975). Absent a showing of such prejudice there is no reversible error. The burden is on appellant to show that he has been prejudiced by the nondisclosure. *State v. Smith,* 92 N.M. 533, 591 P.2d 664 (1979).

The granting of a mistrial or a new trial is discretionary with the trial court and will not be disturbed on appeal in the absence of a clear showing of abuse of that discretion. *State v. Johnson,* 91 M.M. 148, 571 P.2d 415 (Ct.App.1977); *State v. Padilla,* 86 N.M. 282, 523 P.2d 17 (Ct.App.1974), *cert. denied,* 86 N.M. 281, 523 P.2d 16 (1974).

The judgment and sentence of the trial court is affirmed.

IT IS SO ORDERED.

EASLEY and PAYNE, JJ., concur.

596 P.2d 518

Robert A. CLAUSS, II,
Plaintiff-Appellant,

v.

ELECTRONIC CITY, a/k/a Electronics City and John Capo,
Defendants-Appellees.

No. 3659.

Court of Appeals of New Mexico.

May 15, 1979.

Rehearing Denied May 28, 1979.

David H. Pearlman, Albuquerque, for plaintiff-appellant.

David W. King, Albuquerque, for defendants-appellees.

OPINION

HENDLEY, Judge.

Plaintiff, as the personal representative of the estate of Marilyn R. Clark, appeals the termination of workmen's compensation benefits to the estate. The appeal concerns three issues: (1) jurisdiction of the trial court; (2) a lump sum award; and (3) whether the benefits accrue to the estate of decedent.

Facts

Allen B. Clark suffered a fatal accidental injury while employed by defendants. His widow, Marilyn R. Clark, on September 21, 1976, was awarded benefits "from March 1, 1974, . . . up to a cumulative total for past and future compensation of 500 weeks at Fifty-Seven Dollars and Fifty Cents ($57.50) per week, for a total Judgment for past and future weekly benefits in the sum of Twenty-Eight Thousand Seven Hundred Fifty Dollars ($28,750.00) . . ." This judgment was affirmed on appeal. *Clark v. Electronic City*, 90 N.M. 477, 565 P.2d 348 (Ct.App.1977).

Mrs. Clark died on September 13, 1977. It does not appear that there were any eligible surviving dependents (§ 52–1–17, N.M.S.A.1978) legally entitled to support. The estate brought suit for a lump sum payment for the amounts due from June 14, 1977, through September 13, 1977, and for all sums due and owing thereafter. The trial court found for the estate for the amount from June to September. It further found that defendant was discharged from paying any amounts after September 13, 1977.

Jurisdiction of Trial Court

It is plaintiff's position that the trial court was without jurisdiction to act since there was no appeal from the Judgment on the Mandate which provided for weekly installments of $57.50 for 500 weeks after March 1, 1974. It is plaintiff's contention that the only applicable statute is § 52–1–38 A, N.M.S.A.1978. Subsection A states in part:

> In addition to executions for any amount already due in the judgment, executions for amounts to become due in the future shall be issued by the clerk of the court at any time after the time provided in the judgment for the payment thereof, if the workman files his affidavit with the clerk that the same is unpaid and that his disability still continues; provided, however, if application is made for a physical examination of the workman under Section 52–1–51 NMSA 1978, issuance of execution shall await the further order of the court in [on] the premises.

Plaintiff's argument is totally without merit. Because Marilyn had filed an affidavit

of non-payment under this section before her death does not limit the authority of the trial court to only act under this section.

Plaintiff's reliance on *Fowler v. W. G. Const. Co.*, 51 N.M. 441, 188 P.2d 160 (1947) for support for his position is misplaced. *Fowler* holds that the district court *has* jurisdiction after the expiration of thirty days to reopen, amend or modify its judgment.

Fowler is consistent with the general scheme of the Workmen's Compensation Act. Sections 52–1–46 and 56, N.M.S.A. 1978, both provide for a continuing jurisdiction of the court. See also, *Churchill v. City of Albuquerque*, 66 N.M. 325, 347 P.2d 752 (1959); *Segura v. Jack Adams General Contractor*, 64 N.M. 413, 329 P.2d 432 (1958). The trial court had jurisdiction to terminate the award.

Lump Sum Award

Plaintiff contends that the judgment was a lump sum award. This is manifestly without merit. Section 52–1–30, N.M.S.A.1978, provides for compensation to be paid in installments unless it is in the interest of rehabilitation or in the "best interests of the person entitled to compensation." There was no "best interests" hearing, nor was there a present value discount. Plaintiff's argument defies common reasoning as to what is a lump sum settlement or award. See *Livingston v. Loffland Brothers Co.*, 86 N.M. 375, 524 P.2d 991 (Ct.App.1974); *Arther V. Western Company of North America*, 88 N.M. 157, 538 P.2d 799 (Ct.App.1975).

Whether Benefits Accrue to the Estate

Plaintiff's position is basically that the benefits became vested in Marilyn and, accordingly, pass to the personal representative as assets of the estate. This is a matter of first impression in New Mexico and is answered by reference to our statutes and the intent evidenced thereby.

Section 52–1–17, supra, defines dependents and what causes benefits to cease:

> As used in the Workmen's Compensation Act [52–1–1 to 52–1–69 NMSA 1978], unless the context otherwise requires, the following persons, and they only, shall be deemed dependents and entitled to compensation under the provisions of the Workmen's Compensation Act:
>
> * * * * * *
>
> B. the widow or widower, only if living with the deceased at the time of his death, or legally entitled to be supported by him, including a divorced spouse entitled to alimony;
>
> * * * * * *
>
> E. questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the injury, and their right to any death benefit shall cease upon the happening of any one of the following contingencies:
>
> * * * * * *
>
> (3) upon the death of any dependent.

Section 52–1–46, supra, provides that only "eligible dependents" shall receive the benefits and Subsection A provides:

> if there be no eligible dependents, except as provided in Subsection C of Section 52–1–10 NMSA 1978 of the Workmen's Compensation Act, the compensation shall be limited to the funeral expenses, not to exceed one thousand five hundred dollars ($1,500), and the expenses provided for medical and hospital services for the deceased, together with all other sums which the deceased should have been paid for compensation benefits up to the time of his death.

Subsection F provides "in the event of the death or remarriage of the widow or widower entitled to compensation benefits as provided in this section, the surviving children shall then be entitled to compensation benefits. . . ."

Thus, it would seem that the legislative intent was to only give benefits to those who were "eligible dependents" and not "heirs" as in the case of descent and distribution. See, *2 Larson's Workmen's Compensation Law*, § 58.40 at 10–247–249. This is more apparent when one views the various opinions discussing the purposes of

the Workmen's Compensation Acts. See generally, N.M.Digest, Workmen's Compensation, ⟹ No. 11. As stated in *Gonzales v. Chino Copper Co.*, 29 N.M. 228, 222 P. 903 (1924):

> It may well be kept in mind that the theory upon which the Workmen's Compensation Acts of the several states were adopted was to substitute a more humanitarian and economical system of compensation for injured workmen or *their dependents* in case of their death; to provide a speedy and inexpensive method by which such compensation might be made to such employees or *those dependent* upon them and which is more in harmony with modern methods of industry than the common-law liability for torts, which usually involved long, tedious and expensive litigation, and often produced ill feeling between employer and employee. * * (Emphasis added.)

Affirmed.

IT IS SO ORDERED.

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

596 P.2d 521

Ramon R. CASIAS, Plaintiff-Appellee,

v.

The ZIA COMPANY, Employer, and United States Fidelity and Guaranty Company, Insurer, Defendants-Appellants.

No. 3842.

Court of Appeals of New Mexico.

May 17, 1979.

Walter J. Melendres, John K. Silver, Montgomery, Andrews & Hannahs, Santa Fe, for defendants-appellants.

John Wentworth, Steven L. Tucker, Jones, Gallegos, Snead & Wertheim, Santa Fe, for plaintiff-appellee.

OPINION

WALTERS, Judge.

Appellants urge that plaintiff-appellee Casias was awarded total disability benefits

at an incorrect rate because the accident occurred on October 7, 1976 and he became totally and permanently disabled on August 28, 1977, during which time the percentage of the average weekly wage in the state (*see* § 52–1–41(A), N.M.S.A.1978), upon which maximum compensation is based, increased from 78% to 89%. Appellants contend the lower rate should have been applied against the average weekly wage on October 7, 1976 because § 52–1–20, N.M.S.A.1978, provides for determination of the weekly wage "at the time of the accident."

It appears, from an analysis of the two sections above referred to, that the terms "time of the accident" (§§ 52–1–20 A, –20 B(1), –(2), –(3), and –(4); "time of injury" (§ 52–1–20 B); "date of disability" (§ 52–1–40); and "date of accidental injury" (§ 52–1–40), were used by the Legislature in the Workmen's Compensation Act with some lack of selectiveness. It, of course, is more frequently the case in workmen's compensation suits that the date of the accident, the injury, and the disability, all coincide. But when there is a lapse of time between any of those incidents, appeals of the present nature have resulted and they have become the fiber from which the decisions of *LaMont v. New Mexico Military Inst.*, 92 N.M. 804, 595 P.2d 774 (Ct.App., 1979); *Herndon v. Albuquerque Pub. Schools*, 92 N.M. 635, 593 P.2d 470 (1978) (rev'd on issue of attorney fees only)); *Moorhead v. Gray Ranch Co.*, 90 N.M. 220, 561 P.2d 493 (Ct.App.1977); and *De La Torre v. Kennecott Copper Corp.*, 89 N.M. 683, 556 P.2d 839 (Ct.App.1976), were fashioned. Each of those cases either interpreted the limitation section of the Act [now § 52–1–31, N.M.S.A.1978] to commence running when "the disability is discovered rather than from the accidental occurrence," *De La Torre, supra* at 686, 556 P.2d at 842, or that rate of compensation is "based upon the applicable law on the date of disability" rather than at the time of the accident, *Moorhead, supra*, 90 N.M. at 224, 561 P.2d at 497, because if the claimant suffers an accident in the course of his employment which does not disable but ultimately leads to a later "malfunction of the body" resulting in disability, the continuing pain and degenerating ability to function constitute the operative "accident" which brings about the compensable "accidental injury" on the date of disability, *Moorhead; Herndon, supra.*

Judge Sutin, in the *Herndon* opinion cited above, discussing the issue of "accidental injury" within the factual context of plaintiff's fall on June 4, 1975 and her inability to continue work on September 2, 1975, wrote:

> 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 Section 59–10–6 * * *."
>
> In support of this position, defendants rely strongly on *Towle v. Department of Transportation, State Highway*, 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. * * *
>
> * * * * * *
>
> As we read *Lyon* [*Lyon v. Catron County Commissioners*, 81 N.M. 120, 464 P.2d 410] 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.

It is necessary to reconcile these decisions relating to statute of limitation, date of injury, and rate of compensation issues, because at first blush one might believe that entirely different propositions were determined and should not be confused. We believe the decided cases have refined the meaning of entitlement to and the amount of compensation to some very basic principles, the Court always having in mind that the Act itself expresses the intention and policy of this State that employees who suffer disablement as a result of injuries causally connected to their work, shall not become dependent upon the welfare programs of the State, *Codling v. Aztec Well Servicing Co.*, 89 N.M. 213, 549 P.2d 628 (Ct.App.1976), but shall receive some portion of the wages they would have earned, had it not been for the intervening disability, *LaMont, supra*; and that the fundamental reason for its adoption was to protect the workman, *Clark v. Electronic City*, 90 N.M. 477, 565 P.2d 348 (Ct.App.1977). Those principles may be summarized as follows:

(1) The statute of limitation does not begin to run when a non-disabling accident occurs, but rather when the workman knows or should know that he has sustained a compensable injury as a result of the accident. *Duran v. New Jersey Zinc. Co.*, 83 N.M. 38, 487 P.2d 1343 (1971); *De La Torre, supra.*

(2) Compensation is not payable until and unless a work-related accident produces an injury which becomes disabling. *Willcox v. United Nuclear Homestake Sapin Co.*, 83 N.M. 73, 488 P.2d 123 (Ct.App.1971); *Pacheco v. Springer Corp.*, 83 N.M. 622, 495 P.2d 800 (Ct.App.1972); *Gomez v. Hausman Corp.*, 83 N.M. 400, 492 P.2d 1263 (Ct.App.1971); *LaMont, Herndon, supra.*

(3) The disabling event may occur many months or years after the work-related accident, *LaMont, Gomez, supra,* and then become compensable; or it may be the product of a new "accident" resulting from the bodily malfunction ultimately induced by the original injury, *Herndon; Moorhead; De La Torre, supra.*

(4) The rate of compensation, being intended to bear some relationship to the workman's wage earning capacity, *Kendrick v. Gackle Drilling Co.*, 71 N.M. 113, 376 P.2d 176 (1962), is measured as of the time that wage-earning capacity is affected, i. e., the date of disability. *LaMont; Moorhead, supra.*

The logic which dictates that the reasoning expressed in the decided cases be considered together, with respect to limitations and rate of compensation, is demonstrated by pointing out that under § 52–1–29 the employee must, with one exception, give notice "of the accident *and* of the injury within thirty days after *their* occurrence," but "at all events not later than sixty days after the occurrence of the *accident.*" These requirements have been interpreted to equate "accident" with "injury" in those cases where a latent injury is suffered, simply because an eligible workman shall not be required to report every accidental incident, whether disabling or not, at the peril of losing benefits for failure to do so should he at some later time become disabled from a seemingly insignificant incident. The court's discussion on this matter in *Montell v. Orndorff*, 67 N.M. 156, 353 P.2d 680 (1960), is illustrative of the policy considerations for such an interpretation. The construction there adopted has long been followed in this jurisdiction, *e. g., Langley v. Navajo Freight Lines, Inc.*, 70 N.M. 34, 369 P.2d 774 (1962); *Brown v. Safeway Stores, Inc.*, 82 N.M. 424, 483 P.2d 305 (Ct.App. 1970). It was stated flatly, in *Anaya v. Big*

Three Industries, Inc., 86 N.M. 168, 521 P.2d 130 (Ct.App.1974), that "[c]ompensation is paid only when there is a disability." It is clear from these cases that "date of accident" and "date of injury" have come to mean "date when compensable injury manifests itself."

Thus, to apply the same construction to all of the provisions of § 52–1–20 is not unique or startling. Subsection A defines "wages" as the money rate at which services are recompensable under the contract of hire "at the time of the accident." Subsection B requires computation of benefits upon the monthly, weekly, daily or hourly remuneration which the workman was earning "at the time of the injury." The further subsections under B all refer to "time of the accident." It is apparent that the Legislature used the two terms interchangeably and indiscriminately. We, therefore, apply the meaning "date when the compensable injury manifests itself" or "date when the workman knows or should know he has suffered a compensable injury" to all of the portions of the Workmen's Compensation Act where the terms "time of accident," "time of injury," "date of disability," "date of accidental injury," or words of similar import, are used, recognizing that in doing so we acknowledge the reality of possible latent injuries and that payment of compensation is a partial substitute for wages formerly earned by the workman at the time when he can no longer earn the same wage. What a travesty it would be a award a percentage of a lower wage earned by the injured employee if he had received wage increases between the date of the accident and the date he was no longer able to work. In times of inflation, such as the present, he might well be relegated to the State's welfare system to meet the ever-increasing monetary demands for maintaining a standard of decency, dignity and self-respect (1 Larson's Compensation Law 6, § 2.20), if his increased wage-earning ability between accident and disablement were not recognized. We do not believe the Legislature so intended, and its enactments thus are read to give the most beneficial interpretation to them favorable to the workman.

The formula, then, to determine the amount of compensation to be paid, is extracted from the provisions of §§ 52–1–20 and 52–1–41 and –42. Section 52–1–20 provides the applicable quotient or multiple by which a workman's monthly, daily or hourly wage shall be divided or multiplied to obtain his average weekly wage; § 52–1–41 establishes the maximum and minimum amounts that may be paid for total disability, regardless of the workman's average weekly wage, and requires a graduated increase until July 1, 1978 when one hundred percent of the average weekly wage in the State became the maximum allowed; and § 52–1–42 makes the amount of total disability, multiplied by the percentage of disability, the amount to be recovered for the court-determined degree of partial disability. A hypothetical illustration may be helpful:

1. W earned $1,260.00 a month at the time he suffered a total and permanent compensable injury and disability, on August 1, 1977. Section 52–1–20 B(1) requires that the monthly wage be multiplied by 12 and then divided by 52.

   $1,260 x 12 = $15,120

   $\frac{\$15,120}{52}$ = $290.769 ($290.77) = W's average weekly wage.

2. Assume that the average weekly wage in the state on July 1, 1977 was $210.50. Section 52–1–41 provides that, for total disability, the workman shall receive a maximum of 89% of the average weekly wage, or:

   $210.50 x 89% = $187.345 ($187.35)

3. Section 52–1–41 further provides that a totally injured workman shall receive, during the period of his disability, two-thirds of his average weekly wage.

   $\frac{2}{3}$ x $290.77 = $193.844

4. Since two-thirds of W's average weekly wage is greater than 89% of the hypothetical average weekly wage in the state, W may not be awarded more than $187.35 from Au-

gust 1, 1977 through June 30, 1978. However, on July 1, 1978, according to the provisions of § 52–1–41 A, he shall become entitled to 100% of the average weekly wage in the state, or $210.50, since that amount is still less than W's actual average weekly wage. And if the *July 1, 1978* average weekly wage in the state is more that $2.00 greater that $210.50 (the average weekly wage on July 1, 1977), W shall then receive 100% of the greater amount (so long as it is not more than $290.77) from July 1, 1978 forward. § 52–1–42 D, N.M.S.A. 1978.

Thus, a workman's disability compensation award may increase over a 600-week period from a maximum of $90 per week in July 1975, through 100% of the average weekly wage in the state on and after July 1, 1978, but it may never exceed two-thirds of the actual average weekly amount the workman was earning at the time his disability commenced. No doubt the Legislature, cognizant of the Report of the National Commission of State Workmen's Compensation Laws published in July 1972 (*see* "Insurance Study Committee Report to the Thirty-second Legislature"), sought to alleviate the impossibility of stretching a rigidly fixed income to the permanently disabled workman during those years following disability when he would be faced with an erosion in the value of his benefits, and enacted the escalating increase of benefits in its 1975 amendment to § 52–1–42 [then § 59–10–18.3, N.M.S.A.1953].

With respect to the instant case, the parties stipulated plaintiff was earning $275.40 per week both at the time of the accident in 1976 and when he became unable to work in 1977. Two-thirds of $275.40 is $182.60. They also stipulated that if compensation were to be determined as of the 1976 date, the rate to be paid would be $114.61; if the 1977 date applied, $142.59. Those figures accurately represent the maximum entitlements as computed in accordance with § 52–1–41(B), N.M.S.A.1978.

Applying, then, the rule that the date of a workman's accident, injury, and benefits are to be determined by and as of the "date when the injury manifests itself" or "when the workman knows or should know he has suffered a compensable injury," we are satisfied that the trial court properly awarded the higher rate of compensation to Mr. Casias. Moreover, since the average weekly wage in the state increased by more than $2.00 on July 1, 1978, to $172.46, then Mr. Casias became entitled to the entire 100% of that average weekly wage in the state. He is so limited because he is only entitled to two-thirds of his own average weekly wage ($182.60) *or* the maximum percentage of the average weekly wage in the state ($172.46), whichever is less.

Gilliland v. Hanging Tree, 92 N.M. 23, 582 P.2d 400 (Ct.App.1978), and *Ideal Basic Industries, Inc., v. Evans*, 91 N.M. 460, 575 P.2d 1345 (1978), urged by appellants, have no factual similarity to this case, since each of those claimants suffered simultaneous accident, injury and death or disablement. To have awarded compensation benefits computed as of the dates of the respective accidents in *Gilliland* and *Ideal* does not present a conflict with what we have said here.

One final matter is appellee's request for attorneys fees for their services on appeal. As we have noted, the matter was submitted to the trial court upon stipulation. The record does not indicate extraordinary services below by counsel for appellee, but does disclose an award of substantial fees by the trial court. Appellee is awarded $1,000 in attorney's fees for his counsel's services on appeal. *Gearhart v. Eidson*, 92 N.M. 763, 595 P.2d 401 (1979); *Herndon v. Albuquerque Public Schools*, 92 N.M. 287, 587 P.2d 434 (1978); *Ortega v. New Mexico State Highway Dept.*, 77 N.M. 185, 420 P.2d 771 (1966).

Judgment is affirmed.

IT IS SO ORDERED.

HENDLEY and SUTIN, JJ., concurring in result.

HENDLEY, Judge (concurring in result).

I concur in the result of Judge Walters' opinion and particularly, under the facts here, in the holding that the date the average weekly wage is computed is the "date when the compensable injury manifests itself."

I agree that the attorney fees on appeal should be $1,000.

SUTIN, Judge (concurring in result).

I concur in the result.

The Legislature enacted the Workmen's Compensation Act a half century ago. By additions, amendments, and rewriting of its provisions, the Legislature has created a monster that often defies the wisdom of Solomon and the dexterity of Houdini. I write harshly to alert the Legislature to the need of a Workmen's Compensation Act based upon common sense and clear language that meets the challenge of today; provided, of course, the Supreme Court does not deny publication of this opinion.

The interplay of the words "accident," "injury," "accidental injury," "disability," "total and partial disability," on a crossword puzzle would please the lawyers and the judiciary. But to use the interplay in the determination of workmen's compensation benefits does not conform to the normal wisdom of the Legislature. We have resolved these puzzling problems by judicial interpretation. Nevertheless, there has been constant disagreement of what we believed to be fair and equitable in each case.

Let us turn to the present case.

The date of plaintiff's accident was *October 2, 1976.* Effective July 1, 1976, the rate of compensation to be paid the workman was 78% of the average weekly wage fixed by the Employment Security Commission. The Commission fixed the amount of compensation, effective at the time of the accident, at *$114.61* per week as the average weekly wage.

The date of disability was *August 28, 1977.* Effective July 1, 1977, the rate of compensation to be paid the workman increased to 89% of the average weekly wage to be fixed by the Employment Security Commission. The Commission fixed the amount of compensation, effective at the time of disability, at *$142.59* per week as the average weekly wage. See § 52–1–41, N.M.S.A.1978, enacted Laws 1975, ch. 284, § 8. Subsection B says:

> [T]he average weekly wage in the state shall be determined by the employment security commission * * *.

Section 52–1–20, enacted in 1965, is entitled "Determination of average weekly wage." It provides a formula by which the court shall determine the average weekly wage. The average weekly wage was computed by the remuneration the workman was receiving "at the time of the accident." To me, this long and complicated section was impliedly repealed by § 52–1–41(B) enacted years later.

The question for decision is:

> At what rate does an employer begin to pay the workman his average weekly wage, the rate in effect at the time of the accident or the time of disability?

Let us note some of the statutory provisions.

Section 52–1–40 entitled "Waiting period" reads:

> No compensation benefits shall be allowed * * * for any *accidental injury* which does not result in the workman's death, or in a *disability* which lasts for more than seven days; provided, however, *if the period of the workman's disability lasts for more than four weeks from the date of his accidental injury, compensation benefits shall be allowed from the date of disability.* [Emphasis added.]

Section 52–1–41(C) reads:

> The average weekly wage in the state, determined as provided in Subsection B of this section, *shall be applicable for the full period during which compensation is payable,* when the date of the occurrence of an *accidental injury* falls within the calendar year commencing January 1 following the June 30 determination. [Emphasis added.]

Section 52–1–48 reads:

> The benefits that a workman shall receive during the entire period of *disability*, and the benefits for death, shall be based on, and limited to, the benefits in effect on the date of *the accidental injury* resulting in the *disability* or death. [Emphasis added.]

Section 52–1–41(A) begins:

> For total disability the workman shall receive, *during the period of that disability* [a rate of compensation] * * *. [Emphasis added.]

Section 52–1–42, on partial disability, uses the same language.

We note that the language used, as related to compensation benefits, speaks in terms of "disability," not "accident."

Section 52–1–41 was in effect both at the date of the accident and at the date of disability. There was one accident and one disability. I choose to hold that the employer shall begin to pay the workman his average weekly rate from the date of disability because a workman is not entitled to compensation for the mere happening of an accident.

My opinion in *De La Torre v. Kennecott Copper Corporation*, 89 N.M. 683, 556 P.2d 839 (Ct.App.1976) must not be misinterpreted. In *De La Torre*, the first accident which occurred in 1967 was governed by a statute of limitations that did *not* toll the limitation period. Thereafter, plaintiff completely recovered. At the time of the second accident which occurred in 1974, the amended limitation statute of 1967 which *did* toll the limitation period, was in effect. Because public policy demanded it, we held that the one year period of limitation was tolled and plaintiff's complaint was filed in time. I said:

> * * * The 1967 statute applies because the date of disability is critical and the law effective at the time controls. [89 N.M. at 686, 556 P.2d at 842.]

In *Moorhead v. Gray Ranch Co.*, 90 N.M. 220, 224, 561 P.2d 493 (Ct.App.1977), we said:

> * * * Therefore, *De La Torre* is authority for the proposition that *the rate of compensation should be based upon the applicable law on the date of disability.* In this case, total disability commenced in January of 1975 and the rate of compensation should be based upon the statutory rate in effect at that time. [Emphasis added.]

De La Torre was not authority for the proposition stated. *De La Torre* involved two separate accidents, disabilities, and two separate statutes. In the instant case, we are involved with one accident, one disability, and one statute that covers the date of the accident and the date of disability. However, I do agree in principle, the rule in *De La Torre*, that the law effective at the time of disability controls and should be applied to the instant case.

In *Herndon*, cited in Judge Walters' opinion, I said:

> * * * [Plaintiff] suffered total disability as of September 2, 1975 and is entitled to disability benefits as of that date. [Not June 4, 1975.]

In *Lamont v. New Mexico Military Institute*, 92 N.M. 804, 595 P.2d 774 (1978), this Court, without reference to § 52–1–41 then in effect, decided that the amount fixed as the rate of compensation on January 21, 1977, the date of disability, was correct.

Based upon the foregoing discussion, I concur with Judge Walters' opinion. However, in my opinion, plaintiff should be awarded an attorney fee of $2,500 for services rendered in this appeal.

596 P.2d 527

STATE of New Mexico,
Plaintiff-Appellee,

v.

Arthur MONTOYA, Defendant-Appellant.

No. 3822.

Court of Appeals of New Mexico.

June 5, 1979.

John B. Bigelow, Chief Public Defender, Michael Dickman, Asst. App. Defender, Carlos F. Vigil, Asst. Public Defender, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Ralph W. Muxlow II, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

The appeal involves the validity of defendant's probation revocation "hearing."

Pursuant to plea bargain, defendant pled guilty to two criminal sexual penetration offenses. The sentences imposed were suspended and defendant was placed on probation. One of the conditions of probation was that defendant obey all state laws. Another condition of probation was that defendant not consume any alcoholic beverages or liquors.

The motion to revoke probation alleged that defendant had committed criminal sexual penetration and aggravated burglary. The motion also alleged defendant had consumed alcoholic beverages or liquors.

At the hearing on the motion, the trial court called defendant's attention to the probation condition prohibiting the consumption of any alcoholic beverages and liquor. The trial court stated: "I ask the Defendant, just at [sic] though it were an arraignment, to either admit or deny that." Defendant admitted a violation of this probation condition.

The trial court then inquired: "Need we proceed any further in this hearing?" Defendant insisted that he was entitled to a hearing; he asserted that defendant was led to believe, by the probation officer, that the total prohibition against consumption of alcoholic beverages applied only for a six-month period and his consumption of alcoholic beverages occurred "after" the six-month period.

Defense counsel asked "whether or not this revocation is supposed to be imposed without a hearing." The trial court said: "We've had a hearing. You have admitted a violation of the conditions of probation; so . . . nothing further is required as the Court sees it."

Section 31–21–15(B), N.M.S.A.1978 requires a hearing on the charge that probation has been violated. At that hearing, the probationer is entitled to an opportunity to explain the alleged violation. *State v. Brusenhan*, 78 N.M. 764, 438 P.2d 174 (Ct. App.1968). Concerning a parole revocation, *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) states:

> The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation sug-

gest that the violation does not warrant revocation.

Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) extended the above requirement to the revocation of probation.

Defendant sought to explain his violation, contending that there were mitigating circumstances. In not permitting defendant to be heard as to this claim, the trial court violated defendant's right to due process.

The State asserts there is no reason to give defendant a new hearing because subsequent to the probation revocation hearing, defendant was convicted of the two criminal offenses alleged in the motion to revoke probation. Thus, according to the State, a remand for a new revocation hearing can afford defendant no relief. Defendant is entitled to a hearing on the question of his violation of probation. Section 31–21–15(B), supra. There is nothing indicating any revocation hearing has been held in connection with the criminal offenses alleged in the motion to revoke or that defendant has waived such a hearing. Defendant's right to a hearing is not to be avoided on the basis of the State's contention that defendant's probation will be revoked at such time as a revocation hearing is held.

The order revoking probation is reversed; the cause is remanded with instructions to conduct a new revocation hearing.

IT IS SO ORDERED.

HENDLEY and ANDREWS, JJ., concur.

596 P.2d 856

In the Matter of the ESTATE of Carlos DE LA FUENTE, Deceased.

Joe HOLLAND, Petitioner-Appellant,

v.

Kay de la Fuente HARMSTON, Administratrix-Appellee.

No. 12277.

Supreme Court of New Mexico.

June 19, 1979.

LeRoi Farlow, Albuquerque, for petitioner-appellant.

Toulouse, Krehbiel & DeLayo, James R. Toulouse, Albuquerque, for administratrix-appellee.

OPINION

SOSA, Chief Justice.

On May 12, 1977, Holland petitioned the District Court of Bernalillo County to order administratrix, Kay de la Fuente Harmston, to convey real estate located in Albuquerque to him, pursuant to an alleged agreement entered into by Holland and the estate's former administrator, Ray Shollenbarger, and the estate's attorney, Stephen Lawless. Holland appeals from an order dismissing his petition.

Carlos de la Fuente died on February 24, 1975. He was survived by two minor children, Renee Carla de la Fuente and Kevin de la Fuente. Harmston, Fuente's ex-wife, is the conservator of Renee's estate and has been at all times represented by counsel. Kevin was never located. At no time during these proceedings was he represented by counsel or by a guardian ad litem.

Shollenbarger was appointed administrator of Fuente's estate in March 1975. Lawless was appointed as attorney of the estate in June 1975. On June 17, 1975, Shollenbarger filed a petition in district court to *rent* the property to Holland, with 60% of the mortgage payments being applied to the possible future purchase of the property. At the time that Shollenbarger filed that petition, there was neither an appointment of a guardian ad litem by the court in the probate proceedings nor any legal guardianship filed in New Mexico for the minor heirs.

The court's Order provided in part:

3. That the Administrator has a Lessee who will pay as *rent* the mortgage payments on the home, with sixty percent (60%) being applied to a possible purchase in the future.
4. That approval for such *rental* has been obtained from the only heir to the Estate who can be found, Kay de la Fuente Harmston, Conservator of the Estate of Renee Carla de la Fuente, a protected person.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Administrator of the Estate of Carlos de la Fuente, Deceased be allowed to *rent* the aforementioned property to a *Lessee* who will pay as *rent* the mortgage payments on the home with sixty percent (60%) being applied to a possible future purchase. (Emphasis added.)

Holland moved into the house on July 1, 1975, and made the mortgage payments from that date to August 1978, totalling $11,581. He also made improvements and repairs on the property amounting to approximately $5,000.

Harmston petitioned that Shollenbarger be removed as administrator in November 1975. She and Shollenbarger stipulated that the First National Bank of Albuquerque be appointed administrator. Harmston was substituted and appointed administratrix in April 1977.

A $50,000 lien had been filed against the real estate prior to June 10, 1975, by Suzette Hausner, who alleged that she had purchased the property. This claim was eventually settled.

In his petition, Holland alleged that he entered into a rent-purchase agreement with Lawless, by which Holland was to make the monthly payments on the mortgaged property. Sixty percent of these payments were supposedly to be applied to the down payment of the sales price of the property.

The district court found that Holland was a renter of the property and a volunteer in making the improvements. The court concluded that the real estate descended directly to the heirs and that there was no guardianship or guardian ad litem appointed in the probate proceedings to sell the property. The court also concluded that the alleged agreement between Holland, Lawless, and Shollenbarger was void. We agree.

In determining whether Shollenbarger or Lawless had the authority to enter into an agreement to sell the real estate in question, we consider §§ 31–7–1 through 31–7–11, 32–1–29, and 32–1–30, N.M.S.A. 1953 (repealed N.M. Laws 1975, ch. 257, § 9–101). Section 32–1–29 provides that a guardian or next friend petition the court for approval prior to the sale of the real estate. Section 32–1–30 requires the appointment of a guardian for purposes of supervising the sale or conveyance of property and the court's approval after the transaction is completed and before the transfer of title from the minor's name. None of these requirements were complied with in this case. The court properly determined that Shollenbarger and Lawless had no authority to enter into an agreement to sell the property, which vested in the minor children, without approval of the court or the appointment of a guardian ad litem for the minor heirs.

We find that there was substantial evidence to support the court's findings and conclusions of law. Finding no error, we affirm the decision of the district court dismissing Holland's petition.

IT IS SO ORDERED.

EASLEY and PAYNE, JJ., concur.

596 P.2d 858

Precilla L. DESJARDIN,
Plaintiff-Appellant,

v.

ALBUQUERQUE NATIONAL BANK as Trustee for Helen M. Gillespie,
Involuntary Plaintiff-Appellee,

v.

H. S. FINGADO, Ruth Fingado, Herbert Gilbert and Bernice Gilbert,
Defendants-Appellees.

No. 12314.

Supreme Court of New Mexico.

June 19, 1979.

Melton & Puccini, Robert E. Melton, Albuquerque, for Desjardin.

Dale W. Ek, Albuquerque, for Albuquerque Nat'l Bank.

Warren O. F. Harris, Albuquerque, for Fingado.

OPINION

SOSA, Chief Justice.

Plaintiff brought a quiet-title action in the District Court of Bernalillo County alleging ownership of the property in question by virtue of a tax deed issued to her by the New Mexico Property Tax Department

on February 14, 1977. Plaintiff filed a Motion for Summary Judgment on May 15, 1978. Defendants filed their response to this motion on June 19, 1978. A hearing on the motion was scheduled for June 22, 1978.

By letter dated June 19, 1978, District Judge Maloney informed counsel for the parties that he was granting plaintiff's Motion for Summary Judgment. The judgment was granted without the benefit of oral arguments. The June 22 hearing was vacated. The order granting summary judgment in favor of plaintiff was entered on June 27, 1978.

In the June 27 judgment Judge Maloney held that title was forever quieted in plaintiff and that defendants were barred from claiming any right to the premises adverse to plaintiff's interest. The court issued a writ of possession on June 30, 1978, allowing the Sheriff of Bernalillo County to seize the property in question and to deliver possession of the property to plaintiff.

Defense counsel informed plaintiff's counsel on or about June 27, 1978, that he would be filing a Motion for Stay of Execution of the June 27 judgment in order to appeal the court's decision. Plaintiff's counsel agreed that nothing would be done concerning the execution of the June 27 judgment until a hearing could be held on defendants' Motion for Stay of Execution.

A hearing was held before Judge Maloney on the afternoon of July 5, 1978, with counsel for all parties present. Defense counsel informed Judge Maloney that he was filing a Motion for Stay of Execution and a Motion for Rehearing. At the conclusion of the hearing Judge Maloney granted defendants' Motion for Stay of Execution and in effect reversed the June 27 judgment.

On July 25, 1978, Judge Maloney entered a Final Judgment in which he amended the summary judgment entered on June 27. The July 25 judgment denied plaintiff's claim against defendants and ordered defendants to reimburse plaintiff for the payments she had made in connection with the property. Plaintiff appeals.

The issue presented in this case is whether the court erred in reversing the June 27 judgment where there was no motion before the court to alter, amend, set aside or vacate that particular judgment. Plaintiff argues that the court erred in reversing the judgment because there was no motion to alter, amend, or set aside the judgment. Plaintiff contends that a court cannot modify a judgment when neither party has sought such relief and the issue has not been implicitly or explicitly consented to by the parties.

Defendants counter that equity may demand that a final judgment be set aside for good cause. The June 27 judgment was granted before any oral arguments were heard. Defendants contend that it was within Judge Maloney's discretion to amend the June 27 judgment after hearing the arguments on July 5. We agree.

■ A district court is authorized to set aside its judgment on its own motion. *Arias v. Springer*, 42 N.M. 350, 356, 78 P.2d 153, 157 (1938). In *Pugh v. Phelps*, 37 N.M. 126, 19 P.2d 315 (1932), a motion to amend the judgment was filed within thirty (30) days after the entry of that judgment. The Court said:

> [T]he court had full control of its judgment and jurisdiction and authority *even upon its own motion* to make any change, modification, or correction thereof which it deemed proper under the circumstances. (Emphasis added; citations omitted.)

Id. at 128, 19 P.2d at 317.

■ In the case at bar, summary judgment was entered on June 27. That judgment remained in Judge Maloney's control for 30 days thereafter. § 39–1–1, N.M.S.A. 1978. Defendants' Motion for Stay of Execution was filed within 30 days after entry of the June 27 judgment and was directed against that judgment. Judge Maloney's Final Judgment was filed on July 25 and was also within 30 days of the June 27 judgment. Under these circumstances, we find that the court did not err in amending its June 27 judgment.

In addition, N.M.R.Civ.P. 60(b), N.M.S.A. 1978, provides that a court may relieve a party from a final judgment or order on motion and upon such terms as are just. A judge can initiate relief from a judgment or order under Rule 60 on his own motion. *Martin v. Leonard Motor-El Paso*, 75 N.M. 219, 402 P.2d 954 (1965).

The setting aside of a final judgment under Rule 60(b) is within the discretion of the district court. *Phelps Dodge Corp. v. Guerra*, 92 N.M. 47, 582 P.2d 819 (1978); *Springer Corporation v. Herrera*, 85 N.M. 201, 510 P.2d 1072 (1973). This Court "will not interfere with the action of the trial court in vacating a judgment except upon a showing of abuse of discretion. [Citation omitted.]" *Phelps Dodge Corp.*, 92 N.M. at 51, 582 P.2d at 823.

The record does not show an abuse of discretion in this regard. We therefore affirm the district court's decision.

McMANUS, Senior Justice, and FEDERICI, J., concur.

596 P.2d 860

STATE of New Mexico, Plaintiff-Appellee,

v.

John R. COOK, Defendant-Appellant.

No. 3800.

Court of Appeals of New Mexico.

May 24, 1979.

Donald C. Schutte, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Sammy Lawrence Pacheco, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant appeals his conviction of ten counts of forgery contrary to § 30–16–10, N.M.S.A.1978. His first point for reversal is dispositive—whether under the facts he could be convicted of forgery. We reverse.

Facts

Defendant was indicted by the Bernalillo County Grand Jury on ten counts of forgery contrary to § 30–16–10, supra, or in the alternative, on ten counts of issuing worthless checks contrary to § 30–36–4, N.M.S.A. 1978. At the close of all the evidence, the State elected to send only the forgery counts to the jury. Defendant objected and renewed his motion for a directed verdict.

The jury found defendant guilty on all counts.

Defendant opened a checking account at Republic Bank in Albuquerque under the name of John R. Cook. He signed the signature card under the same name and produced a New Mexico driver's license as proof of identification. He gave his birthdate as January 20, 1958, and listed the same social security number as that on his military identification card under the name of John R. Cook. He gave a false address and telephone number, the latter belonging to a woman, Alice Smith, who did not know defendant and did not give him permission to use her number.

Through the testimony of a Mrs. Cook, the State established that she had a son, John R. Cook, who was born January 20, 1958, and died January 22, 1958. An FBI agent, to whom defendant had spoken, testified that defendant had told him that he previously had been in the military under a different name, but had left the service under questionable circumstances. He had wished to reenlist and, therefore, went to the newspaper files and reviewed infant deaths for the year in which he was born. He had found the name John R. Cook, obtained a birth certificate, entered the military and obtained an identification card in that name.

The vice president of Republic Bank testified that "Cook" had set up a checking account with $50.00, withdrew $45.00, and had seven overdraft checks in the amount of $6,000. The evidence also showed that the $6,000 overdraft took the form of ten separate transactions wherein defendant wrote checks to several businesses in return for which he received valuable merchandise. The checks were returned to the businesses for insufficient funds.

Forgery

In *Rapp v. State*, 274 So.2d 18 (Fla.App. 1973) the defendant opened a checking account in the name of another and wrote several checks on that account signing the assumed name. The question confronting that court was "whether one who opens a checking account under an assumed name commits the crime of forgery * * *." The court found that forgery may exist when an assumed or fictitious name is used when it is shown that the name was used with the intent to defraud.

However, the court found that the signing of a fictitious name is not forgery if the signer does not intend that the signature be taken as the genuine signature of the person owning the assumed name. Forgery, then, is not committed where a person assumes a name and obtains goods by signing that name to checks "so long as the check purports to be the very act of the person issuing it and not the act of another person."

In *Smith v. State*, 379 S.W.2d 326 (Tex. Crim.App.1964) defendant, using an assumed name, acquired a driver's license and, using the license as identification, opened a checking account under the assumed name. He then wrote several checks on the account, some of which were returned for insufficient funds. The court, in citing Texas precedent, found that defendant had not committed forgery since the act of passing the checks was his own act and did not purport to be that of another. *See also Young v. State*, 529 S.W.2d 542 (Tex. Crim.App.1975).

Section 30–16–10, supra, defines forgery as:

A. falsely making or altering any signature to, or any part of, any writing purporting to have any legal efficacy with intent to injure or defraud; or

B. knowingly issuing or transferring a forged writing with intent to injure or defraud.

* * * * * *

Although the New Mexico statute reads somewhat differently than do the Florida and Texas statutes, the effect on the case at hand is the same. Here, defendant assumed the name and identity of John R. Cook. He went into the military and obtained identification under his assumed name. As in the above cases, he used the identification to open a checking account.

Defendant then wrote and signed checks under his assumed name and tendered them to various stores in return for valuable merchandise. The acts did not purport to be those of another. Defendant did not commit forgery.

The State erred in electing to send the forgery counts to the jury, since legally no forgery could have been committed. Defendant's conviction of ten counts of forgery is reversed.

IT IS SO ORDERED.

ANDREWS, J., concurs.

SUTIN, J., concurring in part and dissenting in part.

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

I concur in the reversal and dissent for failure to discharge defendant.

David DeRuyver, now 20 years of age, rests comfortably in the State Penitentiary. He comes from a broken home. He attended school through the tenth grade. He enlisted in the military under the assumed name of his deceased brother who died in infancy, went AWOL, but decided to re-enlist. He had to do so under a different name. He reviewed newspapers of 1958, the year of his birth, and found the name of an infant who had died that year—"John R. Cook." David obtained the infant's birth certificate for purposes of re-enlisting in the military. He entered the military and obtained an identification card in the name of "John R. Cook," then "left" or "deserted" the military. He married and fathered two children.

David learned the art of issuing worthless checks. He was indicted on ten counts stated in the alternative—issuing checks with insufficient funds, or in the alternative, forgery. The State and David presented testimony to the jury on both issuing worthless checks and forgery. Thereafter, the State elected to send the forgery charges alone to the jury. The charges of issuing worthless checks were dismissed. David was found guilty of all ten forgery charges.

The trial court entered severe consecutive sentences which would have kept David imprisoned for many years. Upon motion made, the sentence was lightened to shorter consecutive sentences. It is obvious that if David serves a number of years in the penitentiary, he will emerge as a confirmed criminal. He will so serve anyway. For unknown reasons, David obtained "joinder of Criminal Cause No. 30167 which involves violent offenses." He was convicted and sentenced concurrently with the forgery sentence. To me, the trial court should have denied consolidation. The record of the Criminal Cause No. 30167 does not appear.

In my dissent in *State v. Helker*, 88 N.M. 650, 655, 545 P.2d 1028, 1033 (Ct.App.1975), I said:

> Helker is 19 years of age. He received three *consecutive* sentences in the State Penitentiary. * * * His life, as well as his liberty, are subject to the rack and the stake. We do not know what factors caused his departure from normal life. Was it his environment? His family? His schools? His church? His society? * * *

David needs rehabilitation, not prison.

Judges and lay persons shout: "Throw him in the penitentiary! Let him rot there!"—except, of course when it is their own son. The slow but sure decay of family life has cast thousands of children in the penitentiary, a relic of the middle ages. The news media and society have the freedom to continue to harass these comments of an appellate judge, but I shall continue to blame David's family and society for his imprisonment. When we sit in judgment in the last quarter of the 20th century, we should seek rehabilitation of youngsters, not the destruction of their spirits and desire to move into the flow of a good society. The Supreme Court in its infinite wisdom will deny publication of this opinion.

For additional authorships that hold David free from forgery, *see, People v. Hodgins*, 85 Mich.App. 62, 270 N.W.2d 527 (1978); *Winston v. Warden, Nevada State Prison*, 86 Nev. 33, 464 P.2d 30 (1970); *Dun-*

lap v. State, 169 Tex.Cr.R. 198, 332 S.W.2d 727 (1960).

A. *Double jeopardy prevents retrial on issuing worthless checks.*

The majority opinion remains silent on the issue of double jeopardy. The district attorney, having misplayed the record of the trial, may seek to play the record a second time. Upon the impaneling of the jury, double jeopardy attached. *State v. Mazurek*, 88 N.M. 56, 537 P.2d 51 (Ct.App. 1975). David's right not to be put in jeopardy twice for the same offense is constitutionally protected. *State v. Spillmon*, 89 N.M. 406, 553 P.2d 686 (1976); *State v. Sedillo*, 88 N.M. 240, 539 P.2d 630 (Ct.App. 1975).

David must be discharged.

597 P.2d 280

STATE of New Mexico,
Plaintiff-Appellee,

v.

William A. MANUS,
Defendant-Appellant.

No. 11879.

Supreme Court of New Mexico.

May 4, 1979.

Rehearing Denied May 21, 1979.

[redacted]

[redacted]

[redacted]

Jack Smith, Albuquerque, Pickard & Singleton, Sarah Michael Singleton, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Charlotte H. Roosen, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

EASLEY, Justice.

The jury found William Manus guilty of first degree murder, attempted first degree murder and aggravated assault. Consecutive sentences were imposed. Manus appeals. We affirm.

Manus raises issues of:

1. substantial evidence of deliberate intent;

2. sufficiency of evidence to submit the charge of aggravated assault;

3. failing to instruct the jury on voluntary manslaughter;

4. consecutive sentences as double jeopardy;

5. admissibility of statements made by the defendant;

6. admission of pretrial statements of witnesses;

7. allowing a rebuttal witness to testify without allowing further discovery and investigation; and,

8. warrantless search of defendant's clothing.

The following facts are not in dispute. The victim, Officer Wasmer, had stopped Mrs. Manus for driving violations, had arrested her and placed her in the back seat of his police car. This occurred nearly in front of the Manus' home. Lesher had stopped to report that her truck had been sideswiped a short time before. Wasmer was filling out an accident report with the help of Lesher. Switzer, a member of the Bosque Farms Patrol who was with Wasmer, was standing in front of the Lesher vehicle which had pulled up behind the police car. Manus approached the vehicle from the front carrying a loaded shotgun. Wasmer died from injuries inflicted as a result of the discharge of Manus' shotgun.

There is conflicting testimony concerning events at the immediate scene. Manus testified that he had taken the shotgun out of his house and had gone to some outbuildings to investigate what he thought were prowlers. He said he approached the police car with the intention of reporting the suspected prowlers. He was blinded by the lights, and the next thing he remembered was being shot, staggering and sitting down.

Lesher testified that she looked up and saw a man with a shotgun in front of Mrs. Manus' car, that the man said, "Just go on and put the car in the driveway." Wasmer then said, "Put down the gun." The man did not put down the gun, but pointed the shotgun in the direction of Lesher and Wasmer. She then testified that she ducked behind her truck door and heard two shots. When she looked up, she observed that Wasmer had been shot, and the man with the shotgun was pointing it at Switzer. She testified that Switzer told her to go to the end of the block and get help, and that he was trying to get the man to drop his gun. When she returned, the man was sitting on the ground. Lesher found shotgun pellet marks in the door and on the top of her truck.

Switzer testified that he observed someone running toward them, and when the person was about 15 feet away, Switzer noticed that he had a gun. He pointed the gun at Switzer, who then yelled, "He's got a gun", and ducked behind the car. He heard two shots. He drew his gun and ran to the back of the car, where he saw the man with the shotgun run to the front of the car and again point the gun at him. Switzer fired at the man, who then dropped his gun and said, "I will get you, too."

Cole, a neighbor of Manus, testified that he arrived at the scene and was rendering first aid to Manus. He testified that Manus made the following statement: "I was drunk. Stupid thing. Just a stupid thing. The Bosque Farms police stopped my wife. I got angry and went and got my gun." Faust, another neighbor of Manus, testified that he also was rendering first aid. He testified that Manus said, "I have done a stupid, stupid thing." He further testified that Manus appeared shaken and upset, but that he apparently knew what had happened and what was going on at the time.

Finally, there was testimony that the police, soon after the incident, discovered two boxes of shotgun shells and some loose shells scattered on top of a table in Manus' home.

Evidence of Premeditation—Deliberate Intent

In determining whether substantial evidence was presented to support charges, an appellate court must view the evidence in the light most favorable to the State and indulge all reasonable inferences which support the conviction. *State v. Lankford*, 92 N.M. 1, 582 P.2d 378 (1978). The direct evidence shows that Manus killed Wasmer. The evidence was circumstantial on the element of deliberate intent. Since the element of intent involves the state of mind of the defendant it is seldom, if ever, susceptible to direct proof, and may be proved by circumstantial evidence. *State v. Ferrari*, 80 N.M. 714, 460 P.2d 244 (1969); *State v. Smith*, 76 N.M. 477, 416 P.2d 146 (1966). A verdict of not guilty should be directed only when there are no reasonable inferences or sufficient surrounding circum-

stances from which to infer intent. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct.App. 1977).

From the evidence set out above, the jury could reasonably infer deliberation and premeditation. Manus' statement that he got angry when the police stopped his wife is evidence of motive. His statement that he went and got his gun, and the testimony of shotgun shells loose on his table next to boxes of shells, is evidence which the jury could infer manifested a plan or design. When coupled with the testimony of the witnesses at the scene concerning the action and conduct of Manus, there was clearly sufficient evidence to submit the charge of first degree murder to the jury and to support the jury's verdict of guilty thereon.

With regard to the attempted murder in the first degree of Switzer, there is also sufficient evidence to support the submission of the charge and the verdict thereon. The testimony shows that Manus twice aimed his shotgun at Switzer, who had to seek cover, and that Manus told Switzer, "I'll get you, too."

Intent Requirement in Aggravated Assault Charge

Manus argues that his conviction for the aggravated assault of Lesher cannot stand because there was no evidence of any intentional assault directed at Lesher. Three recent cases have addressed this issue. *State v. Cutnose*, 87 N.M. 307, 532 P.2d 896 (Ct.App.1974), *cert. denied*, 87 N.M. 299, 532 P.2d 888 (1974); *State v. Mascarenas*, 86 N.M. 692, 526 P.2d 1285 (Ct.App.1974); *State v. Cruz*, 86 N.M. 455, 525 P.2d 382 (Ct.App.1974). Each held that a general criminal intent is required to support a conviction for aggravated assault.

The court below gave N.M.U.J.I.Crim. 1.50, N.M.S.A.1978 as to the elements of aggravated assault, and also instructed on general criminal intent.

The State was not required to prove that Manus intended to assault Lesher, but only that he did an unlawful act which caused Lesher to reasonably believe that she was in danger of receiving an immediate battery, that the act was done with a deadly weapon, and that it was done with a general criminal intent. §§ 30–3–1 & 2, N.M.S.A.1978; *Cutnose, supra.* There is substantial evidence to support the conviction of aggravated assault.

Necessity for Instruction on Voluntary Manslaughter

Manus argues that it was reversible error for the court to fail to instruct on voluntary manslaughter. Manus tendered an instruction conforming with N.M.U.J.I. Crim. 2.20, N.M.S.A.1978. The uniform instruction reads, in pertinent part, "In the case of voluntary manslaughter the defendant kills after having been sufficiently provoked, ... 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.*" (Emphasis added). Manus was entitled to an instruction on voluntary manslaughter only if there was some evidence in the record to support it. *State v. Riggsbee*, 85 N.M. 668, 515 P.2d 964 (1973); *State v. Ulibarri*, 67 N.M. 336, 355 P.2d 275 (1960).

The general rule is that, in order to reduce murder to manslaughter, the victim must have been the source of the defendant's provocation. 1 R. Anderson, *Wharton's Criminal Law and Procedure*, § 276 (1957); 1 O. Warren & B. Bilas, *Warren on Homicide*, § 92 (1938); 40 C.J.S. *Homicide* § 53 (1944). We therefore review the record to determine if there is some evidence that Wasmer provoked Manus. We must also ask whether there is sufficient evidence that the provocation was such as to cause a temporary loss of self control in an ordinary person of average disposition.

The key facts in favor of Manus are that Wasmer had stopped Mrs. Manus and, when Manus approached the scene with his shotgun, a shot was fired from behind the lights of the stopped cars. Up to the time when the first shot was fired, there is nothing to indicate that Wasmer was not rightfully and lawfully exercising his duties.

> The exercise of a legal right, no matter how offensive, is no such provocation as lowers the grade of homicide. [*State v. Lawry*, 4 Nev. 161 (1868); *State v. Craton*, 28 N.C. (6 Ired.L.) 133 (1845)].
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> . . . . .
>
> If the defendant intentionally caused the victim to do acts which the defendant could claim provoked him, he cannot kill the victim and claim that he was provoked. In such case, the circumstances show that he acted with malice aforethought, and the offense is murder. (Footnote omitted).

1 R. Anderson, *supra* at 587. A law enforcement officer performing lawful acts in the discharge of his duty is engaged in the exercise of a legal right. Acts of a peace officer exercising his duties in a lawful manner cannot rise to the level of sufficient provocation. *People v. Roman*, 256 Cal. App.2d Supp. 656, 64 Cal.Rptr. 268 (Ct.App. 1967). *See also Suhay v. United States*, 95 F.2d 890 (10th Cir. 1938), *cert. denied*, 304 U.S. 580, 58 S.Ct. 1060, 82 L.Ed. 1543 (1938); *State v. Nolan*, 354 Mo. 980, 192 S.W.2d 1016 (1946).

If Wasmer fired the first shot, was this evidence of sufficient provocation to cause an ordinary person to kill under the circumstances? Was Wasmer exercising reasonable and necessary force, or exercising unreasonable, and therefore, excessive force?

> Officers, within reasonable limits, are the judges of the force necessary to enable them to make arrests or to preserve the peace. When acting in good faith, the courts will afford them the utmost protection, and they will recognize the fact that emergencies arise when the officer cannot be expected to exercise that cool and deliberate judgment which courts and juries exercise afterwards upon investigations in court.

Mead v. O'Connor, 66 N.M. 170, 173, 344 P.2d 478, 479–80 (1959).

The State's evidence showed that Manus was angry about the officer stopping his wife, got his shotgun, loaded it, approached the scene in a trot with the loaded gun, had some words with the officers, refused to put his shotgun down when told to do so, pointed the shotgun at Switzer, and ultimately fired at Wasmer, after which he threatened that he would "get" Switzer also.

[redacted] Manus testified that he did not know that Mrs. Manus was stopped at the scene, that he had approached the police vehicle with his shotgun to report prowlers, that he was blinded by the lights, that he was shot at from behind the lights, and that the next thing he remembered was sitting or falling down. He did not remember discharging his shotgun. He did not present any other evidence of sufficient provocation for killing Wasmer.

> [T]here may be "some evidence" of a lesser offense even though this depends on an inference of a state of facts that is ascertained by believing defendant as to part of his testimony and prosecution witnesses on the other points in dispute. (Citations omitted.)

Belton v. United States, 127 U.S.App.D.C. 201, 207, 382 F.2d 150, 155 (1967).

Had the jury been instructed on voluntary manslaughter, the only way they could have returned a verdict of guilty on that charge would have been to accept Manus' testimony up to the point where Wasmer fired at him from behind the lights, and reject the rest of Manus' testimony; then to accept the State's evidence that Manus pointed his gun at Wasmer and shot him, disregarding the majority of the State's remaining evidence of the events at the scene.

> [D]espite the jury's broad authority in treating the proofs, the selective process must not be so attenuated as to strain credulity to the breaking point. Among the inquiries we deem relevant when the legitimacy of the process is at stake are whether there must be extensive picking and discarding of evidence, whether the ultimate finding necessitates fragmentation of testimony in such degree as to distort it, and whether facts not supported by proof must be supplied. (Footnote omitted.)

Brooke v. United States, 128 U.S.App.D.C. 19, 24, 385 F.2d 279, 283 (1967).

In the case before us, in order to convict of voluntary manslaughter, the jury would have had to fragment the testimony of Manus to such a degree as to distort it. The entire line of his testimony was exculpatory; he indicated no heat of passion or sufficient provocation. The jury would have had to speculate to supply these elements. While we recognize that whether a police officer exercised reasonable force depends on all the circumstances of the case and is normally a jury question, *Mead, supra,* it is nonetheless the defendant's burden to come forward with evidence establishing sufficient provocation in order to be entitled to an instruction on voluntary manslaughter as a lesser included offense. *See Smith v. State,* 89 N.M. 770, 558 P.2d 39 (1976). We find no evidence that Officer Wasmer was acting unlawfully or used excessive force, and no evidence of provocation such as would cause a loss of self control in an ordinary person of average disposition. We therefore hold that there was no evidence of sufficient provocation to warrant instructing the jury on voluntary manslaughter.

Double Jeopardy

Manus argues that principles of double jeopardy prohibit consecutive sentences under the circumstances of this case. He alleges that all three convictions arose out of a set of acts constituting a single transaction, and therefore, consecutive sentences should not be imposed.

Manus argues that the "same transaction" test should be applied to determine whether consecutive sentences are proper. That test was rejected in *State v. Tanton,* 88 N.M. 333, 540 P.2d 813 (1975). The "same evidence" test has been adopted as the law in New Mexico. *Tanton, supra; State v. Sandoval,* 90 N.M. 260, 561 P.2d 1353 (Ct.App.1977), *cert. denied,* 90 N.M. 637, 567 P.2d 486 (1977).

In the case before us, different elements were required to be proved in order to sustain each of the three convictions, and different evidence was admitted to prove the different elements. Therefore, it appears that the three convictions were based in part on separate evidence. The prohibition against double jeopardy does not bar consecutive sentencing under the circumstances of this case. *Sandoval, supra.*

Admissibility of Manus' Statements to Cole and Faust

Cole was permitted to testify, over defense objection, that Manus had said, "I got angry and went and got my gun." Faust also testified to a statement made by Manus at the scene. Manus argues that these statements were inadmissible because they were involuntary and also because they were in violation of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Manus argues that he lacked sufficient capacity to make a voluntary statement because of his head wounds. For a statement to be voluntary, ". . . the defendant must have had sufficient mental capacity at the time he made the statement, to be conscious of the physical acts performed by him, to retain them in his memory and to state them with reasonable accuracy." *State v. Chavez,* 88 N.M. 451, 452, 541 P.2d 631, 632 (Ct.App.1975). The record furnishes substantial evidence that the *Chavez* test was met, that Manus had sufficient mental capacity at the time he made the statement, and that it was therefore voluntarily made.

Manus next argues that the statement should have been excluded because it was made before he had been given his *Miranda* rights. He argues that he was "in custody" at the time the statement was made, and that Cole was acting as an agent of the police. We need not determine whether Manus was "in custody" at the time, however, because it is clear that Cole and Faust were not acting as agents of the police. They volunteered to help Manus. The police did not request any assistance from Cole or Faust, and there was no intent on their part to interrogate Manus for the police. Manus had not been arrested. He cites *United States v. Brown,* 466 F.2d 493

(10th Cir. 1972), and *Commonwealth v. Bordner,* 432 Pa. 405, 247 A.2d 612 (1968). These cases are distinguishable on the facts. We hold that Manus' statement was not the result of "custodial interrogation", as that term is used in *Miranda.* The admission into evidence of these statements was not an abuse of discretion.

Admissibility of Witnesses' Prior Consistent Statements

During the testimony of Lesher and Switzer, counsel for defendant vigorously cross-examined them regarding certain inconsistencies between their trial testimony and statements made shortly after the incident.

The prior written statements of Lesher and Switzer were admitted into evidence on the State's motion pursuant to N.M.R.Evid. 801(d)(1)(B), N.M.S.A.1978, which provides:

> A statement is not hearsay if: . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with his testimony and is *offered to rebut an express or implied charge* against him *of recent fabrication or improper influence or motive* . . .. (Emphasis added.)

Manus argues that it was error to admit the entire statements of the witnesses, rather than just those portions which tended to rehabilitate the witnesses with respect to the inconsistencies pointed out on cross-examination.

We acknowledge the general rule to be that, where a statement is made available to defendant for impeachment, the State may then introduce into evidence only that portion of the statement used to impeach the witness or that which explains and clarifies the same subject. *Allen v. State,* 493 S.W.2d 515, 516 (Tex.Cr.App. 1973); *Camps v. New York City Transit Authority,* 261 F.2d 320, 322 (2d Cir. 1958).

However, this principle does not aid Manus in this case. The record clearly indicates that defense counsel did not merely impeach Lesher and Switzer regarding specific inconsistencies between their trial testimony and their prior statements, but he also called into question their general credibility.

There was obviously an "express or implied charge . . . of recent fabrication or improper influence . . .." N.M.R.Evid. 801(d)(1)(B). The record does not indicate that the trial court abused its discretion in admitting the complete pre-trial statements of Lesher and Switzer in order to show the high degree of consistency those statements had with their trial testimony. *See State v. Bell,* 90 N.M. 134, 560 P.2d 925 (1977), and *United States v. Lombardi,* 550 F.2d 827 (2d Cir. 1977).

Rebuttal Witness

Manus claims error regarding the testimony of one of the State's rebuttal witnesses, Charles Seig, whose name did not appear on the State's list of witnesses. The defense objected to his testimony on the basis of surprise. The court postponed Seig's testimony until the next day in order to allow the defense to depose Seig. Seig testified at trial and was vigorously cross-examined. He said he met Manus while in a hospital ward at the State Penitentiary and asked Manus what he was "in" for. He testified that Manus replied that he had "blown away a cop", and that he felt that he had "done the community a service." Seig's deposition revealed that there were several prisoners and a guard present at the time that Manus allegedly made these statements. Prior to Seig's testimony, the defense moved for a continuance in order to allow investigation of the other persons present at the time the alleged statement was made, to determine whether they would corroborate or contradict Seig's testimony. The court denied the continuance.

Manus argues that the prosecution was obligated to disclose prior to trial that Seig was a possible witness and that allowing Seig to testify in rebuttal, and not allowing the defense a continuance to investigate other witnesses to the statement of Manus, denied him his rights to a fair trial, to effective assistance of counsel and to present witnesses in his own defense.

The purpose of discovery in a criminal case, indeed the purpose of a trial itself, is to ascertain the truth.

> A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined. The current tendency in the criminal law is in the direction of discovery of the facts before trial and elimination of surprise at trial. (Footnote omitted).

Gregory v. United States, 125 U.S.App.D.C. 140, 144, 369 F.2d 185, 188 (1966), *cert. denied,* 396 U.S. 865, 90 S.Ct. 143, 24 L.Ed.2d 119 (1969). *See Coppolino v. Helpern,* 266 F.Supp. 930, 935–36 (S.D.N.Y. 1967). In a criminal case, "[t]he district attorney should not hesitate to show his entire file to the defendant. It is not the primary duty of the district attorney to convict a defendant. It is his primary duty to see that the defendant has a fair trial, that justice is done. *State v. Chambers,* 86 N.M. 383, 524 P.2d 999 (Ct.App.1974)." *Chacon v. State,* 88 N.M. 198, 201, 539 P.2d 218, 221 (Ct.App.1975).

This Court has not addressed the question of whether N.M.R.Crim.P. 27(b), N.M.S.A. 1978, requires the district attorney to disclose rebuttal witnesses, or whether it only requires disclosure of witnesses he intends to call in his case-in-chief. N.M.R.Crim.P. 27(b) provides:

> The defendant may serve on the district attorney a request to produce a written list of the names and addresses of *all witnesses* which the district attorney *intends to call* . . . .. (Emphasis added).

There is authority that the rule covers witnesses, whether in chief or in rebuttal. *People v. Manley,* 19 Ill.App.3d 365, 311 N.E.2d 593 (1974). *See also State v. Driver,* 38 N.J. 255, 183 A.2d 655 (1962).

On the other hand, many courts have held that the rule does not apply to rebuttal witnesses.

> As for whether rebuttal witnesses come within the purview of the witness list requirement, the general rule seems to be that they do not, so long as the rebuttal is *true rebuttal* and not an attempt to present the state's case-in-chief in the rebuttal. (Footnote omitted; emphasis added).

McCurry v. State, 538 P.2d 100, 105 (Alaska 1975). *See also Rowan v. State,* 252 So.2d 851 (Fla.App.1971). The issue of what is "true rebuttal" evidence was addressed in *State v. White,* 74 Wash.2d 386, 444 P.2d 661 (1968). In that case, the Supreme Court of Washington stated:

> Genuine rebuttal evidence is not simply a reiteration of evidence in chief but consists of evidence *offered in reply to new matters.* The plaintiff, therefore, is not allowed to withhold substantial evidence supporting any of the issues which it has the burden of proving in its case in chief merely in order to present this evidence cumulatively at the end of defendant's case. Ascertaining whether the rebuttal evidence is in reply to new matters established by the defense, however, is a difficult matter at times. Frequently true rebuttal evidence will, in some degree, overlap or coalesce with the evidence in chief. Therefore, the question of admissibility of evidence on rebuttal rests largely on the trial court's discretion, ... (Emphasis added).

444 P.2d at 667.

The circumstances of this case indicate that Mr. Seig was not a "true rebuttal" witness. The district attorney was fully aware of Seig's testimony ahead of time. Seig was transferred from the State Penitentiary to the County Jail in order that he might be present to testify. The transcript shows that Seig's testimony was not truly in rebuttal of anything Manus had presented in his defense. Rather, it appears that the district attorney asked two seemingly irrelevant questions on cross-examination of Manus, dealing solely with the alleged statements of Manus in prison, in order to set up the alleged rebuttal testimony of Seig. This type of gamesmanship in the conduct of a criminal trial is not to be commended.

The failure to disclose a witness, however, will not aid Manus unless he can show that he was prejudiced thereby. *Chacon v. State, supra; People v. Jarrett*, 22 Ill.App.3d 61, 316 N.E.2d 659 (1974). In the case now before us, Manus' counsel was given an opportunity to depose Seig prior to his testifying at trial. On the basis of information obtained through the deposition, Seig was vigorously and competently cross-examined. This opportunity to depose this surprise rebuttal witness before his testimony at trial served to remove the prejudice caused by the initial surprise. *People v. Clark*, 9 Ill.App.3d 998, 293 N.E.2d 666 (1973); *cf. Rowan v. State, supra.*

There remains the question whether the trial court should have granted a continuance to allow defense counsel to seek out and investigate other witnesses present when Manus allegedly made his statement to Seig. In the present case, we have no indication that Seig lied on the witness stand. N.M.R.Crim.P. 45(c), N.M.S.A.1978, provides for making a motion for a new trial on the ground of newly discovered evidence. Nothing prohibited defense counsel from attempting to ascertain the true facts after trial and moving for a new trial based on newly discovered evidence, if indeed his investigation would have indicated that Seig had lied. *See People v. Lott*, 66 Ill.2d 290, 5 Ill.Dec. 841, 362 N.E.2d 312 (1977).

The granting or denial of a continuance is within the sound discretion of the trial court, and in the absence of prejudice being shown, there is no basis for reversal on this point. *State v. Sanchez*, 58 N.M. 77, 265 P.2d 684 (1954).

Warrantless Search of Defendant's Clothing

Manus argues that the court erred in admitting into evidence four shotgun shells which were discovered as the result of a warrantless search of Manus' clothing. We agree.

Manus had been taken to Presbyterian Hospital Emergency Room for treatment. His clothing had been taken from him, and Officer Chavez asked for the clothing as possible evidence in the case. The clothing was turned over by an aide at the hospital. Officer Galaviz testified that he took custody of the clothing. He further testified:

> [A]s I picked the pants up I noticed they felt heavy. I shook the pants and I could hear something in the pocket and I reached in the pocket and pulled out four shells.

The four shotgun shells were admitted into evidence over defense objection.

A warrantless search is *per se* unreasonable unless it falls within certain well-defined exceptions to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *State v. Ledbetter*, 88 N.M. 344, 540 P.2d 824 (Ct.App.1975). The State argues admissibility under three of the exceptions which were outlined in *Ledbetter*; probable cause, search incident to arrest, and inventory search.

A warrantless search may be made on the basis of probable cause and exigent circumstances. *Ledbetter, supra; State v. Sims*, 75 N.J. 337, 382 A.2d 638 (1978). The State does not argue, nor does the record support, a finding of exigent circumstances. In *Rodriquez v. State*, 91 N.M. 700, 705, 580 P.2d 126, 131 (1978), a case involving a search incident to arrest, this Court held: "Where officers have within their exclusive control personal effects belonging to the arrestee, a warrantless search of these items is illegal. *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977)." The record shows that Manus' clothing was within the exclusive control of the officers before that clothing was searched and the shotgun shells were found.

The State argues that the evidence was admissible as a result of an inventory search for the purpose of protecting the defendant's property. The State cites *Chavis v. Wainwright*, 488 F.2d 1077 (5th Cir. 1973). However, there was no proof that the purpose of the officer here was to inventory Manus' property. The burden

was on the State to prove this exception to the rule. This exception does not apply. In the case of *Lowe v. Hopper*, 400 F.Supp. 970, 977 (S.D.Ga.1975), *aff'd*, 520 F.2d 1405 (5th Cir. 1975), the court stated:

> *The burden is on the government* to show that the search is within one of the exceptions to the warrant requirements of the Fourth Amendment. (Citations omitted; emphasis added.)
>
> [T]he test is a . . . subjective one. *The "real purpose" of the inspection must be inventorial and nonpretextuous with an unexpected result insofar as turning up evidence is concerned.* (Emphasis added).

See State v. Sims, supra. The shotgun shells found during the search of Manus' clothing should not have been admitted. *Rodriquez, supra.*

The error in admitting this evidence does not require reversal, however. Although the admission of evidence obtained in violation of certain constitutional rights requires automatic reversal, see *Miranda, supra*, the admission of evidence in violation of the Fourth Amendment, under certain circumstances, may be harmless error. In *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), the United States Supreme Court held that the admission of illegally seized evidence did not require reversal so long as the error was harmless beyond a reasonable doubt. This "reasonable doubt" standard has been interpreted to mean a "reasonable possibility" that the jury would not have convicted in the absence of the improperly admitted evidence. *United States v. Smith*, 578 F.2d 1227 (8th Cir. 1978).

> Which standard an appellate court selects depends on the type of case on appeal—criminal or civil—or on the type of error committed in the trial court—constitutional or nonconstitutional. If the error in the present case was "a federal constitutional error," . . . we would of course be bound to apply the reasonable possibility test. (Footnotes omitted).

United States v. Valle-Valdez, 554 F.2d 911, 915 (9th Cir. 1977). *See also* Saltzburg, *The Harm of Harmless Error*, 59 Va.L.R. 988 (1973).

In the face of all the other evidence of guilt and statements of Manus that he had used the gun and the shells in connection with an investigation of prowlers, it appears beyond a reasonable doubt that the jury would have reached the same verdict had those four shotgun shells not been in evidence.

We therefore affirm Manus' convictions and the sentences imposed thereon.

IT IS SO ORDERED.

SOSA, C. J., and PAYNE, J., concur.

597 P.2d 290

UNITED NUCLEAR CORPORATION, Plaintiff-Appellee,

v.

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

Indiana and Michigan Electric Company, Defendant-Appellee.

No. 11775.

Supreme Court of New Mexico.

May 7, 1979.

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Rodey, Dickason, Sloan, Akin & Robb, John D. Robb, Richard C. Minzner, Albuquerque, Montgomery, Andrews & Hannahs, Seth D. Montgomery, Santa Fe, Howrey & Simon, Washington, D. C., for General Atomic Co.

Bigbee, Stephenson, Carpenter & Crout, Harry L. Bigbee, Donnan Stephenson, G. Stanley Crout, Michael R. Comeau, Larry Maldegan, Mel E. Yost, Santa Fe, for appellee United Nuclear Corp.

James T. Paulantis, Albuquerque, Simpson, Thacher & Bartlett, Rogers M. Doering, New York City, for appellee Indiana & Michigan Elec. Co.

OPINION

EASLEY, Justice.

Appellee-plaintiff, United Nuclear Corporation (UNC), filed this declaratory judg-

ment action in the Santa Fe County District Court against appellant-defendant, General Atomic Company (GAC), alleging fraud, unlawful monopolistic practices and violation of the antitrust laws, and seeking cancellation of two uranium supply contracts and damages. GAC denied those allegations, claimed the principal issues are subject to arbitration under the terms of the contract, and counterclaimed against UNC for over one billion dollars in damages.

Indiana and Michigan Electric Company (I & M) and Detroit Edison Company (Detroit), (collectively "the utilities"), were brought into the suit as third-party defendants because they were to be supplied uranium products by GAC from the supplies that UNC had contracted to deliver.

The district court enjoined GAC from proceeding to litigate or arbitrate the same issues in any other jurisdiction. GAC appealed to the U.S. Supreme Court, and that Court reversed.

The trial had been in progress almost sixty days when the U.S. Supreme Court mandate came down, but GAC moved to stay the trial until arbitration of the issues could be accomplished. The trial judge denied the motion on the grounds that GAC had waived its right to arbitration. GAC appeals this partial final judgment. We affirm.

The principal issues are:

(1) Whether the Federal Arbitration Act applies.

(2) Whether the issue of waiver of arbitration is for the court or for the arbitrators.

(3) If the determination is to be made by the court, whether the evidence here supports the trial court's finding of waiver.

(4) Whether under the circumstances GAC was constitutionally entitled to further hearing before the district court on the issue of waiver.

Other claims advanced by GAC are that: (5) the trial court's actions were inconsistent with the decision of the U.S. Supreme Court in this case; (6) the holding that the state's antitrust claims are not arbitrable was in error; (7) the trial court should have stayed or severed the Duke and Commonwealth demands; and, (8) UNC obtained incorrect findings on issues not addressed below.

Factual Background

As we survey the massive accumulation of evidence, which could be measured by the ton, the key inquiry is: What was the intent of GAC? Did it intend to arbitrate, litigate or both? In order to determine this intent, we consider all the material assertions and objective manifestations of GAC, together with all other facts and circumstances. This calls for greater detail in setting forth the facts.

UNC and GAC were parties to two contracts, one dated June 30, 1973 (1973 Supply Agreement) covering approximately twenty-five million pounds of uranium, and one dated June 28, 1974 covering three million pounds of uranium (1974 Concentrates Agreement), under which UNC was to supply uranium to GAC. The 1973 Supply Agreement contained an arbitration clause calling for arbitration of all disputes under the rules of the American Arbitration Association (AAA). These rules provide a simple method of invoking arbitration. The initiating party makes demand, setting forth the nature of the dispute, the amount involved and the remedy sought. This is served on the other party and filed in any regional office of AAA, accompanied by a proper fee. (When GAC ultimately filed its motion for stay, it consisted of two pages, and the demand for arbitration contained three and one-half pages.)

GAC is a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc. On August 8, 1975 UNC first filed suit in the Santa Fe District Court against GAC as well as the individual partners in GAC, Gulf and Scallop, asking for a declaratory judgment and damages and raising all issues arising under the 1973 Supply Agreement. The cause was removed by the defendants to the U.S. District Court for the District of New Mexico. Gulf and Scallop moved to

extend the time to answer the complaint and to object to interrogatories propounded by UNC. As grounds for the motion, movants alleged that more time was necessary to determine whether to seek arbitration.

On October 6, 1975 Gulf filed a motion for additional time, stating that failure to demand arbitration prior to answering the complaint without asserting its right to arbitration might constitute a waiver of Gulf's right to compel arbitration. UNC sought voluntary dismissal of the cause in federal court, *which the defendants opposed*; but, the case was dismissed on December 31, 1975, five months after being filed. Neither GAC, Gulf nor Scallop had demanded arbitration or requested a stay in the proceedings to arbitrate.

On December 31, 1975, the same day the first suit was dismissed, UNC again filed suit, against GAC only, in the District Court of Santa Fe County alleging virtually identical claims and filing identical interrogatories. GAC then filed an affidavit of disqualification against Judge Santiago Campos.

On January 19, 1976 GAC filed a federal interpleader action in the U.S. District Court for the District of New Mexico against UNC, I & M, and Detroit as well as Duke Power Company and Commonwealth Edison Company. Although stating that it was not waiving its right to arbitration, GAC sought the judicial determination of all the rights and obligations of the parties under the 1973 Supply Agreement and other utility agreements. On March 2, 1976 the case was dismissed for lack of subject matter jurisdiction. GAC appealed the dismissal to the Tenth Circuit where it was affirmed in April of 1977. *General Atomic Co. v. Duke Power Co.*, 553 F.2d 53 (10th Cir. 1977).

In February and March 1976 GAC filed motions to dismiss for lack of personal jurisdiction, for additional time to answer interrogatories, and for dismissal due to the failure to join certain parties. All three motions specified that they were made "without waiving its right to demand arbitration."

In a brief in support of its application to dismiss for lack of jurisdiction, filed on March 22, 1976, the following statement was contained: "At the outset, defendant admits to having filed various legal actions in New Mexico because New Mexico provided the only or best forum for the vindication of its rights in various matters."

In March 1976 UNC moved for a default judgment for a willful failure to answer interrogatories, but later withdrew the application "in consideration of the agreement attached hereto." The agreement specified that GAC was to answer "in good faith all interrogatories to defendant presently pending." The parties stipulated to a number of actions to be taken in the discovery process which would not have been available as a matter of right under arbitration, and which ultimately cost the parties millions of dollars. Nothing was mentioned in the stipulation regarding GAC's asserted right to arbitrate.

On March 15, 1976 UNC applied for an injunction to restrain GAC from *filing suit* against UNC in other jurisdictions concerning the same facts and circumstances. No mention was made of arbitration. On that same date a temporary restraining order was issued for a ten-day period prior to the hearing enjoining GAC from filing suits or third-party complaints against UNC in any other jurisdiction. The restraining order placed no restraints on GAC against demanding arbitration and seeking a stay of the court proceedings during this period of time, which was seven months after the first complaint had been filed. Up to that time, GAC had made no demand for arbitration upon which a challenge to the jurisdiction of the court could be predicated. GAC filed a response and memorandum brief in answer to the motion for a preliminary injunction but did not mention the issue of arbitration therein.

The first indication in the record of proceedings that arbitration might be enjoined is a statement by the court at the hearing held on April 2, 1976 on the application for enjoining lawsuits in other forums. The judge referred to a letter written by him,

dated March 29, 1976, three days before the hearing, in which he had outlined the terms of the proposed preliminary injunction. One of the terms was to restrain GAC from seeking *arbitration* in any other forum, a remedy not even requested by UNC. The letter was received by GAC attorneys on March 30, 1976. No effort was indicated on the part of GAC to preclude a hearing on restraints against arbitration because of lack of proper notice, and no effort to demand arbitration before the hearing. The preliminary injunction followed closely the statement of terms contained in the letter.

As bearing on GAC's avowed allegiance to arbitration of the issues here, there was a significant colloquy among the attorneys and the judge at the hearing on the motion for preliminary injunction held three days after GAC received the judge's letter. The letter and the form of the preliminary injunction were under discussion. GAC made reference to the clause in the contract providing for arbitration and called specific attention to the New Mexico Uniform Arbitration Act, § 44–7–2(D), N.M.S.A.1978, which reads as follows:

> 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 . . . .

During those proceedings nothing was mentioned by GAC regarding federal arbitration rights.

GAC's attorney stated further: "We want to make sure and we have admitted language to this effect, that we are not foreclosed, because obviously the Plaintiff would not be foreclosed from demanding arbitration *in this action.*" (Emphasis added.) GAC further complained that it was unequal treatment to enjoin GAC from participation in arbitration in other actions and not to restrain UNC from doing so. GAC asked that it not be deprived of the right to demand arbitration and suggested that it would be inappropriate to foreclose such remedy.

UNC stipulated that it should be equally enjoined by the preliminary injunction and the court interlined wording in the order to effect this purpose. The following discussion then took place:

> MR. THOMPSON: . . . [W]e believe that we should not be foreclosed, in spite of what the Plaintiff has stated at this point. I have also raised the question of the *possibility* of the Defendants desiring to exercise their rights to arbitration *in this case,* under Article 17 of the Contract, . . . (Emphasis added.)
>
> THE COURT: Subject to the supervision of this court.
>
> MR. THOMPSON: *That is correct.* We would ask that the Injunction be clear in excluding any prohibition against us demanding arbitration *in this case.* (Emphasis added.)
>
> MR. BIGBEE: It is clear enough anyway, anything they want to file into this action will be subject to your Honor's decision.
>
> THE COURT: Did you, Mr. Bigbee, in your application for a Preliminary Injunction contemplate that the Defendants be enjoined from arbitrating under the Arbitration Clause of the Contract in this forum subject to the jurisdiction of this Court?
>
> MR. BIGBEE: I did not. I understood that it may or may not come up. I have asked repeatedly if they want arbitration, they have never answered me; I think they waived it. That is not the point that I wanted an Injunction on. Anything they want to submit under their responsive pleadings, under the rules, they are entitled to do it.

The court, at another point when the language of the preliminary injunction was being discussed, stated:

> THE COURT: I don't think there is anything in the language here that relates to arbitration in this forum pursuant to the arbitration clause contained in the contract. If there is any question about it that can be clarified.
>
> MR. BIGBEE: There is no question that they have the right to include that, whether it should be granted or what[,]

it is, [sic] under Your Honor's jurisdiction. . . .

The preliminary injunction, as issued, restrained GAC from either arbitrating or litigating the same issues "in any other forum." The dispute was brought to this Court, where the trial court was sustained, and then was taken to the United States Supreme Court, which held that the trial court could not properly restrain GAC from seeking relief in federal courts or by arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1–14.

GAC filed its answer on May 5, 1976 stating that the answer was "as to all matters in which arbitration is not being sought by defendant and as to all issues which the court may deem unarbitrable." GAC did not raise the issue of arbitration as an affirmative defense, nor did it ask for a stay in the proceedings for the purpose of demanding arbitration or arbitrating the dispute. GAC also counterclaimed, asking the court to enforce the contractual obligations or, in the alternative, for damages in the sum of $1,030,000,000 and costs.

The parties prepared a voluminous pretrial order which was signed by the court and filed in August 1977 in which there was nothing mentioned at any point about arbitration rights, although GAC prepared its portion of the order. I & M and Detroit were involuntarily joined as defendants at the instance of GAC on some issues different from those asserted against UNC.

The first demand for arbitration came on November 30, 1977 and made its way into the record at page 5455 of the transcript of the record proper at a point where it took over 2,000 additional pages of transcript of proceedings to detail the progress of the suit.

Thereafter, for a total period of over two years, dating from the filing of the first complaint up to the demand for arbitration, the parties were in and out of the district court, the federal courts, and this Court dozens of times on motions and interlocutory appeals. Most of the activity in the district court concerned discovery proceedings for which the parties obviously expended millions of dollars. GAC claimed to have submitted 6,000,000 pages of material for UNC to inspect and claimed that UNC had actually copied approximately 180,000 pages. GAC alleged that producing the documents and answering interrogatories propounded by UNC had involved on its part the efforts of more than 37 lawyers, 19 para-professionals, 80 management personnel and engineers, plus secretarial and clerical personnel. The total hours allegedly consumed by April 19, 1977 was estimated to be 34,700. Over 100 depositions were taken resulting in 16,000 pages of testimony and 2,785 deposition exhibits. GAC contended that the parties had designated approximately 11,000 exhibits. UNC claimed that GAC had copied 500,000 pages of its records.

1. *Applicability of The Federal Arbitration Act*

Although there was considerable controversy at trial over whether the state or federal statutes govern the arbitration rights of the parties, the trial court concluded that it had jurisdiction under the Federal Arbitration Act, 9 U.S.C. §§ 1–14. The parties now agree with this judgment, as do we.

GAC insisted below that the federal act applies while UNC was contending that the New Mexico Uniform Arbitration Act governs. Sections 44–7–1 to 22, N.M.S.A. 1978. The trial court first held with UNC, but in the decision being appealed, concluded that jurisdiction was present under both acts. GAC complains that the record does not show that the court decided the issue based on the federal act, although concluding that it applied. We cannot go behind a valid conclusion to invalidate it by showing that the judge reached it for the wrong reasons. *Tsosie v. Foundation Reserve Insurance Company*, 77 N.M. 671, 427 P.2d 29 (1967); *Holmes v. Faycus*, 85 N.M. 740, 516 P.2d 1123 (Ct.App.1973).

The federal act provides, in § 3, that when a proceeding is brought in court involving any issue referrable to arbitration,

the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had . . . providing the applicant for the stay is not in default in proceeding with such arbitration." The statute does not specifically mandate that a demand for arbitration must be made before application is made to the court for a stay. UNC claims that GAC is in "default" under the terms of this statute and has therefore waived its right to seek arbitration.

2. *Forum for Question of Waiver*

GAC insists that the arbitration board and not the court should decide whether GAC has waived its rights to arbitration. Although GAC relies on authority to the contrary,[1] at least a strong majority of courts take jurisdiction over the issue with many finding that waiver has occurred. *Demsey & Associates v. S. S. Sea Star*, 461 F.2d 1009 (2d Cir. 1972); *Burton-Dixie Corp. v. Timothy McCarthy Const. Co.*, 436 F.2d 405 (5th Cir. 1971); *Cornell & Company v. Barber & Ross Company*, 123 U.S.App. D.C. 378, 360 F.2d 512 (1966); *American Locomotive Co. v. Gyro Process Co.*, 185 F.2d 316 (6th Cir. 1950).[2]

The Federal Arbitration Act, 9 U.S.C. § 3, clearly mandates that a court in which a case is pending, and a stay is requested for arbitration, has jurisdiction to determine whether the movant is "in default in proceeding with such arbitration." Our case was in this precise posture. We hold that the judge was not in error in assuming jurisdiction to decide the question of waiver.

3. *Question of Waiver*

Although there is disagreement from case to case as to what set of facts will justify a holding that a party has waived his rights to arbitration, the federal courts have developed general principles that are useful in appraising this issue. It has been held that the Federal Arbitration Act evidences a strong federal policy favoring the enforcement of arbitration agreements. *Hanes, supra; Demsey, supra; Carcich v. Rederi A/B Nordie*, 389 F.2d 692 (2d Cir. 1968). The reasons for the encouragement of arbitration are to ease the congestion in the court systems, to speed up the resolution of disputes, and to afford a more economical means of disposing of cases. *Griffin v. Semperit of America Inc.*, 414 F.Supp. 1384 (S.D.Tex.1976). *See also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974); *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263 (7th Cir. 1976).

As is true in other types of contracts, a party may waive certain terms, but in arbitration agreements the courts hold that all doubts as to whether there is a waiver must be resolved in favor of arbitration. *Robert Lawrence Company v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. grant-*

1. *Hanes Corp. v. Millard*, 174 U.S.App.D.C. 253, 531 F.2d 585 (1976); *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362 (2d Cir. 1965); *Lundell v. Massey-Ferguson Services N. V.*, 277 F.Supp. 940 (N.D.Iowa 1967); *Auxiliary Power Corporation v. Eckhardt & Co.*, 266 F.Supp. 1020 (S.D.N.Y.1966); *Lowry & Co. v. S. S. Le Moyne D'Iberville*, 253 F.Supp. 396 (S.D.N.Y.1966), *appeal dismissed*, 372 F.2d 123 (2d Cir. 1967).

2. Other courts that have decided the issue of waiver and found that rights have been lost are: Circuit Courts: *E. C. Ernst, Inc. v. Manhattan Const. Co. of Tex.*, 559 F.2d 268 (5th Cir. 1977; on rehearing); *Gutor International AG v. Raymond Packer Co., Inc.*, 493 F.2d 938 (1st Cir. 1974); *E. I. Du Pont De Nemours & Co. v. Lyles & Lang Const. Co.*, 219 F.2d 328 (4th Cir. 1955), *cert. denied*, 349 U.S. 956, 75 S.Ct. 882, 99 L.Ed. 1280 (1955); *American Locomotive Co. v. Chemical Research Corp.*, 171 F.2d 115 (6th Cir. 1948), *cert. denied*, 336 U.S. 909, 69 S.Ct. 515, 93 L.Ed. 1074 (1949); *Galion Iron Works & Mfg. Co. v. J. D. Adams Mfg. Co.*, 128 F.2d 411 (7th Cir. 1942). District Courts: *Weight Watch. of Quebec Ltd. v. Weight W. Int., Inc.*, 398 F.Supp. 1057 (E.D.N.Y.1975); *Liggett & Myers Incorporated v. Bloomfield*, 380 F.Supp. 1044 (S.D.N.Y.1974); *Sulphur Export Corporation v. Carribean Clipper Lines, Inc.*, 277 F.Supp. 632 (E.D.La.1968); *United Nations Children's Fund v. S/S Nordstern*, 251 F.Supp. 833 (S.D.N.Y.1966). *See also N&D Fashions, Inc. v. DHJ Industries Inc.*, 548 F.2d 722 (8th Cir. 1977); *Gulf Central Pipeline Co. v. Motor Vessel Lake Placid*, 315 F.Supp. 974 (E.D.La.1970).

ed, 362 U.S. 909, 80 S.Ct. 682, 4 L.Ed.2d 618 (1960), *cert. dismissed per stipulation*, 364 U.S. 801, 81 S.Ct. 27, 5 L.Ed.2d 37 (1960); *Bigge Crane and Rigging Co. v. Docutel Corporation*, 371 F.Supp. 240 (E.D.N.Y. 1973).

The party asserting the default in pursuing arbitration bears a heavy burden of proving waiver. *General Guar. Ins. Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924 (5th Cir. 1970); *Hilti, Inc. v. Oldach*, 392 F.2d 368 (1st Cir. 1968).

The courts generally hold that dilatory conduct by the party seeking arbitration, unaccompanied by prejudice to the opposing party, does not constitute waiver. *Demsey, supra; Carcich, supra.* Waiver cannot be inferred merely from a party's attempt to meet all issues raised between it and another party. *Germany v. River Terminal Railway Company*, 477 F.2d 546 (6th Cir. 1973); *Romnes v. Bache & Co., Inc.*, 439 F.Supp. 833 (W.D.Wis.1977). " '[D]efault' under the [Federal Arbitration Act] may not rest mechanically on some act such as the filing of a complaint or answer but must find a basis in prejudice to the objecting party." *Batson Y. & F. M. GR., Inc. v. Saurer-Allma GmbH–Allgauer M.*, 311 F.Supp. 68, 73 (S.C.1970).

It must appear that the delay in requesting arbitration was an intentional relinquishment of the right to arbitrate. Such intention may be inferred when a party takes action inconsistent with its right to demand arbitration. *Weight Watchers*, supra. *See Cornell, supra; The Belize*, 25 F.Supp. 663 (S.D.N.Y.1938). It is the objective manifestation of intent upon which the opposing party may rely. The question should be determined by the trier of facts based on the evidence in each case. *Burton-Dixie, supra; Weight Watchers, supra.* An appellate court should accept such factual determination if supported by substantial evidence. *Burton-Dixie, supra; Galion Iron Works, supra.*

In *Cornell, supra*, the trial court denied a stay under 9 U.S.C. § 3, because the party was "in default in proceeding with such arbitration," and stated:

> A party waives his right to arbitrate when he actively participates in a lawsuit or takes other action inconsistent with that right. Once having waived the right to arbitrate, the party is necessarily "in default in proceeding with such arbitration."

Before filing the present motion, appellant (1) moved for a transfer of venue to the Eastern District of Pennsylvania, (2) filed an answer to appellee's complaint and a counterclaim, and (3) filed notice of depositions, took the deposition of an official of appellee, and procured the production of various records and documents. As the District Court stated:

> [T]he litigation machinery had been substantially invoked and the parties were well into the preparation of a lawsuit by the time (some four months after the complaint was filed) an intention to arbitrate was communicated by the defendant to the plaintiff.

360 F.2d at 513. (Footnotes omitted.)

In *Weight Watchers, supra*, the court made a determination as to the elements of waiver in these cases, stating:

> The factors upon which the waiver question appears to have turned most frequently against the party seeking to compel arbitration are his dilatory conduct in seeking arbitration, usually coupled with his gaining of an undue advantage in the judicial forum or other substantial prejudice to the opposing party, or any other actions taken by the moving party which are sufficiently inconsistent with his seeking arbitration. Examining the circumstances of a particular case, it is usually the absence of one or more of these factors that forms the basis for concluding there has been no waiver.

398 F.Supp. at 1059. (Footnotes omitted.)

As a basis for holding that waiver had been correctly determined, the court in *Burton-Dixie, supra*, stated the evidence to be as follows:

> [A]t no time before answering the complaint in the instant lawsuit did McCarthy demand that the matter be submitted

> to the architect or to arbitration. Even when Burton-Dixie filed suit against McCarthy, McCarthy did not attempt to invoke the arbitration provision in the contract. In its answer to the complaint, McCarthy did not ask the court to stay proceedings pending arbitration, but rather denied liability and set up as an affirmative defense Burton-Dixie's failure to arbitrate. Moreover, McCarthy impleaded as third-party defendants two of its subcontractors and proceeded to litigate the dispute over the defective roof.

436 F.2d at 408–409. The court concluded that McCarthy waived its right to insist upon arbitration.

The United States Court of Appeals in *Demsey, supra,* after analyzing numerous cases which hold that there was no waiver under the particular facts, stated:

> We have found no cases, however, where arbitration has been allowed after a party has answered on the merits, asserted a cross-claim that was answered, participated in discovery, failed to move for a stay, and gone to trial on the merits.
>
> . . . . .
>
> We can think of no clearer case of prejudice than we have here in this case. The substantial expense to all concerned that was involved in the trial of all the factual and legal issues in the case, including those raised by Jordan's cross-claims, was caused by Jordan's full participation in the pretrial procedures and in the trial on the merits, despite its mere allegation of the arbitration clause in the voyage charter as a defense. We think it would be a gross miscarriage of justice now to require a retrial by arbitration of any of these issues.

461 F.2d at 1018.

In *Gavlik Const. Co. v. H. F. Campbell Co.,* 526 F.2d 777, 783 (3d Cir. 1975), the court stated: "Recent cases have only found waiver where the demand for arbitration came long after the suit commenced and when both parties had engaged in extensive discovery." (Citing *Demsey, supra; American Locomotive v. Gyro, supra; Ernst, supra; Liggett, supra*; and *Sulphur Export, supra.*)

Failing to invoke arbitration for ten months from the date the suit was commenced, while at the same time obtaining many benefits from pre-trial discovery that would not have been available had they reasonably demanded arbitration, was held to constitute waiver of the arbitration provision in *Liggett, supra.* The parties demanding arbitration had answered and counterclaimed without asserting their right to arbitration, but they had actively participated in the discovery process and obtained a number of extensions. The court held that their acts and conduct had been prejudicial and thus constituted waiver.

In *E. C. Ernst, supra,* the court found waiver, stating:

> When one party reveals a disinclination to resort to arbitration on any phase of suit involving all parties, those parties are prejudiced by being forced to bear the expenses of a trial, which in this case was quite lengthy. Arbitration is designed to avoid this very expense. Substantially invoking the litigation machinery qualifies as the kind of prejudice to Manhattan that is the essence of waiver. (Citations omitted.)

559 F.2d at 269.

A party to a lawsuit who claims the right to arbitration must take some action to enforce that right. *Burton-Dixie, supra.* This must be done within a reasonable time after suit is filed. *Demsey, supra; American Locomotive v. Gyro, supra.*

The courts have held a variety of acts to be inconsistent with a party's alleged reliance on arbitrating the dispute in question. The determination of waiver seldom turns on a single inconsistent act or failure to act. Some of the conduct or acts of a party in relationship to a claim subject to arbitration that have been considered by themselves, or in conjunction with others, to constitute default or waiver are as follows: Answering a complaint, *Demsey, supra; Cornell, supra; Weight Watchers, supra;*

Liggett, supra; counterclaiming in a judicial proceeding, *Demsey, supra; Cornell, supra; American Locomotive v. Gyro, supra; Liggett, supra*; filing a complaint, *Gutor International supra; Bank of Madison v. Graber*, 158 F.2d 137 (7th Cir. 1946); *Galion Iron Works, supra*; participating in a discovery process in a lawsuit, *Demsey, supra; Cornell, supra; Liggett, supra*; moving for summary judgment, *Weight Watchers, supra*; going to trial on the merits, *Demsey, supra; Blake Construction Company v. United States*, 252 F.2d 658 (5th Cir. 1958); *Radiator Specialty Co. v. Cannon Mills*, 97 F.2d 318 (4th Cir. 1938).

Preparation for trial by a party based on the belief that the other party does not desire or intend to make a demand for arbitration has been held to constitute substantial prejudice which may invoke a waiver or constitute a default under the Federal Arbitration Act. *Demsey, supra; Weight Watchers, supra.*

The courts also consider any advantage that may have been received by a party that might not otherwise have been available to the party under an arbitration proceeding by reason of participating in the discovery process. *Liggett, supra.* Neither the federal statutes nor the rules of AAA give a party an absolute right to demand discovery. As a general rule, discovery is very limited in arbitration proceedings. Once a district court has stayed judicial proceedings pending arbitration, the parties may not continue discovery in the district court. *Mississippi Power Company v. Peabody Coal Company*, 69 F.R.D. 558 (S.D. Miss.1976); *Commercial Solvents Corp. v. Louisiana Liquid F. Co.*, 20 F.R.D. 359 (S.D. N.Y.1957); *Cavanaugh v. McDonnell & Company*, 357 Mass. 452, 258 N.E.2d 561 (1970). In *Bigge, supra*, a federal district court did enforce discovery which had been ordered by the arbitrator, but did so on a showing of necessity rather than of mere convenience. Later cases have denied discovery, but, based on *Bigge, supra*, have indicated that discovery might be proper in extraordinary circumstances. *Coastal States Trading, Inc. v. Zenith Nav. S. A.*, 446 F.Supp. 330 (S.D.N.Y.1977); *Levin v. Ripple Twist Mills, Inc.*, 416 F.Supp. 876 (E.D.Pa.1976).

Discovery procedures are often the most expensive and time-consuming elements of a court trial, and thus have often been considered to be inconsistent with the reasons for arbitration. *Commercial Solvents, supra.* In most cases, discovery in arbitration is limited to the discovery available under the Arbitration Act itself. M. Domke, The Law and Practice of Commercial Arbitration, § 27.01 (1968); G. Goldberg, A Lawyer's Guide to Commercial Arbitration, § 3.03 (1977). The only discovery mentioned in the Act is the taking of depositions of witnesses who cannot be subpoenaed or who are unable to attend the hearing.

No one act or a specific series of acts has been held consistently to indicate waiver. The courts have looked to the totality of the proof in each case to arrive at a decision. We take into consideration all of the material facts to determine whether GAC defaulted on its obligation to make a timely demand for arbitration and a stay of proceedings and thus waived its rights.

We ask whether GAC intended to arbitrate or litigate. However, it would be a mistake to assume that each of these courses is mutually exclusive of the other. We must inquire whether it can be inferred from the circumstances that the intent of GAC was to litigate *and* arbitrate. The purpose could plausibly be to preserve the right to arbitrate and at the same time litigate down to the last possible moment. Thus, we examine not only the acts of GAC that occurred prior to the time the injunction was entered on April 2, 1976 but the conduct or inaction of GAC thereafter as bearing on the real designs of the company.

It is hornbook law that intent is a state of mind. As such, it generally remains hidden within the brain where it was conceived. It is rarely, if ever, susceptible of proof by direct evidence. It must be inferred from the words, acts or conduct of the party entertaining it as well as the

other attendant facts and circumstances. No citations as to these principles are necessary.

In applying the above law to the facts in this case we consider the challenges specified by GAC. As to waiver, GAC challenged six of the district court's findings of fact that: (a) the preliminary injunction did not prohibit GAC from demanding arbitration in the district court; (b) for twenty-seven months GAC did not "in any way manifest its intention or desire to arbitrate rather than litigate"; (c) GAC made numerous motions for extensions and discovery orders and "represented to the district court that such orders were necessary for its preparation for trial"; (d) information obtained from UNC by GAC by way of discovery would not otherwise have been available to it; (e) UNC had been prejudiced and would be irreparably injured if a stay were ordered; and (f) GAC was in default and had relinquished any rights to arbitrate.

(a) The extent to which GAC was *prohibited*, if at all, by the injunction from making demand for arbitration and from requesting a stay of the proceedings in the district court is a very crucial matter with GAC. That company contends that the injunction absolutely prohibited it from demanding arbitration outside New Mexico and that arbitration within New Mexico was ordered to be conducted only under the supervision of the district court. GAC argues that this was such a violation of its rights that it had no duty to pursue the matter further in the trial court. GAC claims that its actions after the issuance of the injunction were strictly in self-defense and were forced upon it by the illegally obtained injunction.

It is further claimed by GAC that its actions prior to the issuance of the injunction on April 2, 1976 were not such as would justify a finding of waiver and that most of the conduct of GAC upon which UNC relies for support of its allegation of waiver occurred after GAC was unlawfully restrained from seeking arbitration.

We look at all the evidence. The hearing on April 2, 1976 on the motion for an injunction is most significant. The motion did not contain any plea for restraining arbitration; and the temporary restraining order mentioned only restraints on suing or counterclaiming. The first time that the record shows notice to GAC that the court was even considering enjoining arbitration demands was in the judge's letter of March 30, three days before the hearing. However, GAC did not object to holding the hearing insofar as it pertained to arbitration, did not demand arbitration in the interim, did not seek to continue the hearing while it took the proper steps to demand arbitration and to request a stay in the suit, and did not raise the issue of its rights under the Federal Arbitration Act at the hearing on the motion.

The reliance of GAC on § 44–7–2 of the New Mexico Uniform Arbitration Act, which provides for an automatic stay of court proceedings pending arbitration on "application therefor", indicates that GAC was fully aware of this simple means of putting an immediate halt to the litigation, yet its lawyers talked only of the "possibility of arbitration". Bearing in mind that the colloquy among lawyers and judge may not ordinarily be considered to dispute the judgment, it is still admissible as being indicative of the intent of GAC, with regard to arbitration as opposed to litigation upon which UNC and the court were entitled to rely. GAC only alerted the court to its right to demand arbitration under the New Mexico Uniform Arbitration Act, where it would be entitled to an automatic stay in the event that it demanded arbitration, and made references only to arbitration "in this case". Thus, another well-known risk was taken by GAC, i. e., that it would not later be permitted to complain because of failing to properly object. N.M.R.Civ.P. 46, N.M.S.A.1978; N.M.R.Civ.App. 11, N.M.S.A.1978.

Although the court offered clarification of what was meant by a right to arbitrate "in this forum", none was ever requested at that time or any later time, nor was any effort made to determine what the judge meant when he said that if GAC decided to

exercise its rights to arbitration it would be done "subject to the supervision of this court." The latter expression could be interpreted in many ways, one of which could be that the judge believed that he had the power to refuse to stay the proceedings if the evidence showed a default on GAC's part in demanding arbitration that amounted to a waiver. Another probability is that the court would want to retain jurisdiction over any contested items in the contract that were not subject to arbitration. Furthermore, the court would have the jurisdiction to inquire whether or not there was in fact a valid contract providing for arbitration. No clarification was sought and none was thereafter offered.

There is nothing in the preliminary injunction that prohibited GAC from demanding arbitration at any time by serving a demand on UNC in New Mexico, without regard for the location at which the arbitration would take place. This would have set the stage for a claim by GAC that the court did not have jurisdiction. The argument that GAC could do nothing with regard to arbitration is not persuasive. Nor is the claim that it had to await the decision of the U. S. Supreme Court before it could make any demands for arbitration. The U. S. Supreme Court decision did not change the portion of the preliminary injunction giving GAC the right to demand arbitration in New Mexico.

Common sense dictates that a litigant that has been so capably represented by such a host of outstanding lawyers, who have meticulously handled every other infinitesimal detail, and who have verbally displayed such ferocious passion for arbitration, could have found a way to say: "Judge, we want to arbitrate." There were no restraints on filing a motion in the trial court for leave to arbitrate. Admittedly, it is not called for under the federal law, but the failure of GAC to adopt such a simple and plausible course of action is a commentary on the validity of its claimed intent to arbitrate.

Inherent in GAC's argument is the impermissible presumption that if it had made demand for arbitration the trial court would have acted unlawfully rather than follow the mandate of the Federal Arbitration Act. We must presume that the court would have done its "supervision" in accordance with that law. The law presumes that rulings of district courts have validity. *Coastal Plans Oil Company v. Douglas*, 69 N.M. 68, 364 P.2d 131 (1961); *Carlile v. Continental Oil Company*, 81 N.M. 484, 468 P.2d 885 (Ct.App.1970). *A fortiori*, the law must presume that rulings which district courts may be called upon to make in the future will likewise be valid.

As suggested by GAC, the court's finding that the preliminary injunction did not prohibit GAC from demanding arbitration with UNC *"in this forum"* shows a tinge of legal conclusion. The thrust of GAC's challenge to this finding is more in the nature of a complaint that it was wrong for the court to prohibit arbitration *in other forums*. The U. S. Supreme Court agreed with this theory; however, the finding, or the mixed finding and conclusion, is obviously correct because the prohibition did not run against demanding arbitration with UNC in New Mexico. In order to assert any right to arbitration under 9 U.S.C. § 3, it was mandatory that GAC make a demand for arbitration and make application to the Santa Fe County District Court for a stay in these proceedings, at which time the trial court would have been obligated under federal law to determine whether GAC was in default in demanding arbitration. This is exactly what occurred after the U. S. Supreme Court mandate came down.

Early in its appeal, GAC, in discussing the scope of review available to this Court, argued that we should not apply the substantial evidence rule. The argument is, since the trial judge reached his findings by the use of documentary evidence, the pleadings and the statements of the attorneys, this Court is in as good a position to determine the facts by preponderance of the evidence as was the trial judge. We think this case is not a good subject for the application of that principle. We hold that *Valdez v. Salazar*, 45 N.M. 1, 107 P.2d 862

(1940) is more in point where this Court stated:

> Where all or substantially all of the evidence on a material issue is documentary or by deposition, the Supreme Court will examine and weigh it, and will review the record, giving some weight to the findings of the trial judge on such issue, and *will not disturb the same upon conflicting evidence unless such findings are manifestly wrong or clearly opposed to the evidence.* (Emphasis added.)

Id. at 7, 107 P.2d at 865.

We affirm the trial court's ruling that the preliminary injunction did not prohibit GAC from demanding arbitration in that court.

(b) GAC filed numerous pleadings which stated that it did not intend to waive its rights to arbitration. However, the trial court found that for a period of twenty-seven months GAC did not "in any way manifest its *intention or desire* to arbitrate rather than litigate the issues between the parties arising under the 1973 Supply Agreement." (Emphasis added.) GAC's intentions are the number one question in this case. GAC claims that its numerous statements that it did not intend to *waive its right* to demand arbitration was sufficient to establish its intent. UNC urges that an intention to *preserve the right to demand arbitration* is not the same as an intention or desire *to arbitrate.* UNC relies on the other acts and conduct of GAC to prove that a good faith intent to arbitrate was not shown.

The record shows that GAC was fully aware of the perils of dilatory conduct in asserting its arbitration rights. This knowledge surfaced in its first pleading. However, it took obvious risk after obvious risk. It did not assert arbitration as an affirmative defense in its answer, thus taking the chance of having the issue excluded under N.M.R.Civ.P. 8(c) and 12(b), N.M.S.A. 1978, which call for every defense in law or fact to be "asserted." "The failure to plead the arbitration clause as a defense to the lawsuit will be considered a waiver of the party's rights arising under such clause." M. Domke, *supra.* § 19.01, page 181 (1968); *Almacenes Fernandez, S. A. v. Golodetz,* 148 F.2d 625 (2d Cir. 1945). Generally the courts have held that failure to plead an affirmative defense results in the waiver of that defense; and it is excluded as an issue. *Radio Corporation of America v. Radio Station KYFM, Inc.,* 424 F.2d 14 (10th Cir. 1970).

GAC further imperiled its position by failing to assert arbitration as a defense in the pre-trial order. Parties are expected to disclose at a pre-trial hearing all legal and factual issues which they intend to raise in the lawsuit. N.M.R.Civ.P. 16, N.M.S.A., 1978; *Becker v. Hidalgo,* 89 N.M. 627, 556 P.2d 35 (1976); *Harvey v. Eimco Corp.,* 33 F.R.D. 360, (E.D.Pa.1963); *Burton v. Weyerhaeuser Timber Co.,* 1 F.R.D. 571 (D.Or.1941). The parties are limited to the issues contained in the order and must not introduce issues not so contained at trial. *Fowler v. Crown-Zellerbach Corporation,* 163 F.2d 773 (9th Cir. 1947).

Although these two lapses by GAC and others cited are not conclusive of voluntary waiver, they do add to the volume of proof that the court and UNC were misled into believing that GAC intended to litigate the issues and that its intent to arbitrate was not as strong as it now contends.

An attempt to reserve a right inconsistent with that asserted is ineffectual. *The Belize, supra; Commercial Bank v. Central Nat. Bank,* 203 S.W. 662 (Mo.App. 1918).

There was no error in the trial court's finding that GAC did not manifest an intention and desire to arbitrate, as opposed to litigating. The finding is based upon substantial evidence. We will not disturb such a finding. *Montoya v. Travelers Ins. Co.,* 91 N.M. 667, 579 P.2d 793 (1978).

(c) The court's finding that GAC made repeated representations to the district court that it needed extensions of time and in "all" instances said the purpose was to enable it to "prepare for trial", is challenged on grounds that most of the acts

occurred after the issuance of the preliminary injunction and that *every* such action was not accompanied by the alleged representation. However, GAC failed to comply with N.M.R.Civ.App. 9(d), N.M.S.A.1978, which requires that the substance of all the evidence be stated with proper transcript references. The same is true of GAC's challenges to the court's findings that UNC had provided *all* materials to GAC sought on discovery and that GAC obtained "huge amounts of information from UNC which would not otherwise be available to it." We hold that challenges (c) and (d) fell short of complying with Rule 9(d) and will not be considered. *Perez v. Gallegos*, 87 N.M. 161, 530 P.2d 1155 (1974); *Galvan v. Miller*, 79 N.M. 540, 445 P.2d 961 (1968). However, as to the merits of the two challenges, careful scrutiny of the record discloses insubstantial support for the contentions. Even if error had been committed as to one or both issues, it would not be dispositive of the case.

(e) The court's finding that UNC had been prejudiced by GAC's default in demanding arbitration is attacked on the basis that there was no such prejudice shown by the events prior to the entry of the injunction against arbitration and that, after the entry of that injunction, GAC's conduct could not be considered in determining waiver. This issue is partially resolved by our holding that there is substantial evidence that GAC did not properly manifest its intention or desire to arbitrate during a period of twenty-seven months from the time of the filing of the first lawsuit to a point well into the trial of the second case.

By that time, UNC had spent millions of dollars on discovery proceedings and trial preparation. UNC takes the position that GAC obtained the advantages of discovery that would not have been available to GAC as a matter of right under the Federal Arbitration Act.

GAC argues that the court's findings of prejudice should be categorized as a legal conclusion and that it was not incumbent upon GAC to establish the lack of an evidentiary basis for the finding as required by Rule 9(d). Even though it is for the court to conclude whether there is prejudice, it is clear that a conclusion must be based on findings of fact that have support in the record. The conclusion fails when it is demonstrated that it has no proper support in the facts. Even though the substantiality of the evidence on this point may not be properly before us, we nevertheless hold on the merits that the evidence in the record substantiates a finding that GAC's default in demanding arbitration caused material prejudice to UNC both before and after the preliminary injunction was issued.

(f) The last finding challenged is that GAC was in default and had relinquished any right to arbitrate. This finding overlaps many of the others. This holding must be predicated upon finding substantial evidence from the entire record.

This complex, multi-party, multi-issue litigation was within days of final solution at the trial level when the first *demand* was made for arbitration. This very simple act of stating, in writing: "We want to arbitrate", followed by a motion for a stay of litigation, would have challenged the jurisdiction of the court to proceed. Our search of the record reveals no instance where these words were either written or spoken until November of 1977.

Without reiterating the facts relied upon, we hold that there is substantial evidence to support the court's finding that GAC was in default and thus waived its right to arbitration.

The parties expressly provided that the AAA Rules would govern arbitration under the 1973 Uranium Supply Agreement. GAC claims that waiver is entirely precluded under § 46(a) of these rules which specifies:

> No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

GAC relies upon *People ex rel. Delisi Const. Co., Inc. v. Board of Ed.*, 26 Ill. App.3d 893, 326 N.E.2d 55 (1975). This case

is distinguishable in that it involved a delay by the party seeking arbitration only for a period during which the validity of the contract to arbitrate was being decided, as opposed to trial preparation and trial in our case. Furthermore, the Illinois Court recognized that only arbitrable questions are covered by § 46(a) by stating:

> Moreover, the arbitration clause provides that *arbitrable questions* be decided "in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association . . . (Emphasis added.)

326 N.E.2d at 57–58.

UNC cites M. Domke, *supra*, at 264, to support its contention that Rule 46(a) is designed only to provide that, after arbitration has been commenced, there is no waiver by participation in judicial proceedings *supplementary to* and *in aid of arbitration.* UNC argues that, regardless of the AAA Rule, a party may be in default in demanding arbitration, as specifically mentioned in the Federal Arbitration Act, and therefore, have no arbitrable questions remaining which could be governed by § 46(a). In the latter situation, it is the province of the court to determine whether there has been a default. The parties are precluded from contracting to exclude the court from jurisdiction over this issue. *American Sugar Refining Co. v. The Anaconda*, 138 F.2d 765 (5th Cir. 1943), *aff'd*, 322 U.S. 42, 64 S.Ct. 863, 88 L.Ed. 1117 (1944); *Ocean Science & Eng., Inc. v. International Geomarine Corp.*, 312 F.Supp. 825 (Del.1970).

4. *Procedural Issues*

GAC argues that the procedures followed by the court below in arriving at a decision were defective in that (a) the court below failed to exercise its independent judicial discretion in entering its findings and conclusions; and (b) the court erred in disposing of GAC's arbitration claim without a trial-type evidentiary hearing.

(a) GAC states that the findings of fact and conclusions of law were adopted entirely from the proposed findings and conclusions submitted by UNC. GAC argues that this procedure was in violation of N.M.R. Civ.P. 52(B)(a)(5) and (7), N.M.S.A.1978, and also in violation of the leading case law.

In reviewing the cases cited by GAC it appears that the practice of adopting findings and conclusions entirely as submitted by one of the parties has been held to be error in only the most extreme circumstances. *See Mora v. Martinez*, 80 N.M. 88, 451 P.2d 992 (1969); *Chicopee Manufacturing Corp. v. Kendall Company*, 288 F.2d 719 (4th Cir. 1961), *cert. denied*, 368 U.S. 825, 82 S.Ct. 44, 7 L.Ed.2d 29 (1961). Most of the cases hold that, although the practice is not to be commended, it is not reversible error so long as the findings adopted are supported by the record. *United States v. El Paso Gas Co.*, 376 U.S. 651, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964); *U. S. v. Crescent Amusement Co.*, 323 U.S. 173, 65 S.Ct. 254, 89 L.Ed. 160 (1944); *Bradley v. Maryland Casualty Company*, 382 F.2d 415 (8th Cir. 1967). The prodigious record in this case provides ample support for the court's findings.

The court entered an order expressly refusing all requested findings and conclusions inconsistent with those announced in its decision. GAC urges that there was a failure to strictly comply with Rule 52(B)(a)(5) since the judge did not mark GAC's requested findings and conclusions "refused". We find no prejudice and thus no reversible error. *Martinez v. Research Park, Inc.*, 75 N.M. 672, 410 P.2d 200 (1966), *rev'd on other grounds*, 86 N.M. 151, 520 P.2d 1096 (1974).

As to Rule 52(B)(a)(7), GAC argues that the court adopted the findings and conclusions offered by UNC and, by separate order, refused GAC's "inconsistent" findings and conclusions. The gist of this argument is that this violates the single document requirement of the rule. However, the word "decision" as used in Rule 52 means " 'findings of fact and conclusions of law.' " *Trujillo v. Tanuz*, 85 N.M. 35, 38, 508 P.2d 1332, 1335 (Ct.App.1973). Rule 52 contains no requirement that an order *refusing* proposed findings be included in the same document as the court's decision.

(b) GAC's motion for a stay requested a hearing. The trial court gave the parties short notice to submit affidavits and briefs on the facts and the law, but did not hear oral argument or testimony. GAC did not object at the trial level to the sufficiency of the hearing, did not complain that it was being deprived of due process, and did not tender any additional evidence in support of the motion. This issue is raised for the first time on appeal. GAC now argues that it was entitled to a trial-type hearing, claiming that the Federal Arbitration Act and the constitutional due process clauses require such a hearing. The question, however, is what type of hearing is "appropriate to the nature of the case." *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). We must look to the Federal Arbitration Act and the cases interpreting it.

Section 3 of the Federal Arbitration Act provides for a stay of pending court action on application of one of the parties when the trial court is satisfied that the issue involved is referable to arbitration and that the applicant for the stay of court proceedings is not in default in proceeding with such arbitration. Section 4 of the Act, on the other hand, contemplates a situation where no court action is pending. It allows for a party to petition any *United States District Court* for an order to compel arbitration, and provides for jury trial. *Prima Paint v. Flood & Conklin*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) held that, under either section, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In that case, the Court said nothing regarding the procedures to be followed in deciding those limited issues.

Section 6 of the Federal Arbitration Act states: "Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided." Section 4 is the only exception to § 6. *World Brilliance, supra.*

Section 4 provides: "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed . . . ." By its literal language, § 4 is applicable only to United States District Courts. *See Robert Lawrence*, 271 F.2d at 407. We have found no authority which indicates that a party may petition a state court for an order to compel arbitration under § 4 of the Federal Arbitration Act. We therefore conclude that § 4 is not applicable to this case.

Except for claims brought pursuant to § 4 of the federal act, claims under that act are to be heard as motions rather than by trial. *World Brilliance, supra.* "Motions may be decided wholly on the papers, and usually are, rather than after oral examination and cross-examination of witnesses." *Id.* 342 F.2d at 366. Contrary to the arguments of GAC, *Prima Paint, supra*, does not change the import of the decision in *World Brilliance.*

GAC claims that the failure to accord it a hearing was a violation of its due process rights. The requirements of due process are not technical, and no particular form of procedure is necessary for protecting substantial rights. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974). The circumstances of the case dictate the requirements. *Rivera-Lopez v. Gonzalez-Chapel*, 430 F.Supp. 704 (D.Puerto Rico 1975). The integrity of the fact-finding process and the basic fairness of the decision are the principal considerations. *Boykins v. Fairfield Board of Education*, 492 F.2d 697 (5th Cir. 1974), *cert. denied*, 420 U.S. 962, 95 S.Ct. 1350, 43 L.E2d 438 (1975). Oral argument on a motion is not a due process right. *Spark v. Catholic University of America*, 167 U.S.App.D.C. 56, 510 F.2d 1277 (1975); *Skolnick v. Spolar*, 317 F.2d 857 (7th Cir. 1963), *cert. denied*, 375 U.S. 904, 84 S.Ct. 195, 11 L.Ed.2d 145 (1963).

In our case, the trial judge was ending the second month of the trial on the merits,

and had virtually lived with the participants in this controversy for over two years at the time the ruling complained of was made. The record was approaching the 10,000 page point, and exhibits were running into the hundreds of thousands of pages and were being measured by the running foot.

The parties had full opportunity to brief the facts and the law, and they filed extensive briefs with the court before this decision. Both sides filed requested findings of fact and conclusions of law.

Although UNC claims that GAC waived its right to a hearing by failing to properly object and alert the court to the right, if it had such right, we do not decide the issue of waiver. We hold instead that the hearing held by the court was "appropriate to the nature of the case". *Mullane, supra; World Brilliance, supra;* 9 U.S.C. § 6.

5. *Inconsistency of Proceedings*

GAC claims that the actions of the trial court were inconsistent with the holdings of the U.S. Supreme Court in *General Atomic Co. v. Felter,* 434 U.S. 12, 98 S.Ct. 76, 54 L.Ed.2d 199 (1977). This bears on the district court's determination not to stay the trial on the grounds that GAC had waived its right to arbitrate and that the New Mexico antitrust claims were not arbitrable as a matter of law.

In *General Atomic,* the Supreme Court ruled that, "it is not within the power of state courts to bar litigants from filing and prosecuting *in personam* actions in the federal courts." 434 U.S. at 12, 98 S.Ct. at 76. The district court then modified its April 2, 1976, injunction to exclude from its terms and conditions all *in personam* actions in federal courts "and all other matters mandated to be excluded from the operation of said preliminary injunction by the Opinion of the United States Supreme Court, dated October 31, 1977."

The district court had jurisdiction over the arbitration controversy under the Federal Arbitration Act, at least up to approximately sixty days into the trial of the case on the merits, when GAC made demand for arbitration and moved for a stay in the proceedings. When GAC sought a stay the trial court had the obligation to determine whether the issues involved in the suit were referable to arbitration under the agreements, and whether "the applicant for the stay is not in default in proceeding with such arbitration. . . ." 9 U.S.C. § 3. The trial judge made these determinations in favor of UNC. There is nothing in the Supreme Court's decision that prohibits this type of disposition since it comports with the federal statutes.

There was nothing in the amended injunction which prohibited GAC from demanding arbitration in the case to be conducted in any location, so long as an application was made to the district court to stay the pending trial. The Federal Arbitration Act prevented GAC from proceeding with arbitration without an order from Judge Felter. 9 U.S.C. § 3.

Furthermore, in *General Atomic Co. v. Felter,* 436 U.S. 493, 496–97, 98 S.Ct. 1939, 58 L.Ed.2d 480 (1978), decided after argument in this case, the Court observed: "Clearly, our prior opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate * * *. Nor did our prior decision prevent the Santa Fe court * * * from declining to stay its own trial * * *."

6. *Arbitration of State Antitrust Laws*

The trial court held that claims raised under the New Mexico Antitrust Act, 57–1–1 to 6, N.M.S.A.1978, were not arbitrable and that other claims in the suit were so intertwined with the anti-trust claims, that none were arbitrable. Although we consider that our decision that GAC has waived its arbitration rights is controlling, in the interest of judicial economy, we decide the antitrust questions.

Even though the Federal Arbitration Act contemplates that *all* claims are arbitrable where there is a contract to arbitrate, the federal courts have established an exception where the federal antitrust laws are con-

cerned. In reconciling two strong and conflicting federal policies, the federal courts have established the rule that claims under the Federal Antitrust Act are not arbitrable under the Federal Arbitration Act. *Applied Digital Tech., Inc. v. Continental Cas. Co.*, 576 F.2d 116 (7th Cir. 1978); *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974); *Power Replacements, Inc. v. Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970); *American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968). The New York courts have held that claims arising under that state's antitrust act were not arbitrable under the New York Arbitration Act. *Schachter v. Lester Witte & Co.*, 52 A.D.2d 121, 383 N.Y.S.2d 316 (1976), *aff'd on other grounds*, 396 N.Y.S.2d 175, 364 N.E.2d 840 (1977); *Aimcee Wholesale Corp. v. Tomar Products, Inc.*, 21 N.Y.2d 621, 289 N.Y.S.2d 968, 237 N.E.2d 223 (1968). We found no case on the issue of whether state antitrust claims are arbitrable under the Federal Arbitration Act. The parties cited none.

GAC argues that, by virtue of the supremacy clause of the United States Constitution, state antitrust claims cannot be applied to bar arbitration under the Federal Arbitration Act. We do not agree.

The policies underlying both federal and state antitrust laws are concurrent, as indicated by the legislative history of the federal act. During the debates on the federal legislation, Senator Sherman commented:

> Each State can and does prevent and control combinations within the limit of the State. This we do not propose to interfere with. The power of the State courts has been repeatedly exercised to set aside such combinations . . . .

21 Cong.Rev. 2456 (1890).

Senator Sherman further stated that the act was designed to "arm the Federal courts . . . that they may co-operate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States . . ." and that the Act was "in this way to supplement the enforcement of the established rules of common and statute law by the courts of the several States." 21 Cong.Rec. 2457 (1890).

Twenty-one states had constitutional or statutory antitrust laws when the Sherman Antitrust Act was passed on July 2, 1890. 26 Stat. 209. 15 U.S.C. § 1 *et seq.* Very shortly thereafter in 1891, the Territorial Legislature of New Mexico passed an antitrust act in which the pertinent and material language is almost identical with the federal law. Chapter 10, § 1 *et seq.*, page 28, *Acts of the Legislative Assembly of the Territory of New Mexico*, 1891. The New Mexico Constitution in Article IV, § 38, later provided that the Legislature "shall enact laws to prevent trusts, monopolies and combinations in restraint of trade."

To further emphasize the common purpose underlying antitrust enforcement and the cooperation between federal and state authorities, we note that as late as the 95th Congress $11 million in federal grants were made available to aid the states in improving antitrust enforcement. Pub.L. 95–86. *See* S.Rep.No.95–285 to accompany H.R. 7556, 95th Cong., 1st Sess. 18 (1977).

The underlying purposes behind both the federal and state Laws are the same, to establish a "public policy of first magnitude"; that is, promoting the national interest in a competitive economy. *American Safety Equipment, supra.* We perceive no "clash of competing fundamental policies" between the two statutes as GAC claims. We are convinced by the basic policy considerations expressed in the federal and New York cases holding that antitrust issues are not arbitrable. *American Safety Equipment, supra; Aimcee, supra.* The cases have developed a body of law that is supportive of an integrated federal-state policy mandating that our courts not abdicate their control over antitrust policy. *Aimcee, supra.*

The rationale for this principle is well-stated in *American Safety Equipment, supra.* The court reasoned that a claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competi-

tive economy. The plaintiff is likened to a private attorney-general who protects the public's interest. Violations can affect hundreds of thousands—perhaps millions—and inflict staggering economic damage. "We do not believe that Congress intended such claims to be resolved elsewhere than in the courts." 391 F.2d at 827. The court thought it proper to ask whether contracts of adhesion between alleged monopolists and their customers should determine the forum for trying antitrust violations. "Since commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues of great public interest." *Id.* at 827. It would surely not be a way of assuring the customer that objective and sympathetic consideration would be given to his claim. The court stated:

> We conclude only that the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make the outcome here clear.

Id. at 827–28.

The validity of these reasons does not vanish simply by exchanging the federal judge for one in a state court who is charged with the same responsibility to enforce a strong public policy against monopolistic practices.

"It is now cardinal doctrine that the public interest in the enforcement of antitrust laws makes antitrust claims inappropriate subjects for arbitration." *Hunt v. Mobil Oil Corporation,* 410 F.Supp. 10, 25 (S.D.N.Y. 1976), *cert. denied,* 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977). This strong language leaves no room for argument that, if you swap a large judge for a small one, public interest disappears.

The New York Court of Appeals in *Aimcee, supra,* held that the enforcement of the state's antitrust policy was of such extreme importance to all of its people that commercial arbitration was not a fit instrument for the determination of these controversies. The court reasoned that arbitrators are not bound by rules of law, and their decisions are essentially final. The awards may not be set aside for misapplication of the law. Records need not be kept upon which a review of the merits may be had. Arbitrators are not obliged to give reasons for their rulings or awards. The courts may be called upon to enforce arbitration awards which are directly at variance with the statutory law and the public policy as determined by the decisions of the court. *See generally Applied Digital, supra; Cobb, supra; Power Replacements, supra; American Safety Equipment, supra; Aimcee, supra;* and *Annot.,* 3 A.L.R.Fed. 918, § 2 (1970).

GAC cites several cases which hold that, in enacting the Federal Arbitration Act, Congress created federal substantive law which controls over inconsistent state substantive law. *E. g. Grand Bahama Petroleum Co. v. Asiatic Petroleum,* 550 F.2d 1320 (2d Cir. 1977); *Commonwealth Edison Co. v. Gulf Oil Corp.,* 541 F.2d 1263 (7th Cir. 1976); *Stokes v. Merrill Lynch, Pierce, Fenner & Smith,* 523 F.2d 433 (6th Cir. 1975); *Lawn v. Franklin,* 328 F.Supp. 791 (S.D.N.Y.1971). In each of the cases cited by GAC, however, the Federal Arbitration Act was held to control over various *conflicting* state laws, other than state antitrust statutes.

We hold that the enforcement of state antitrust law by the courts rather than by arbitrators is entirely consistent with congressional intent because (1) the state and federal antitrust acts serve to protect the same societal interests, and (2) the Federal Arbitration Act itself provides that arbitration agreements in contracts involving commerce are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Title 9 U.S.C. § 2 has been construed by several courts. *Litton RCS, Inc. v. Pennsylvania Turnpike Commission,* 376 F.Supp. 579 (E.D.Pa.1974), *aff'd by order,* 511 F.2d 1394 (3d Cir. 1975), turned on whether a state agency had authority to enter into the particular contract. The District Court held that before a state may limit conditions under which a public instru-

mentality, otherwise possessing the power to arbitrate, may contract to arbitrate, it must do so in a clear and express manner. The court found that the provisions of the Pennsylvania Arbitration Act did constitute an express limitation on the authority of the Turnpike Commission to contract in a manner contrary to such act. The court then held that the Federal Arbitration Act provided for the incorporation of state law governing enforceability of contracts. It is only when a state law contravenes express provisions of the federal act that the state law must fail. If state law prohibits a public instrumentality from agreeing to arbitrate in a certain manner, the defense that the agency acted ultra vires, in agreeing to arbitrate in that manner, was available to the agency under the Federal Arbitration Act "*if such a defense would constitute 'grounds as exist at law or in equity for the revocation of any contract.'*" (Emphasis added; citation omitted). *Id.* at 587.

In *American Airlines, Inc. v. Louisville & Jefferson C. A. B.*, 269 F.2d 811 (6th Cir. 1959), the court reviewed the congressional intent behind the Federal Arbitration Act and stated with reference to arbitration agreements:

> [T]here appears no indication whatever of congressional intent that such agreements would be made valid, irrevocable and enforceable solely by virtue of the Federal arbitration statute.
>
> * * * * * *
>
> [T]he Federal Arbitration Statute was intended to declare no more than that agreements to arbitrate "involving commerce" . . . are by virtue of the Federal arbitration statute valid and enforceable, *unless by other Federal law or by State law such agreements are for other reasons to be held invalid or revocable or unenforceable.* (Emphasis added.)

Id. at 816.

The Federal Arbitration Act clearly does not require enforcement of arbitration agreements contained in contracts which are themselves void by operation of a state law which applies to contracts generally. *See Collins Radio Company v. Ex-Cell-O Corporation*, 467 F.2d 995 (8th Cir. 1972). Section 57–1–3, N.M.S.A.1978, provides:

> All contracts and agreements in violation of the foregoing two sections [which prohibit monopolies and restraints of trade] shall be *void* . . . .

Since the federal and state antitrust laws protect the same interests of society, we do not perceive that Congress intended, by enacting the Federal Arbitration Act, to require arbitration under the terms of a contract which is challenged as being in violation of the state antitrust laws. Because of the policy reasons mentioned above, we deem that issues raised under the state antitrust act are not arbitrable.

GAC argues that several issues are unrelated to the antitrust claim and are severable. They argue that the court erred in not allowing arbitration of these other issues.

Whether all issues in the case were so intertwined with antitrust issues as to prohibit arbitration was a question which was answered in the affirmative in *Hunt, supra.* Citing *American Safety Equipment, supra,* and *Cobb, supra,* the court in *Hunt* stated the question to be:

> [W]hether the antitrust issues so permeate the entire case that it would not be "easy for an arbitrator to separate the antitrust issues from the other issues in the case, and to proceed to decide the arbitrable issues without inquiry into the antitrust issues."

410 F.Supp. at 26.

The standard of review is whether the trial court abused its discretion. *Applied Digital, supra; A. & E. Plastik Pak Co., Inc. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968). A review of the record in this case clearly indicates that the issues are "complicated, and the evidence extensive and diverse . . . ." *American Safety Equipment*, 391 F.2d at 827. It would not be "easy for an arbitrator to separate the antitrust issues from the other issues in the case, and to proceed to decide the arbitrable issues without inquiry into the antitrust issues." *Cobb*, 488 F.2d at 50.

The lower court did not abuse its discretion in holding that all the issues in this case are so intertwined with the antitrust issues that no issues are arbitrable.

7. *Arbitration with Duke and Commonwealth*

GAC contends that UNC has a duty to arbitrate jointly with GAC and Duke Power Company as well as Commonwealth Edison Company, two utility firms that were relying on GAC to supply them with uranium obtained from UNC under the 1973 Uranium Supply Agreement. Duke and Commonwealth had separate contracts under which GAC was obligated. However, GAC claimed that UNC's duty was to supply the uranium "in accordance with the terms and conditions" of the utility contracts. GAC urges that the arbitration clauses in the separate Duke and Commonwealth contracts are incorporated into the 1973 Uranium Supply Agreement by reference because of the above quoted language.

UNC argues that Duke and Commonwealth are not parties to this suit, that the rights and obligations as to those two companies as related to UNC cannot be litigated, and that there is nothing in any of the contracts which obligates UNC to arbitrate with GAC with regard to its duties to those two companies.

The trial court found that the Duke and Commonwealth contracts contained no arbitration agreements between GAC and UNC, and concluded that the agreements with the two utilities did not give GAC any right to demand arbitration with UNC.

Since this issue deals solely with GAC's rights to arbitrate with UNC under the terms of the 1973 Uranium Supply Agreement, it is not necessary that we address this issue. GAC has waived whatever arbitration rights it had under the 1973 Uranium Supply Agreement.

8. *Alleged Findings on Issues Not Addressed Below*

GAC complains that the court's finding that *every* extension of time sought by GAC was accompanied by a representation that the extension was needed to prepare for trial is not correct because there is no evidence that *every* action was so accompanied. Error is also alleged in the finding by the trial court that UNC had furnished to GAC *all* of the materials to which it was entitled, GAC contending that the evidence indicates that UNC had made inadequate discovery. GAC further complains that there is no evidence in the record to support the finding that the information obtained by GAC in discovery would not otherwise be available to it. It is not shown that there is prejudice to GAC, even if the challenges have merit. We hold that the challenges to these three findings do not constitute material issues that affect the disposition of this case. *Alonso v. Hills*, 95 Cal. App.2d 778, 214 P.2d 50 (1950); *Costello v. Bowen*, 80 Cal.App.2d 621, 182 P.2d 615 (1947).

It was never intended that the Federal Arbitration Act be used as a means of furthering and extending delays. The policy is to eliminate the delay and expense of extended court proceedings. *Trafalgar Shipping Co. v. International Milling Co.*, 401 F.2d 568 (2d Cir. 1968), *Gulf Central Pipeline Co. v. Motor Vessel Lake Placid*, 315 F.Supp. 974 (E.D.La.1970).

This court holds that the critical elements of inconsistent action, unwarranted delay and substantial prejudice are too prevalent in this case to avoid a holding of waiver. Thus, we affirm the decision of the trial court.

IT IS SO ORDERED.

SOSA, C. J., and PAYNE, J., concur.

597 P.2d 314

Robert J. SCHAEFER, James F. DeShon, Katherine Schnidt and Geneva Still, Plaintiffs-Appellants,

v.

Gene E. HINKLE and First National Bank in Albuquerque, as Trustee, Defendants-Appellees.

No. 12106.

Supreme Court of New Mexico.

June 20, 1979.

Wollen & Segal, Sylvain Segal, Jr., Albuquerque, for plaintiffs-appellants.

Sutin, Thayer & Browne, Jonathan B. Sutin, Marianne Woodard, Albuquerque, for defendants-appellees.

OPINION

SOSA, Chief Justice.

The issue presented in this appeal is whether the trial court erred in concluding that plaintiffs' interests in Montgomery-Eubank, Ltd., terminated when they left the Hinkle Corporation. We find no error.

Plaintiffs brought this action in the District Court of Bernalillo County seeking a judgment declaring that they are limited partners in Montgomery-Eubank Company, Ltd. Following a hearing, the court granted defendant's motion for summary judgment and dismissed the complaint. Plaintiffs appeal. We affirm.

On July 31, 1975, plaintiffs, as limited partners, and defendant Hinkle, as general partner (hereinafter referred to as defendant), entered into a limited partnership agreement (Agreement) of Montgomery-Eubank, Ltd. Defendant was president and director of Walker & Hinkle, Inc., a New Mexico corporation engaged in the real estate brokerage business. Plaintiffs were employees of this corporation. The Agreement recited the capital contributions of each plaintiff and the corresponding percentage of their respective partnership interests as follows:

Schaefer	$4.00	4%
DeShon	4.00	4%
Schnidt	6.00	6%
Still	4.00	4%.

Hinkle's contribution to the capital of the partnership of $100 entitled him to 40% of the partnership's profits. Hinkle's interest in the partnership was owned by defendant First National Bank in Albuquerque as Trustee under a revocable *inter vivos* trust.

Article VII E of the Agreement provided:

> If at any time during the first three years after the Effective Date, any of the Limited Partners shall for any reason no longer be employed by Walker & Hinkle, Inc., the General Partner may at his option purchase the entire limited partnership interest of that Limited Partner for a cash purchase price equal to $1 times the number of percentage points of Limited Partnership interest owned by the Limited Partnership, payable on or before 90 days after termination of employment.

On November 1, 1975, the principals of Walker & Hinkle, Inc., dissolved their affiliation. Plaintiffs terminated their employment with that corporation and became employed on December 1, 1975, by the Hinkle Corporation, which defendant had formed. Defendant took no action as general partner of the limited partnership upon dissolution of Walker & Hinkle, Inc., to terminate or purchase plaintiffs' limited partnership interest. Instead, defendant treated plaintiffs' employment with the Hinkle Corporation as a continuation of their previous employment.

Plaintiffs terminated their employment with the Hinkle Corporation within three years following the date of the Agreement. Still quit on December 15, 1975; Schaefer on October 15, 1976; DeShon on May 1, 1976; and Schnidt on November 30, 1976. Defendant subsequently filed Amended Certificates of Limited Partnership documenting his acquisition of plaintiffs' interests. Defendant alleged that he mailed Still a check for the amount of her capital contribution on April 1, 1976; she denies ever receiving the check. In March 1977 defendant mailed checks for the amount of their capital contributions to Schnidt, Schaefer, and DeShon. They refused tender of these checks.

Plaintiffs filed this action seeking a judgment declaring that they are entitled to retain their limited partnership interests in Montgomery-Eubank Company, Ltd. The court granted defendant's motion for summary judgment. The district court found that plaintiffs received their limited partnership interests purely as an inducement to continue their employment with Walker & Hinkle, Inc., beyond three years from the date of the Agreement. The court also found that each plaintiff understood that his or her partnership interest would be terminated if he or she left the Hinkle Corporation within three years from the date of the Agreement. The court concluded that plaintiffs' limited partnership interests terminated upon their leaving the Hinkle Corporation.

The issue in this case is resolved by a determination of whether or not defendant's right to acquire plaintiffs' limited partnership interests was conditioned upon his payment of the purchase price within a 90-day period. Plaintiffs argue that Article VII E required defendant to pay them the purchase price within 90 days after termination of their employment with Walker & Hinkle, Inc. Defendant counters that his right to acquire plaintiffs' interests was not conditioned upon payment of the purchase price within any 90-day period.

The function of the courts is to interpret and enforce a contract as made by the parties. *Woods v. Collins*, 87 N.M. 370, 533 P.2d 759 (Ct.App.1975), *cert. denied*, 87 N.M. 369, 533 P.2d 758 (1975). A contract will be considered and construed as a whole, with meaning and significance given to each part in its proper context, so as to ascertain the parties' intentions. *Schultz & Lindsay Construction Co. v. State*, 83 N.M. 534, 494 P.2d 612 (1972). The primary objective in construing a contract is to ascertain that intent. *Woods, supra*; *Schultz, supra. See also* 4 S. Williston, *A Treatise on the Law of Contracts* § 601 (3d ed. Jaeger 1961). Where a clause in the contract is ambiguous, the intent of the parties will be ascertained from the language used, the conduct of the parties, and the surrounding circumstances. *Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.*, 84 N.M. 524, 505 P.2d 867 (Ct.App. 1972), *cert. denied*, 84 N.M. 512, 505 P.2d 855 (1972).

We find that, in the context of the entire partnership agreement, defendant's right to purchase plaintiffs' interests was not conditioned upon payment of the purchase price within any 90-day period. The "payable on or before 90 day" provision in Article VII E is merely a promise independent of defendant's right, rather than a condition.

Plaintiffs never denied that defendant had advised them throughout their employment with Walker & Hinkle, Inc., and with the Hinkle Corporation that their limited partnership interests would be terminated if they left employment within three years from July 31, 1975. Plaintiffs' strict and literal reading of Article VII E would require this Court to totally ignore the import of the three-year duration of employment provision. In addition, plaintiffs do not challenge the court's finding that they received their limited partnership interests purely as an inducement to continue their employment beyond three years from the date that they entered into the Agreement. The logical conclusion is that the parties intended that plaintiffs' interest would vest only if they remained employed by the Hinkle Corporation for three years from the date of the Agreement. Plaintiffs failed to remain in said employment for the requisite three years.

We find that the circumstances surrounding the Agreement, the import of that Agreement as a whole, and the undisputed parol evidence of the parties show that defendant's right to acquire plaintiffs' interests was not conditioned upon payment of the purchase price within 90 days after termination of their employment with the Hinkle Corporation. We find that there was substantial evidence to support the trial court's findings and conclusions of law. The judgment of the court is therefore affirmed.

JOHN B. McMANUS, Jr., Senior Justice, and PAYNE, J., concur.

597 P.2d 316

In the Matter of Dale B. DILTS, Attorney at Law.

No. 12596.

Supreme Court of New Mexico.

July 11, 1979.

JUDGMENT

DAN SOSA, Chief Justice.

THIS MATTER came on for hearing before the Court upon the report of the Disciplinary Board and the record of proceedings before Hearing Committee A in the Central Disciplinary District; the Board appearing by William W. Gilbert, Chief Disciplinary Counsel and Respondent appearing in person and by Wycliffe V. Butler, Esquire, his counsel.

And the Court having studied the record and heard the arguments of counsel and being fully advised:

The Court finds the Respondent, Dale B. Dilts, guilty of unprofessional conduct in that while representing one Alberta Cox as her lawyer he allowed his independent professional judgment on her behalf to be impaired by his representation of conflicting interests and in that, through negligence and acceptance of undue influence and instructions from others, he unintentionally aided an embezzlement scheme in which she was the victim; all contrary to various Rules under Canons 5, 6 and 7 of the Code of Professional Responsibility—Canons of Ethics. The Court concludes that discipline is warranted.

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that the Respondent Dale B. Dilts be and he hereby is suspended from the practice of law in all courts of the State of New Mexico for a period of thirty (30) days beginning August 1, 1979, and thereafter until reinstated as provided by the Rules of this Court.

AND IT IS FURTHER ORDERED that the Disciplinary Board recover its costs in this proceeding which are hereby assessed at $923.94.

597 P.2d 317

STATE of New Mexico, Plaintiff-Appellee,

v.

Charles Roland ARAGON, Defendant-Appellant.

No. 3979.

Court of Appeals of New Mexico.

June 5, 1979.

Timothy P. Woolston, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Arthur Encinias, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

This appeal involves the legal effect of a deferred sentence when, in the same judgment, a fine was imposed, the fine having been paid before the deferral was revoked and sentence imposed.

In July, 1977, defendant pled guilty to a fourth degree felony. The authorized sentence was imprisonment for not less than one nor more than five years, or a fine not to exceed $5,000, or both. Section 31–18–3(D), N.M.S.A.1978. However, the trial court, pursuant to § 31–20–3, N.M.S.A.1978, could defer the imposition of sentence.

The July, 1977 judgment states: "[I]t is ordered that imposition of sentence be deferred for a period of three years and defendant is ordered to be placed on probation . . . . Further, the defendant be and is hereby fined in the amount of $2,000."

A fine is a sentence. *State v. Holland*, 91 N.M. 386, 574 P.2d 605 (Ct.App. 1978). The July, 1977 judgment is contradictory because it both defers imposition of sentence and imposes a sentence in the form of a fine. The contradiction exists because defendant pled guilty to only one count; we do not have a situation where the deferral and the fine may be applied to separate counts. See § 31–20–4, N.M.S.A. 1978.

Defendant violated a probation condition imposed in connection with the deferred sentence of July, 1977. In January, 1979, the trial court revoked the deferral and imposed the prison sentence authorized for a fourth degree felony. This order of the trial court also imposed a fine "in the amount of $2,000.00, which has been paid in accord with the Order previously entered."

Defendant objected to this order, pointing out that he had been fined $2,000 in the July, 1977 judgment. There is no question that this fine had been paid. The minutes of the July, 1977 sentencing hearing state that defendant was remanded to the sheriff until the fine was paid. Objecting to the prison sentence, defendant contended "there is no jail sentence possible in this case at this time . . . ."

In the trial court, the prosecutor's position was that the deferred sentence of July, 1977 could properly be revoked, that the fine which defendant had paid had no effect on the deferral, that defendant's only relief was to seek to have the fine remitted. On appeal, the State contends the fine imposed by the July, 1977 judgment was void, but asserts this does not aid defendant because, in imposing sentence after revoking the deferral, the trial court imposed the same fine.

The trial court could not both defer sentence and impose sentence, for one offense, in the same judgment. Thus, the issue is the legal effect of the deferred sentence imposed in the July, 1977 judgment.

One approach to answering the issue is to construe the sentences imposed (the deferral and the fine) in order to give effect to the intent of the trial court. 24 C.J.S. Criminal Law § 1585 (1961) states: "A sentence, as any other judgment, is construed in its entirety according to the usual canons of construction, and so as to give effect to the intent of the sentencing court." See *Hollingsworth v. Hicks*, 57 N.M. 336, 258 P.2d 724 (1953). This approach is of no assistance in this case because the minutes of the July, 1977 sentencing hearing show the trial court intended both to defer sentence and also to impose a sentence in the form of a fine.

Another approach is to determine whether either the deferred sentence or the fine was void, *at the time they were entered.* This is the approach taken by the parties. It is unnecessary, in this case, to determine whether a portion of the July, 1977 judgment was void at the time of entry.

We determine the question of the legal effect of the deferred sentence at the time the deferral was revoked; we do so on the basis of an executed judgment. We adopt this approach because both the deferred sentence and the fine, standing alone, were within the authority of the trial court. The problem arises from their interrelationship. Because the trial court could not both defer a sentence and impose sentence for the same offense, either the deferral or the fine was subject to being stricken as an improper sentence. "But the execution of either part of the sentence . . . renders the remaining part void. . . . Defendant's payment of the fine executed the sentence imposed under Count I, thus rendering void and of no effect the further provisions of Count I respecting suspension of imprisonment and probation." *State v. Robles*, 87 Ariz. 359, 351 P.2d 642 (1960).

When defendant paid the fine, the sentence of July, 1977 was executed. The deferred sentence became void at the time the fine was paid. Probation was authorized in this case solely because of the deferred sentence. Section 31-20-5, N.M.S.A. 1978. Once the deferred sentence became void, the probation requirements were no longer in effect. A violation of probation conditions, which were not in effect, was not a basis for revoking a deferred sentence, which was void. See *State v. Doe*, 90 N.M. 249, 561 P.2d 948 (Ct.App. 1977).

Once the sentence was executed by payment of the fine, the trial court lacked authority to impose additional punishment upon defendant. *State v. Allen*, 82 N.M. 373, 482 P.2d 237 (1971); *State v. Baros*, 78 N.M. 623, 435 P.2d 1005 (1968); *State v. Soria*, 82 N.M. 509, 484 P.2d 351 (Ct.App. 1971).

The order and commitment filed January 31, 1979 is reversed. The cause is remanded with instructions to discharge the defendant from the sentence imposed by the order and commitment.

IT IS SO ORDERED.

ANDREWS, J., concurs.

HERNANDEZ, J., specially concurring.

HERNANDEZ, Judge (specially concurring).

I concur in the opinion. However, I think that it is necessary to make clear my understanding of its holding.

As Judge Wood points out the authorized sentence for a fourth degree felony is imprisonment for not less than one year nor more than five years, or to the payment of a fine not more than $5,000 or to both imprisonment and fine. Section 31-18-3(D), supra. Had the trial court imposed a sentence of imprisonment and a fine it could have entered "an order suspending in whole or in part the execution of the sentence." Section 31-20-3(B), N.M.S.A.1978. The trial court, however, imposed sentence of a $2,000 fine and deferred sentence at the same time. Presumably the trial court intended to impose a sentence of both fine and imprisonment, but this is not what resulted. The holding of this case is that you cannot impose part of a sentence and defer another part.

597 P.2d 745

ORTEGA, SNEAD, DIXON & HANNA, a partnership, Plaintiff-Appellee,

v.

Joseph A. GENNITTI, Pecos Land and Cattle Corporation, Orchid Island Hotels, Inc. and Josephine Gennitti, Defendants-Appellees,

Louis Meneghin and Jeanette Meneghin, his wife, Cross-Defendants-Appellees,

Bill Frost and Leta M. Omta, personal representative for John W. Omta, Deceased, Defendants-Appellants.

No. 11418.

Supreme Court of New Mexico.

July 26, 1979.

Solomon, Roth & Van Amberg, Charles S. Solomon, Santa Fe, for defendants-appellants.

Matias A. Zamora, Santa Fe, Michael D. Bustamante, Albuquerque, Richard F. Rowley, II, Clovis, for defendants-appellees.

OPINION

PAYNE, Justice.

On May 15, 1979 an opinion in the above case was handed down by this Court. A motion for rehearing was filed by the personal representative of one of the defendants, John W. Omta, deceased. The motion for rehearing was granted in order to reconsider our original opinion. Several factual inaccuracies in the first opinion were brought to light on rehearing. Although we are satisfied that these matters do not change the soundness of the result we originally reached, we are hereby withdrawing the opinion of May 15, 1979 in order to correct the inaccuracies.

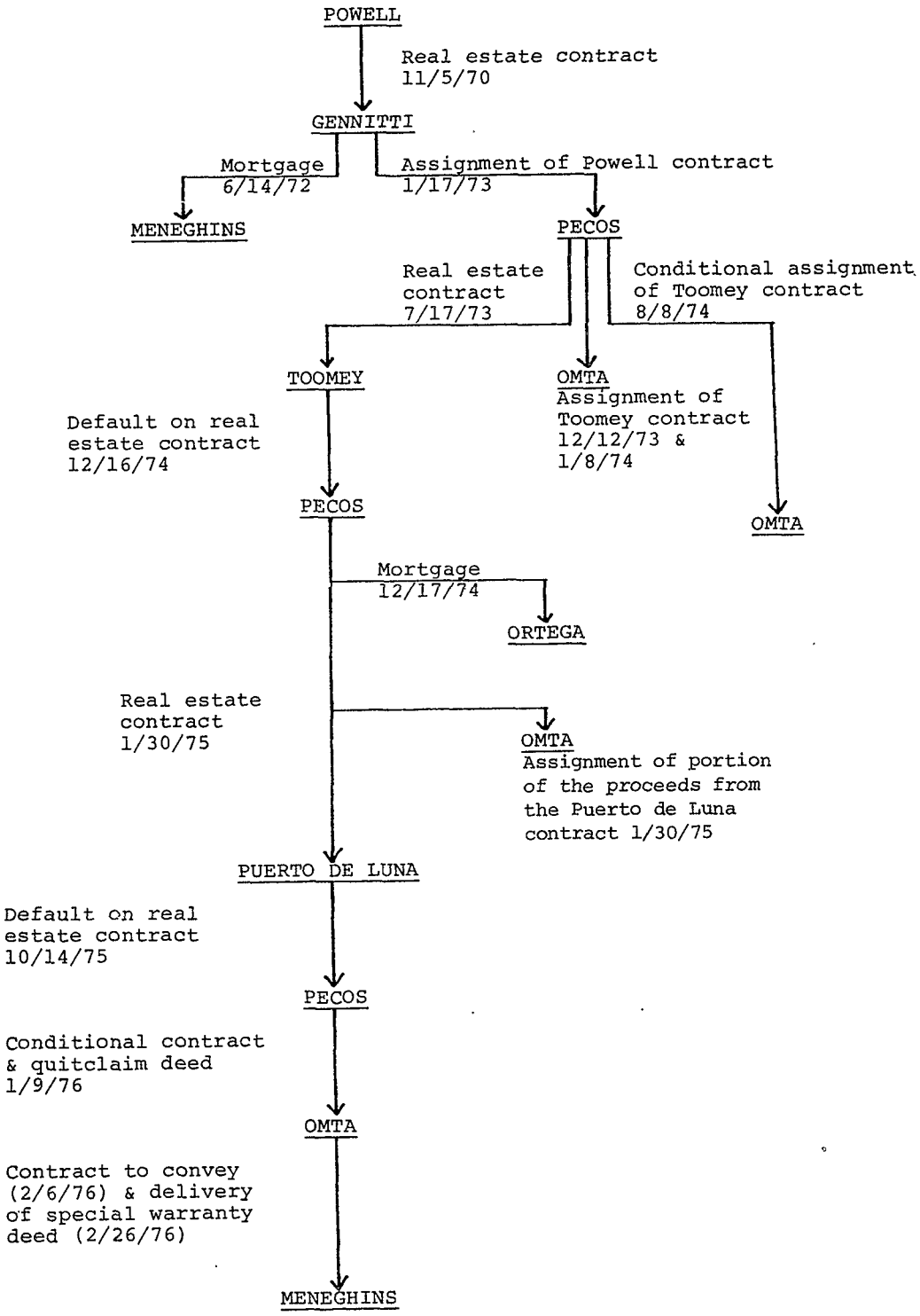
Plaintiff, Ortega, Snead, Dixon & Hanna, a partnership engaged in the practice of law, brought suit in Guadalupe County seeking judgment on an open account and foreclosure of a mortgage. A default judgment was entered against four of the eight named defendants, Joseph and Josephine Gennitti, Pecos Land and Cattle Corporation, and Orchid Island Hotels, Inc. No appeal was taken from this default judgment. The remaining four defendants, Louis and Jeanette Meneghin, and Bill Frost and John Omta, respectively, sought by counterclaim and cross-claim to quiet title to the subject property. The trial court dismissed the claim of Frost and Omta, and quieted title in the Meneghins subject to the mortgage lien in favor of Ortega. Omta appeals.[1]

The transactions which gave rise to this litigation are complicated and confusing. A diagram depicting the chain of title is set out below in order to facilitate an understanding of the nature of the dispute.

1. Subsequent to the filing of this lawsuit, but prior to trial, Frost quitclaimed whatever interest he had in the property to Omta. Subsequent to the filing of this appeal, but prior to oral argument, Omta died, and his personal representative was substituted for him as a party to the appeal. However, for the sake of simplicity, this opinion will refer simply to Omta, although the transactions were undertaken by both Frost and Omta and Omta's personal representative is actually the appellant.

[redacted]

CHAIN OF TITLE DIAGRAM



The first conveyance relevant to the issues in this case of the property which is the subject of this suit occurred in 1970 when Earl Powell, Inc. transferred the land to the Gennittis by a real estate contract (the Powell contract). The contract called for annual payments over a ten-year period. In June 1972 the Gennittis mortgaged the property to the Meneghins, and in January 1973 the Gennittis transferred their interest under the Powell contract to Pecos Land and Cattle Corporation.

In July 1973 Pecos executed a real estate contract by which the land was transferred to Robert J. Toomey (the Toomey contract). Toomey agreed to assume the payments to be made under the Powell contract, and, in addition, agreed to pay $503,000 in six consecutive annual installments of $50,000 each for the first five years, with the remainder to be paid in the sixth year. Toomey also agreed to pay the sum of $75,000 within sixty days of the date of the closing of the transaction.

On December 12, 1973 Pecos, as purchaser, entered into an agreement with Omta, as seller, for the purchase of all of the stock of Omta in a Hawaiian corporation, Orchid Island Hotels, Inc. (the Hotel contract). The Hotel contract called for a cash down payment in the amount of $603,000. In satisfaction of the down payment on the Hotel contract, Pecos assigned to Omta its right to the $75,000 then due Pecos under the Toomey contract. In addition, Pecos delivered a ninety-day promissory note for $25,000, and agreed to pay $503,000 on January 2, 1974.

By a letter agreement dated December 12, 1973, Pecos and Omta agreed that the $503,000 payment due on January 2, 1974 could be satisfied by Pecos' assignment to Omta of its interest in the Toomey contract. An assignment of Pecos' interest in the Toomey contract was executed by Pecos in favor of Omta on January 8, 1974.

On August 8, 1974 Pecos and Omta executed a promissory note and collateral agreement for the sum of $503,000 secured by an agreement which was labeled "conditional assignment." This "conditional assignment" contained the following paragraph:

> This conditional assignment supercedes any previous agreement between the parties regarding the said agreement attached as Exhibit "2" to the December 12, 1973 Purchase Agreement between the parties.

Exhibit 2 to the December 12, 1973 Purchase Agreement was the Pecos-Toomey contract of July 1973.

A separately numbered paragraph in the "conditional assignment" provided that the assignment would become effective upon the election of the assignees (Omta and Frost) to take Pecos' rights under the Toomey contract, and written notice of the election to Pecos. Omta did not give such notice until approximately six months after Toomey defaulted on his contract. In the meantime, upon Toomey's default in October 1974, the property was reconveyed from Toomey to Pecos. In December 1974 Pecos executed and delivered a mortgage note in favor of the Ortega law firm.

On January 30, 1975 Pecos sold the property to the Puerto de Luna limited partnership. On that same date Omta and Pecos agreed on an assignment of a portion of the proceeds of that contract from Pecos to Omta, and conditionally agreed to an assignment of the remainder of the proceeds. A full assignment of this contract was never executed. Puerto de Luna defaulted, and the property was reconveyed to Pecos in October 1975.

On January 9, 1976 Pecos and Omta agreed that Pecos would convey the property to Omta in return for $15,000 and Omta's promise to take the property subject to the Ortega mortgage of December 1974. Omta expressly agreed to make the payments on the Powell contract, one of which had been due on January 6, 1976. Omta did not

make the Powell payment. The trial court found that by this breach of the agreement, Omta lost all his interest in the property.

In order to preserve their interest in the land, Pecos and the Meneghins entered into an agreement on February 6, 1976 under which the Meneghins agreed to make the Powell payments, and Pecos agreed to convey the property to the Meneghins, which it did in late February 1976 by a special warranty deed.

Omta argues several issues on appeal. We address the following questions: (1) Whether the trial court had jurisdiction in a mortgage foreclosure action over a counterclaim and cross-claim to quiet title; (2) whether the Ortega law firm and the Meneghins had standing to seek cancellation of the January 9, 1976 quitclaim deed from Pecos to Omta; (3) whether the Meneghins or Omta had superior title to the property; and (4) whether Omta and Frost acted as partners.

I.

Notwithstanding the fact that he requested the same relief, Omta contends that the trial court did not have jurisdiction to entertain the Meneghins' counterclaim and cross-claim to quiet title. He cites *Clark v. Primus,* 62 N.M. 259, 308 P.2d 584 (1957) and *Jackson v. Hartley,* 90 N.M. 428, 564 P.2d 992 (1977) for the proposition that counterclaims may not be asserted in actions to quiet title. Omta argues that counterclaims and cross-claims to quiet title cannot be asserted in other statutory actions, such as in an action to foreclose a mortgage.

In *Clark* the plaintiff sued to quiet title to certain property. The trial court dismissed the defendant's counterclaims which sought an accounting for the rents and profits received from the premises. This Court held that the counterclaims were properly dismissed because "counterclaims are not within the purview of the quiet title statute, § 22–14–1, N.M.S.A.1953 Compilation. [§ 42–6–1, N.M.S.A.1978]. (Citations omitted.)" 62 N.M. at 263, 308 P.2d at 586.

The *Clark* decision was followed in *Jackson.* In *Jackson* this Court held that a counterclaim for ejectment could not be asserted in a suit to quiet title.

Neither *Clark* nor *Jackson* referred to this Court's decision in *Martinez v. Mundy,* 61 N.M. 87, 295 P.2d 209 (1956), in which a counterclaim to quiet title was permitted to be asserted in an ejectment action. In *Martinez* this Court stated:

> The plaintiff had the right to bring this suit in ejectment and to request a prayer for relief and the defendant had the right to come in with the counterclaim for remedy in the nature of a suit to quiet title. This is in accordance with the familiar rule that when a court of chancery obtains jurisdiction of a cause, it will retain it to administer full relief. (Citation omitted.)

61 N.M. at 96, 295 P.2d at 215. *Martinez* was followed in *Bailey v. Barranca,* 83 N.M. 90, 488 P.2d 725 (1971).

The law in New Mexico is obviously confusing in light of these four decisions by this Court. These cases indicate that a counterclaim to quiet title can be raised in an ejectment action (*Martinez*), but a counterclaim for ejectment cannot be raised in a quiet title action (*Jackson*). As one commentator stated:

> [W]hether or not two actions, one of which involves a suit to quiet title, can be determined in a single proceeding in New Mexico may depend upon the wholly coincidental factor of which party first commences litigation. (Footnote omitted.)

J. Walden, "The 'New Rules' in New Mexico," 25 F.R.D. 107, 121 (1960). Such a distinction is untenable.

Nowhere in *Clark* or the cases following it was any justification set forth for the principle announced therein. *Jackson, supra; Lanehart v. Rabb,* 63 N.M. 359, 320 P.2d 374 (1957). In addition, in the *Clark*

line of cases, this Court never attempted to reconcile its holdings with the New Mexico Rules of Civil Procedure.

The applicable rule in this regard is N.M. R.Civ.P. 1, N.M.S.A.1978:

> These rules govern the procedure in the district courts of New Mexico in all suits of a civil nature whether cognizable as cases at law or in equity, except in special statutory and summary proceedings *where existing rules are inconsistent herewith.* (Emphasis added.)

Clark and its progeny ignore the critical inquiry under N.M.R.Civ.P. 1: Whether the statutory rules for proceedings to quiet title are inconsistent with the applicable rules with respect to the assertion of counterclaims and cross-claims in civil actions, N.M. R.Civ.P. 13, N.M.S.A.1978. As Professor Walden stated: "A careful reading of the quieting title statute * * * reveals nothing specifically nor inherently at variance with the unrestrictive counterclaim provisions of Rule 13." 25 F.R.D. at 120, (footnotes omitted). To the contrary, the language of § 42–6–1, N.M.S.A.1978 is consistent with the application of Rule 13 in this case. That statute provides that a claim to quiet title may be brought by a mortgage holder in an action to foreclose a mortgage. The statute contemplates the trial of both a foreclosure action and a quiet title claim in a single proceeding. It would be logically inconsistent to hold that it is permissible to try both claims in one proceeding if both are asserted by the plaintiff, but it is not permissible to join them in one case if one is asserted by the plaintiff and the other arises in a defendant's counterclaim or cross-claim. *See* Walden, note 53, 25 F.R.D. at 121–22.

This incongruous holding would also be contrary to the purpose of Rule 13. In *Scott v. United States,* 354 F.2d 292, 173 Ct.Cl. 650 (1965), the court said with respect to identical portions of Rule 13 of the Federal Rules of Civil Procedure:

> The overriding emphasis is on consolidation and the expeditious resolution (where that is fair) of all the claims between the parties in one proceeding. * * The controlling philosophy is that, so far as fairness and convenience permit, the various parties should be allowed and encouraged to resolve all their pending disputes within the bounds of the one litigation. (Footnote omitted.)

Id. at 300.

The Meneghins' counterclaim and cross-claim clearly could have been raised under Rule 13. Rule 13(a) provides that a party *must* state as a counterclaim all claims arising out of the same transaction or occurrence giving rise to his opponent's claim. Rule 13(b) provides that a party *may* state as a counterclaim *any* other claim against an opposing party. Regardless of whether the Meneghins' counterclaim against Ortega is considered to arise from the same transaction or occurrence as the Ortega mortgage foreclosure action, there can be no doubt that the counterclaim could have been raised under Rule 13.

The cross-claim against Omta was also proper under Rule 13. Rule 13(g) provides that a cross-claim may state:

> any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or *relating to any property that is the subject matter of the original action.* (Emphasis added.)

The Meneghins' cross-claim clearly related to the property which was the subject of the foreclosure action.

It should be noted that N.M.R.Civ.P. 20(b) and 42, N.M.S.A.1978 provide adequate safeguards to protect against any inconvenience or undue complication which might arise from joinder of claims under Rule 13. In light of these provisions, no purpose is served by continued adherence to the *Clark* rule. *See* Walden, 25 F.R.D. at 120.

We expressly overrule the principle established in *Clark* and the cases which have relied on it. We hold that in determining whether a counterclaim or cross-

claim may be brought in a quiet title action, or whether a counterclaim or cross-claim to quiet title may be brought in any other action, the proper analysis is that provided in Rules 1, 13, 20(b) and 42. Applying those rules to the facts of this case, it is evident that the trial court did not err in hearing the Meneghins' counterclaim and cross-claim in the mortgage foreclosure action.

II.

Omta contends that neither Ortega nor the Meneghins had standing to seek cancellation of the January 9, 1976 quitclaim deed from Pecos to Omta. Omta makes several arguments to support this contention: (1) Cancellation of a deed cannot be sought in a suit to foreclose a mortgage; (2) neither Ortega nor the Meneghins were parties to the agreement pursuant to which the quitclaim deed was conveyed, and only a party is entitled to seek its cancellation; and (3) neither Ortega nor the Meneghins had a claim to the property superior to that of Omta's.

We need not address the first issue. Under Point I we held that a counterclaim to quiet title can be pled in an action to foreclose a mortgage. It is well settled that a deed may be cancelled in an action to quiet title to the property which the deed embraces. 12 C.J.S. *Cancellation of Instruments,* § 16 (1938). Pecos' January 9 quitclaim deed to Omta clearly placed a cloud on the Meneghins' asserted title.

Omta's contention that only a party to a transaction may seek its cancellation is also without merit. Although the Meneghins were not parties to the January 9, 1976 contract and deed between Omta and Pecos, their purported title was derived from Pecos. "[A] conveyance of property carries with it the incidental right of the grantee to maintain a suit in equity to set aside the voidable title of a third person. (Citations omitted.)" *Regnier v. Lay,* 21 Ill.2d 177, 171 N.E.2d 629, 630 (1961). *See also Lockhart v. Garner,* 156 Tex. 580, 298 S.W.2d 108 (1957).

Omta's third argument is that the Meneghins are strangers to the title of this property, and as such have no standing to challenge the quitclaim deed to Omta. This contention requires an examination of the respective claims to title of Omta and the Meneghins.

III.

The trial court found that Omta had lost all his interest in the property. The court found that the Meneghins had title to the property by virtue of the February 1976 special warranty deed from Pecos, but that the Meneghins' interest was subject to the December 1974 mortgage to the Ortega law firm and to the 1970 Powell real estate contract. Omta challenges these findings. He contends that he has title to the property free from the claims of both the Ortega law firm and the Meneghins.

Omta first contends that he had superior title to the property as a result of the January 8, 1974 assignment by Pecos of the Toomey contract. He argues that he and Frost never directly reassigned their interest under this agreement to Pecos. This claim is without merit.

The August 8, 1974 agreement was labeled "conditional assignment." Paragraph 2 of that agreement expressly revoked "any previous agreement" between the parties with respect to the Toomey contract. This language included the January 8, 1974 assignment of the Toomey contract. Furthermore, the assignment provided that any rights Omta had to the Toomey contract were conditional upon written notice to Pecos of an election. Omta never gave timely notice. Therefore, as of December 1974 Omta had no interest in the property by virtue of either the January 1974 assignment or the August 1974 conditional assignment.

Omta next contends that the Pecos-Puerto de Luna contract of January 30, 1975 constituted a re-institution of the Toomey contract. Omta relies on two facts to support this contention: (1) Toomey was a general partner in the Puerto de Luna lim-

ited partnership; and (2) the Puerto de Luna contract incorporated by reference most of the terms of the Toomey contract.

Even if we assume that these two facts indicated that there was a re-institution of the Toomey contract, Omta's actions indicated that his understanding was precisely the opposite. On the same day that the Puerto de Luna real estate contract was executed, Omta and Pecos signed a letter agreement whereby Pecos assigned its right to $50,000 of the proceeds under the Puerto de Luna contract to Omta and Omta agreed to an assignment of the remainder of the proceeds if Ortega and the Meneghins released their claims against the property. If the Puerto de Luna contract had merely re-instituted the Toomey contract, this new assignment would have been unnecessary. By agreeing to an assignment of a portion of the proceeds and conditionally agreeing to an assignment of the remainder, Omta recognized the existence of a new agreement. Therefore, the trial court did not err in refusing to find that there had been a re-institution of the Toomey contract.

In October 1975 Puerto de Luna defaulted on the contract, and the property was once again reconveyed to Pecos. Thus, at the end of 1975, Omta no longer had any interest in the property.

Omta's final claim of title is the January 9, 1976 contract and quitclaim deed from Pecos. The trial court found that Omta's agreement on that date to make the delinquent payment on the Powell contract was a "material and substantial condition subsequent." Further, the trial court held that by his refusal and failure to make the payment on the Powell contract, Omta lost all his interest in the property. These findings are supported by the evidence.

■ Omta argues that the June 1972 mortgage on the property to the Meneghins and the December 1974 mortgage in favor of Ortega are invalid. This claim is also without merit. First, the Meneghins' claim rests not upon the 1972 mortgage, but upon the February 1976 special warranty deed from Pecos. Second, in the contract of January 9, 1976, Omta recognized the existence of the Ortega mortgage, and expressly agreed to take the property *subject to* this mortgage. Having done this, he will not now be heard to say that the mortgage was invalid.

■ In summary, the evidence supports the trial court's finding that Omta had lost all his interest in the property. He lost his original assignment of January 8, 1974 by executing the conditional assignment of August 8, 1974. He lost his interest in the conditional assignment by his failure to fulfill the condition. Finally, he lost the interest he acquired by the quitclaim deed when he failed to fulfill the condition required by his January 9, 1976 agreement with Pecos of making payments under the Powell contract. The trial court did not err in quieting title in the Meneghins.

IV.

Omta also contends that the trial court erred in finding that he and Frost acted as partners with respect to the property transactions at issue in this case. There is no merit to this contention.

First, Omta makes no argument that this finding is in any way relevant to any other issue on appeal, or that a contrary finding would in any way affect the outcome of this case.

■ Second, assuming that the partnership issue is material, it need only be noted that the pre-trial order listed the existence of a partnership between Frost and Omta as the sole uncontroverted fact in this case. Although Omta's counsel objected to other portions of the pre-trial order, he made no reference to this item. The principle is well established that a pre-trial order, made and entered without objection, and to which no motion to modify has been made, "controls the subsequent course of the action." N.M. R.Civ.P. 16, N.M.S.A.1978. *See also Transwestern Pipe Line Company v. Yandell,* 69 N.M. 448, 367 P.2d 938 (1961); *Johnson v. Citizens Casualty Company of New York,* 63 N.M. 460, 321 P.2d 640 (1958).

Omta argues that although the pretrial order provided that Omta and Frost were partners, the evidence at trial showed that they were not. Because the question of a partnership was not an issue at trial, the evidence Omta presented on the question was immaterial.

In light of the disposition we make of the foregoing issues, it is not necessary to consider the other issues raised by Omta.

There being no error in the findings of fact and conclusions of law of the trial court, its judgment is hereby affirmed.

IT IS SO ORDERED.

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

EASLEY, J., not participating.

597 P.2d 1183

STATE of New Mexico,
Plaintiff-Appellee,

v.

John DOE, a child, Defendant-Appellant.

No. 3727.

Court of Appeals of New Mexico.

March 15, 1979.

Rehearing Granted April 24, 1979.

Pedro G. Rael, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Michael E. Sanchez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

John Doe, a minor, was adjudged a delinquent child by reason of conduct in violation of § 30–9–13(A), N.M.S.A.1978 entitled Criminal Sexual Contact of a Minor. He appeals. We reverse.

This matter comes here upon the record proper and a partial transcript of the testimony. We note errors appearing in the record which should be avoided.

1. On *July 13, 1978,* a Predispositional Order was entered. It states: "This matter coming on for trial this 13th day of July, 1978 . . . .", whereas, the matter came on for trial before a jury on June 29, 1978. Below the printed form, the following appears in handwriting.

> *July 24, 1978*—disposition—confined D–Home [Juvenile Detention Home]. [Emphasis added.]

2. On *July 26, 1978,* a Notice of Appeal was filed of record from the Judgment and Sentence heretofore entered.

3. On *July 27, 1978,* Judgment and Disposition was entered of record. It states that John Doe had been adjudged a delinquent child "pursuant to verdict by the court," whereas, John Doe was found to have committed a delinquent act by verdict of the jury.

These errors, negligent in dress, need no explanation.

A. *Failure to file pre-adjudicatory motion does not prevent motion at trial.*

During the jury trial, Dr. Louis Benevento, employed by "D" home was called as a

witness by the State to give evidence about a medical test or examination for a sample taken from John Doe's body. John Doe moved to suppress the evidence because it was illegally taken in violation of Fourth Amendment rights. The trial court allowed the testimony to be presented to the jury.

In this appeal, the State argues that the evidence was properly admitted because the motion was untimely; that it should have been filed prior to trial under Rule 14 (formerly Rule 13) of the Rules of Procedure for the Children's Court. It reads:

> All pre-adjudicatory motions shall be filed:
>
> (a) within 10 days from the date the petition is filed * * * if the respondent is in * * * the custody of the department; or
>
> (b) in all other cases, within 20 days from the date the petition is filed * *.

The State is mistaken. A pre-adjudicatory motion must be filed within the time allowed if a respondent wants a hearing on the motion before commencement of trial. "The rules contemplate that objections to searches . . . and the like will be raised by prehearing motions similar to those used in district court. . . . Rule 13 does not, however, provide that objections not raised before the adjudicatory hearing are deemed waived." Harris, Children's Court Practice, etc., Under the New Rules, 6 N.M.L.Rev., 331, 354 (1975).

In fact, Fourth Amendment limitations on searches and seizures are extended to children's court as a basic right under the Children's Code. Section 32–1–27(C)(2), N.M.S.A.1978. See, *Matter of Doe*, 89 N.M. 83, 547 P.2d 566 (Ct. App. 1976); *Doe v. State*, 88 N.M. 347, 540 P.2d 827 (Ct. App. 1975).

John Doe's failure to file a pre-adjudicatory motion to suppress the evidence did not deny him the right to object to the admission of the evidence at trial.

B. *Doctor's test was taken at request of governmental authority.*

The state argues that the Fourth Amendment rights were not violated because Dr. Benevento acted solely for diagnostic purposes and treatment for record keeping at "D" home and not at the request of any governmental authority.

Dr. Benevento was employed at "D" home to perform medical services rendered to inmates who have any medical contact. He was present 5 days a week, Monday through Friday. The day that John Doe was taken to "D" home for detention, the intake officer told the doctor that John Doe was a new admission placed in isolation; that the intake officer had been informed that John Doe may have had a medical contact. On that basis, the doctor examined John Doe to identify the situation.

The State says that "evidence obtained by private parties and turned over to the police is not obtained in violation of the Fourth Amendment." We made that clear in *State v. Richerson*, 87 N.M. 437, 535 P.2d 644 (Ct. App. 1975). In such circumstances, the State is not involved in taking the tests and thus there was no search or seizure within the meaning of the Fourth Amendment. The Fourth Amendment prohibition against unreasonable searches and seizures was designed to protect people from government searches and did not apply to the acts of private individuals, *State v. Jenkins*, 80 Wis.2d 426, 259 N.W.2d 109 (1977), *Commonwealth v. Gordon*, 431 Pa. 512, 246 A.2d 325 (1968), even though the private individuals obtain the evidence illegally and turn it over to the police. *Commonwealth v. Storella*, 375 N.E.2d 348 (Mass. App. 1978).

However, the Juvenile Detention Home was created, maintained and supervised by the Board of County Commissioners who made the rules governing the conduct of the home. Section 33–6–5, N.M.S.A.1978. Dr. Benevento was employed and ordered to make tests of admitters who had

a medical contact. The examination and tests made by Dr. Benevento were made at the request of the Board of County Commissioners, a governmental authority. John Doe was in "jail" in the custody of an inmate officer who had placed John Doe in isolation. Dr. Benevento acted as an employee of the "D" home in searching for the evidence and then acquiring or "seizing" the evidence. He stood in the same shoes of a police officer who, at the request of a district attorney, enters a jail thirty days after an inmate had been incarcerated for assault and battery. He was told that the inmate carried a weapon strapped to his body. He ordered the inmate to expose his body and there he found the brass knuckles. Dr. Benevento and the police officer were acting under government authority, not for private purposes.

C. *John Doe's Fourth Amendment rights were violated.*

The State contends that even though Dr. Benevento "was an agent of the State or that the police were involved in the doctor's examination of defendant, the test would still not amount to an illegal search and seizure."

The criminal offense had occurred on March 23, 1978. Dr. Benevento obtained his evidence on April 18, 1978, 25 days later. There was no emergency. Dr. Benevento had John Doe expose himself. The doctor saw the evidence and took a sample from John Doe's body.

We note in passing that no evidence was presented that John Doe's medical condition on April 18, 1978 existed on March 23, 1978.

The Fourth Amendment provides that "The right of the people to be secure in their persons * * * against unreasonable searches and seizures, shall not be violated . . . ." The prohibition appears in Art. II, § 10 of the New Mexico Constitution.

It is well established that a search and seizure is constitutionally lawful under any one of three instances: (1) if conducted pursuant to a legal search warrant, (2) by consent, or (3) incident to a lawful arrest. *State v. Sedillo*, 79 N.M. 289, 442 P.2d 601 (Ct. App. 1968). None of these instances appearing of record, John Doe's Fourth Amendment Rights were violated.

All evidence acquired by Dr. Benevento is suppressed.

Reversed.

IT IS SO ORDERED.

HERNANDEZ J., specially concurring.

LOPEZ J., concurs.

HERNANDEZ, Judge (specially concurring).

I concur.

I do not agree with the majority that Children's Court Rule 14 "does not, however, provide that objections not raised before the adjudicatory hearing are deemed waived." Rule 14, in my opinion, encompasses the same matters as Rules 18 and 33(a), N.M.R.Crim.Proc. In the case of *State v. Helker*, 88 N.M. 650, 545 P.2d 1028 (Ct.App.1975), cert. denied 89 N.M. 5, 546 P.2d 70 (1976), where we were considering Rule 18(c), we held that the "rules of criminal procedure can put a time limitation on the exercise of a constitutionally protected right." Consequently, it is my opinion that the defendant waived any claim that his constitutional rights had been violated.

The defendant's third point of error was that the trial court abused its discretion in not allowing him to cross-examine the doctor as to the results of the laboratory culture test which was negative as to gonorrhea. This is not quite accurate. The defendant was allowed to cross-examine the doctor about the laboratory culture test and elicited the answer that the results of that test were negative as to gonorrhea. The State objected and requested that the answer be stricken as hearsay. The motion was granted and the jury instructed to dis-

regard the answer. It is my opinion that the trial court erred in doing this. It must be mentioned that the State had qualified the doctor as an expert in the diagnosis of this venereal disease. Considerable latitude should be allowed in the cross-examination of expert witnesses for the purpose of testing knowledge, judgment and bias. *Elsea v. Broome Furniture Co.*, 47 N.M. 356, 143 P.2d 572 (1943). Rule 705, N.M.R.Evid. provides:

> "The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. *The expert may in any event be required to disclose the underlying facts or data on cross-examination.* (Emphasis added.)

The trial court also erred in striking the answer because it was hearsay. Our Supreme Court in *State v. Chambers*, 84 N.M. 309, 502 P.2d 999 (1972), adopted the following from *Brown v. United States*, 126 U.S. App.D.C. 134, 142, 375 F.2d 310, 318 (1967):

> "In forming an expert opinion it may be necessary to rely upon information—hearsay though it be * * *. The information is winnowed through the mental processes of the expert, and is by him either accepted or rejected."

The Supreme Court in *Chambers* also quoted the following with approval from *Jenkins v. United States*, 113 U.S.App.D.C. 300, 304, 307 F.2d 637, 641 (1962):

> "* * * the better reasoned authorities admit opinion testimony based, in part, upon reports of others which are not in evidence but which the expert customarily relies upon in the practice of his profession."

Rule 703, N.M.R.Evid. provides:

> "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, *the facts or data need not be admissible in evidence.*" (Emphasis added.)

ON MOTION FOR REHEARING

SUTIN, Judge.

The State's Motion for Rehearing is granted to determine whether *State v. Helker*, 88 N.M. 650, 545 P.2d 1028 (Ct.App. 1975), Sutin, J., dissenting, conflicts with the opinion rendered. We hold that it does not.

The State argued that absent the filing of a pre-adjudicatory motion to suppress, a motion to suppress made during trial is untimely. We held that "A pre-adjudicatory motion must be filed within the time allowed if a respondent wants a hearing on the motion before commencement of trial. . . . John Doe's failure to file a pre-adjudicatory motion to suppress the evidence did not deny him the right to object to the admission of the evidence at trial."

The State now claims *Helker* holds that a trial motion to suppress is untimely. In *Helker*, during trial, the State offered defendant's confession in evidence. Defendant requested that a hearing be held out of the presence of the jury to determine whether the confession was voluntary. The court excused the jury and *held a hearing*, limited only to testimony of State's witnesses. Defendant then moved to examine other witnesses to determine whether the confession was voluntary, and the motion was denied as untimely. Apparently, the trial court viewed defendant's motion as a motion to suppress rather than one to determine the admissibility in evidence of defendant's confession.

In the appeal, defendant contended that the time limit set in Rule 18(c) of the Rules of Criminal Procedure to file a motion to suppress cannot deprive defendant of his constitutionally protected right to a trial hearing.

Helker disagreed based upon quotations from federal cases that interpreted prior

Rule 41(e) of the Federal Rules of Criminal Procedure [18 U.S.C.A. rule 41(e) (1961)]. What was not disclosed is the fact that Rule 41(e) did not set a time limitation on defendant's right to a trial hearing. Defendant had the right to move for suppression of evidence at trial. Whether the motion would be granted was placed in the discretion of the trial court. In *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697, 704 (1960), following the *Helker* quotation, Justice Frankfurter said:

> * * * As codified, the rule is not a rigid one, for under Rule 41(e) "the court in its discretion may entertain the motion [to suppress] at the trial or hearing." *This qualification proves that we are dealing with carrying out an important social policy and not a narrow, finicky procedural requirement. This underlying policy likewise precludes application of the Rule so as to compel the injustice of an internally inconsistent conviction.* * * [Emphasis added.]

Although orderly procedure requires the motion to be made earlier, the court in its discretion may entertain a motion at the trial stage. That discretion should be liberally exercised in the furtherance of justice. *Gallegos v. United States*, 237 F.2d 694 (10th Cir. 1956). In other words, the failure of defendant to file a motion to suppress prior to trial did not foreclose defendant's right to object to the admission of evidence during the trial. *Glisson v. United States*, 406 F.2d 423 (5th Cir. 1969). Rule 41(e) did not posit a rigid and absolute requirement that a motion to suppress be presented in limine. *Small v. United States*, 396 F.2d 764 (5th Cir. 1968). It is not fatal. *United States v. Wylie*, 149 U.S.App.D.C. 283, 462 F.2d 1178 (1972).

In *Helker*, the trial court did not deny defendant's request. It exercised its discretion and granted defendant a hearing. Instead of receiving defendant's evidence upon whom the burden rested, the court received only the testimony of the State's witnesses. The injustice of this internal inconsistent conviction establishes that *Helker* carried out a "finicky procedural requirement."

The conclusion of *Helker*, "that rules of criminal procedure can put a time limitation" on defendant's protected rights, did not state that the absence of a pre-trial motion to suppress foreclosed defendant's right to pursue this motion for the first time in an appeal. The purpose of suppression rules is to require an orderly procedure before trial, not a denial of constitutionally protected rights.

■ We must emphasize once again that defendant's duty to move for suppression of evidence before trial is discretionary. Rule 18(b) reads:

> A person aggrieved by a confession * * * *may* move to suppress such evidence. [Emphasis added.]

If a person desires to have a pre-trial hearing, then "A motion to suppress shall be made within twenty days * * *." Rule 18(c). It does not require the citation of innumerable authorities that "The word *may* usually is employed to imply permissive or discretional, and not mandatory, action or conduct. 57 C.J.S. May p. 456." *Shea v. Shea*, 537 P.2d 417, 418 (Okla.1975). If the Supreme Court in the adoption of the Rules of Criminal Procedure had established Rule 18(b) to be mandatory and to limit defendant's rights to pre-trial procedure, it would have done so. Rule 12(b)(3) of the Federal Rules of Criminal Procedure on Pre-Trial Motions reads in pertinent part:

> * * * The following *must* be raised prior to trial:
>
> * * * * * *
>
> (3) Motions to suppress evidence. [Emphasis added.]

We hold that *Helker* is not in conflict with the opinion in the instant case.

HERNANDEZ, J. specially concurring.

LOPEZ, J., concurs.

HERNANDEZ, Judge (specially concurring).

Rule 13 of the Children's Court Rules provides:

"All pre-adjudicatory motions shall be filed:

(a) within 10 days from the date the petition is filed or within 10 days from the appointment of counsel for the respondent or entry of appearance by counsel for the respondent, whichever is later, if the respondent is in detention or the alleged neglected child is in the custody of the department; or

(b) in all other cases, within 20 days from the date the petition is filed or within 20 days from the appointment of counsel for the respondent or entry of appearance by counsel for the respondent whichever is later."

Rule 18(b) and (c) of the Rules of Criminal Procedure provide:

"(b) A person aggrieved by a confession, admission or other evidence may move to suppress such evidence.

(c) A motion to suppress shall be made within twenty days after entry of a plea, unless, upon good cause shown, *the trial court waives the time requirement of the rule.*" [Emphasis added.]

Rule 33(e) and (f) of the Rules of Criminal Procedure provides:

"(e) The following defenses or objections must be raised prior to trial:

(1) defenses and objections based on defects in the initiation of the prosecution, or

(2) defenses and objections based on defects in the complaint, indictment or information other than a failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at anytime during the pendency of the proceeding. Failure to present any such defense or objection, other than the failure to show jurisdiction or charge an offense, constitutes a waiver thereof, *but the court for cause shown may grant relief from the waiver.* If any such objection or defense is sustained and is not otherwise remediable, the court shall order the complaint, indictment or information dismissed.

(f) All motions, unless otherwise provided by these rules or unless otherwise ordered by the court, shall be made at the arraignment or within twenty days thereafter, *unless upon good cause shown the court waives the time requirement.* [Emphasis added.]

Implicit in Rule 13, supra, are the two exceptions made explicit in Rule 33, supra, to-wit: "failure to show jurisdiction in the court or to charge an offense." That is all pre-adjudicatory motions except those alleging lack of jurisdiction and failure to charge an offense must be made within the time limits prescribed in Rule 13, failure to do so shall constitute a waiver by defendant thereof. There being no provision for a waiver of the time requirement by the court.

The Rules of Criminal Procedure were promulgated by the Supreme Court on May 3, 1972, with an effective date of July 1, 1972. The Children's Court Rules were promulgated by the Supreme Court on January 14, 1976, with an effective date of April 1, 1976. So it can reasonably be inferred that the omission of a time waiver provision by the court in Rule 13 of the Children's Court Rules was deliberate. This inference is further supported when one notes the very short time provisions of the Children's Court Rules. Considering that the purpose of rules such as these is to prevent the interjection of collateral issues into a trial or hearing and to prevent the prolongation of such proceedings by interruptions to consider questions and issues that could easily be considered prior to trial or hearing. And as we stated in *State v. Helker*, supra, "rules of criminal procedure can put a time limitation on the exercise of a constitutionally protected right."

I concur in the majority opinion to reverse for the following reason only.

The defendant's third point of error was that the trial court abused its discretion in not allowing him to cross-examine the doctor as to the results of the laboratory culture test which was negative as to gonorrhea. This is not quite accurate. The defendant was allowed to cross-examine the doctor about the laboratory culture test and elicited the answer that the results of that test were negative as to gonorrhea. The State objected and requested that the answer be stricken as hearsay. The motion was granted and the jury instructed to disregard the answer. It is my opinion that the trial court erred in doing this. It must be mentioned that the State had qualified the doctor as an expert in the diagnosis of this venereal disease. Considerable latitude should be allowed in the cross-examination of expert witnesses for the purpose of testing knowledge, judgment and bias. *Elsea v. Broome Furniture Co.*, 47 N.M. 356, 143 P.2d 572 (1943). Rule 705, N.M.R.Evid. provides:

> "The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. *The expert may in any event be required to disclose the underlying facts or data on cross-examination.* [Emphasis added.]

The trial court also erred in striking the answer because it was hearsay. Our Supreme Court in *State v. Chambers*, 84 N.M. 309, 502 P.2d 999 (1972), adopted the following from *Brown v. United States*, 126 U.S. App.D.C. 134, 142, 375 F.2d 310, 318 (1967):

> "In forming an expert opinion it may be necessary to rely upon information—hearsay though it be * * *. The information is winnowed through the mental processes of the expert, and is by him either accepted or rejected."

The Supreme Court in *Chambers* also quoted the following with approval from *Jenkins v. United States*, 113 U.S.App.D.C. 300, 304, 307 F.2d 637, 641 (1962):

> "* * * the better reasoned authorities admit opinion testimony based, in part, upon reports of others which are not in evidence but which the expert customarily relies upon in the practice of his profession."

Rule 703, N.M.R.Evid. provides:

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, *the facts or data need not be admissible in evidence.*" [Emphasis added.]

597 P.2d 1190

C & H CONSTRUCTION & PAVING CO., INC., and Founders Investment, Ltd., Plaintiffs-Appellants,

v.

CITIZENS BANK, a State Banking Corporation, Clarke Harvey, James Arrott and E. M. Wilson, Defendants-Appellees.

No. 3410.

Court of Appeals of New Mexico.

June 19, 1979.

Joseph Goldberg, David A. Freedman, Freedman, Boyd & Daniels, Albuquerque, for plaintiffs-appellants.

Russell Moore, Robert Clark, Keleher & McLeod, Frank H. Allen, Jr., Modrall, Sperling, Roehl, Harris & Sisk, Stephen Durkovich, John P. Viebranz, Nordhaus, Moses & Dunn, Albuquerque, for defendants-appellees.

OPINION

LOPEZ, Judge.

This suit was brought by plaintiffs-appellants in the District Court of Bernalillo

County to recover damages resulting from the alleged wrongful acts of defendants-appellees. The trial court granted appellees' motions for summary judgment and denied appellants' motion for partial summary judgment. Appellants appeal from the court's entry of summary judgments in favor of appellees and from its denial of appellants' motion for partial summary judgment. We reverse the court's order granting appellees' summary judgment motions, affirm its order denying appellants' motion for partial summary judgment and remand.

I. FACTS

On December 20, 1972, appellant C & H Construction & Paving Co., Inc. (hereinafter referred to as C & H Construction), requested a $125,000 line of credit from appellee, Citizens Bank. The granting of the loan was conditioned upon C & H Construction's giving the bank a security interest in its accounts receivable. C & H Construction refused to give such an interest and, consequently, Citizens Bank denied the loan application. On December 28, 1972, C. R. Davis, acting on behalf of C & H Construction, executed a $50,000 promissory note to the bank. In order to secure this loan, Davis, again acting on behalf of C & H Construction, entered into a security agreement giving Citizens Bank a security interest in the accounts receivable of C & H Construction. The loan was paid on January 10, 1973. Appellees, E. M. Wilson and James Arrott (hereinafter referred to as Wilson and Arrott respectively), allegedly represented to Davis that the agreement would apply only to the December 28 loan and not to any previous loans given to C & H Construction by the bank. They also allegedly represented that the agreement would not be filed.

On January 2, 1973, Citizens Bank filed the financing statement accompanying the December 28 security agreement. Sometime in the middle of January, 1973, Arrott informed C. R. Davis of the filing. He further informed Davis that the bank considered the agreement to apply to all the indebtedness owed to it by C & H Construction. Davis conveyed this information to Wilson who refused to take any action. On August 28, 1973, C & H Construction executed a promissory note to the bank in the sum of $50,000. The note was marked unsecured and was both a renewal and combination of previous notes owed to the bank. C & H Construction failed to pay the note when it became due.

On January 11, 1974, Citizens Bank filed in the District Court of Bernalillo County a complaint against C & H Construction, C. R. Davis, Alice J. Davis, Paul D. Wood and Wanda Wood based upon the defaulted note, the December 28 security agreement and guaranties executed by the Davises and Woods. Additionally, on the same date, the bank filed a motion against C & H Construction for an order to show cause why a receiver should not be appointed to collect C & H Construction's accounts receivable and to show cause why C & H Construction should not submit a list of these accounts to the bank or a receiver appointed by the court. A motion for a temporary restraining order was filed by the bank on January 23, 1974, and, on that date, the court granted the motion and ordered C & H Construction and C. R. Davis to refrain from disposing or using any of C & H Construction's accounts receivable. On February 1, 1974, a hearing was held to show cause why the temporary restraining order previously entered should not be continued as a preliminary injunction pending final determination on the merits. A preliminary injunction was granted on that date and the court permitted Fidelity National Bank to file a complaint in intervention naming James C. Davis as a third party defendant. Approximately six days later, the court entered an order appointing a receiver and directing the defendants to turn over a list of accounts receivable. Subsequently, James Davis filed a cross-claim and then an amended cross-claim against Citizens Bank. In response, the bank filed answers pleading estoppel, waiver and laches as affirma-

tive defenses. C. R. and Alice Davis also filed a counterclaim against the bank. In its pretrial order, the court made the following determinations: (1) C. R., Alice and James Davis all allege that Citizens Bank has proceeded negligently, fraudulently and maliciously in the action and has wrongfully obtained a court order placing the accounts receivable of C & H Construction in receivership and (2) the bank raises *inter alia* the defenses of laches and estoppel.

At trial, the jury was instructed on the Davises' claim that Citizens Bank through Arrott committed fraud by inducing C. R. Davis to sign the December 28 security agreement. The defenses of estoppel and waiver raised by the bank to the claims of the Davises were also submitted to the jury by instruction. As grounds for these defenses, the bank asserted that the Davises did not oppose or object to the appointment of the receiver. The jury was further instructed to return a verdict for the Davises if they determined that the Davises had proved their claims and Citizens Bank had not proved any of its defenses. The jury found for the Davises and judgments were accordingly entered on the counterclaim of C. R. Davis and Alice Davis and the cross-claim of James Davis.

Citizens Bank appealed these judgments to this Court. *See Citizens Bank v. C & H Const. & Paving Co., Inc.*, 89 N.M. 360, 552 P.2d 796 (Ct.App.), *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976) (the litigation resulting in this appeal is hereinafter referred to as Citizens I). This Court, per Sutin, J., affirmed the judgments and held *inter alia* that (1) the Davises' claim of fraud, both actual and constructive, was properly at issue and (2) waiver and judicial estoppel did not apply to the Davises. In order to establish that these principles were applicable, the bank argued in part that the preliminary injunction and order appointing the receiver established conclusively that the Davises had consented to the receivership and that they were thereby barred from asserting an inconsistent position later in the same action. This Court disagreed with that argument and found no consent or inconsistent position taken by the Davises.

On October 13, 1976, C & H Construction and appellant, Founders Investments, Ltd. (hereinafter referred to as Founders), filed a second amended complaint naming Citizens Bank, Wilson, Arrott and appellee, Clarke Harvey (hereinafter referred to as Harvey), as defendants. Wilson, Arrott and Harvey were sued individually and in their capacities as director and officers of the bank. Subsequently, the bank filed a motion to strike counts I, II, and III of the second amended complaint on the basis of a prior court order. This order found that the claims of C & H Construction against the bank were compulsory counterclaims which should have been asserted in Citizens I. The bank's motion to strike was granted. As a result of the granting of this motion, the only claims remaining in the suit were the claim of Founders against all defendants and the claims of C & H Construction against the individual defendants, Wilson, Arrott and Harvey. Citizens Bank, Wilson, Arrott and Harvey each moved individually for summary judgment. A separate hearing was held on Wilson's motion against C & H Construction and Founders. The bank's motion against Founders and Arrott's and Harvey's motions against C & H Construction and Founders were argued at the same hearing. At that hearing, appellants' summary judgment motion against the bank and Harvey was also argued. This appeal is from the orders entered on each of these motions. The issues for decision are (1) whether the court properly granted appellees' motions and (2) whether the court properly denied appellants' motion. We shall first discuss Wilson's motion and then the remaining motions.

II. Wilson's Motion

Summary judgment is a drastic remedy to be used with great caution. *Pharmaseal Laboratories, Inc. v. Goffe*, 90

N.M. 753, 568 P.2d 589 (1977); *Zengerle v. Commonwealth Insurance Co. of N. Y.*, 60 N.M. 379, 291 P.2d 1099 (1956). In deciding whether summary judgment is proper, an appellate court must view the matters presented in the light most favorable to support the right to trial on the issues. *Gonzales v. Gackle Drilling Company*, 70 N.M. 131, 371 P.2d 605 (1962); *Read v. Western Farm Bur. Mut. Ins. Co.*, 90 N.M. 369, 563 P.2d 1162 (Ct.App.1977). In addition, a reviewing court must look to the whole record and take note of any evidence which puts a material fact in issue. *Pharmaseal Laboratories, Inc. v. Goffe, supra.* Furthermore, we are not bound by those grounds purportedly used by the trial court as the basis for the granting of summary judgment. *Garrett v. Nissen Corporation*, 84 N.M. 16, 498 P.2d 1359 (1972).

The burden rests on the party moving for summary judgment to establish that no genuine issue of material fact exists for trial and that the movant is entitled to judgment as a matter of law. If the movant fails to meet this burden, summary judgment is erroneous. N.M.R.Civ.P. 56(c), N.M.S.A.1978; *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972). Once this burden is satisfied, the non-moving party has the obligation of showing that there is a genuine, material factual issue requiring trial and that the movant is not entitled as a matter of law to summary judgment. *Goodman v. Brock, supra.* In determining whether this obligation has been fulfilled, all reasonable inferences will be construed in favor of the non-moving party. *Smith v. Klebanoff*, 84 N.M. 50, 499 P.2d 368 (Ct. App.), *cert. denied*, 84 N.M. 37, 499 P.2d 355 (1972).

In response to the allegations contained in appellants' second amended complaint and in support of his motion, Wilson submitted an affidavit stating that (1) he knew nothing of C & H Construction's prior refusal to give Citizens Bank a security interest in its accounts receivable; (2) prior to the signing of the December 28 security agreement, he never had any conversation with Arrott or any other employee of the bank concerning the need to obtain such an agreement; (3) he did not know any of the arrangements allegedly made for securing the December 28 loan until C. R. Davis informed him of them a month or so later; at that time, Davis also informed him of the bank's intention to apply the December 28 security agreement to previous loans given to C & H Construction by the bank; (4) for various reasons, he did not act upon this information; (5) he was not a director of the bank when it filed suit against C & H Construction or when it asked for and obtained the appointment of a receiver; and (6) he had no knowledge of the decision to request the appointment of a receiver. In opposition to Wilson's motion, appellants submitted the affidavit of C. R. Davis. On appeal, Wilson claims that his affidavit establishes that no genuine issue of material fact exists with respect to all counts contained in appellants' second amended complaint. We will examine each count in the order they appear.

A. Counts I and II

Both these counts allege in part that Wilson wrongfully and without proper authority had the accounts receivable of C & H Construction placed in receivership. C. R. Davis' affidavit does not controvert Wilson's claim that he had no knowledge of the decision to request the appointment of a receiver. Because it is uncontroverted that he did not participate in the appointment of a receiver, Wilson argues that he did not have C & H Construction's accounts receivable placed in receivership. Accordingly, Wilson concludes that summary judgment was properly granted with respect to these counts.

Although we agree that Wilson's affidavit establishes the absence of any factual issue concerning his participation in the receivership proceedings, we do not overlook the fact that, as part of his burden,

Wilson must establish that he is entitled to judgment as a matter of law. *See* N.M.R. Civ.P. 56(c); *Goodman v. Brock, supra.* Counts I and II are based upon a general claim of wrongful action. Accordingly, to be entitled to judgment as a matter of law, Wilson must establish that he owed no duty to C & H Construction or that, if he did owe such a duty, his conduct did not constitute a breach of this duty. It is well settled that a director of a corporation has a duty to act to prevent injuries to third parties where he has knowledge, amounting to acquiescence, of the corporation wrongful acts. *Taylor v. Alston,* 79 N.M. 643, 447 P.2d 523 (1968); *see Lobato v. Pay Less Drug Stores,* 261 F.2d 406 (10th Cir. 1958); *Klockner v. Keser,* 29 Colo.App. 476, 488 P.2d 1135 (1971); *see also Hagemeyer Chemical Co. v. Insect-O-Lite Co.,* 291 F.2d 696 (6th Cir. 1961). Wilson's affidavit states that (1) C. R. Davis informed him of the arrangements allegedly made for securing the December 28 loan and the bank's intention to apply the December 28 security agreement to other indebtedness of C & H Construction and (2) for various reasons, Wilson did not act upon this information. Therefore, for Wilson to be entitled to summary judgment as a matter of law, Wilson had the burden of a prima facie showing that he did not acquiesce in the wrongful use by others of the security agreement. Wilson did not meet this burden. Thus we hold that the trial court erred in granting summary judgment as to Counts I and II.

In so holding, we note that the court stated that Wilson could not be held liable for his failure to act on the information given to him by Davis. In light of the above legal principle, we rule that this statement is erroneous. We also note that Wilson argues failure on the part of C & H Construction to plead the existence of a duty to act. This argument has no merit. Counts I and II specifically alleged (1) ". . . Wilson *wrongfully* and without proper authority had the accounts receivable of Citizens Bank [sic] attached and placed into receivership . . ." and; (2) "As a direct and proximate result of the *wrongful* action of . . . Wilson, C & H Construction . . . . has been damaged . . ." (Emphasis added.) Generally, in New Mexico, pleadings are to be liberally construed. *See Biebelle v. Norero,* 85 N.M. 182, 510 P.2d 506 (1973); *Hambaugh v. Peoples,* 75 N.M. 144, 401 P.2d 777 (1965). Guided by this principle, we rule that the above allegations are sufficient to plead not only the existence of a duty to act but also its breach.

B. Count III

In this count, C & H Construction alleges in part that Wilson, with knowledge of its prior refusal to give the bank a security interest in its accounts receivable, conspired with Arrott and Harvey to obtain a security agreement from it. It is also alleged that in obtaining this security agreement, Wilson fraudulently represented that it would be used only to secure the December 28 loan and that it would not be filed. As a result of the security agreement obtained through Wilson's fraudulent misrepresentations, C & H Construction further alleges that it was damaged.

From the record, it appears that the court determined, as a matter of law, the sole proximate cause of appellants' damages to be the appointment of a receiver. The court specifically stated that the transactions surrounding the procurement of the security agreement were not the cause of any damage. In making this statement, the court necessarily found that any fraudulent representations allegedly made by Wilson did not cause C & H Construction to be damaged. Wilson argues that summary judgment was properly granted because his affidavit establishes that no issue of material fact exists with respect to his participation in any of the acts that allegedly damaged C & H Construction or Founders. In making this argument, Wilson impliedly contends that the court was correct in its determination of causation. Appellants

claim that causation is a question of fact. In making this claim, appellants argue that the court erred in determining causation as a matter of law. Implicit in this argument is the contention that Wilson's affidavit fails to satisfy his burden as to count III. This contention is correct.

With respect to causation, appellants' theory is that the following acts contributed to causing their damages: (1) the fraudulent procurement of the security agreement, (2) Wilson's failure to act on his knowledge of the fraud and (3) the bank's seeking the appointment of a receiver based upon this fraudulently procured security agreement. It is well settled in New Mexico that the proximate cause of an injury need not be the last act or nearest act to the injury but may be one which actually aided, as a direct and existing cause, in producing the injury. *Ortega v. Texas-New Mexico Railway Company,* 70 N.M. 58, 370 P.2d 201 (1962); *Galvan v. City of Albuquerque,* 85 N.M. 42, 508 P.2d 1339 (Ct.App. 1973); *Kelly v. Montoya,* 81 N.M. 591, 470 P.2d 563 (Ct.App.1970). After reading the record, we rule that reasonable minds could differ on the issue of whether the fraudulent procurement of the security agreement or Wilson's failure to act actually aided in producing appellants' damages. Where such a difference exists, proximate cause is a question of fact. *Galvan v. Albuquerque, supra; see also Binns v. Schoenbrun,* 81 N.M 489, 468 P.2d 890 (Ct.App.1970); *Harless v. Ewing,* 80 N.M. 149, 452 P.2d 483 (Ct.App.1969). Therefore, we hold that the court erred in determining causation as a matter of law and in granting Wilson's motion for summary judgment with respect to count III.

C. Count IV

This count alleges in part that Wilson, while acting in his capacity as chairman of the board of directors of Citizens Bank, actively participated with full knowledge in the conspiracy to obtain a security agreement by fraudulent misrepresentation and that this conduct was intentional and malicious. Wilson argues that because summary judgment was properly granted as to count III, summary judgment was proper as to count IV since the only difference between the counts is that the latter alleges even less involvement on Wilson's part than does count III. In light of our holding that summary judgment was erroneously granted as to count III, this argument has little force. However, because our task as a reviewing court is to look at the whole record and take note of any evidence which puts a material fact in issue (*Pharmaseal Laboratories, Inc. v. Goffe, supra*), we examine count IV to determine whether there exists any factual issue concerning the involvement of Wilson alleged in this count.

Wilson's affidavit states that he had no knowledge of C & H Construction's prior refusal to give the bank a security interest in its accounts receivable and that he never had any conversation with Arrott or any other employee of the bank concerning the need to obtain such an agreement. Davis's affidavit does not contradict these statements. We assume that Wilson's affidavit contains these statements in order to establish the lack of any issue concerning his involvement in a conspiracy, i. e. in any antecedent agreement with Arrott and Harvey to commit an unlawful act. *See Armijo v. National Surety Corp.,* 58 N.M. 166, 268 P. 339 (1954); *Las Luminarias of the New Mexico Council of the Blind v. Isengard,* 92 N.M. 297, 587 P.2d 444 (1979). However, we conclude that these statements fail to show that Wilson was not involved in a conspiracy.

This conclusion is based upon those principles for establishing a conspiracy stated by this Court in *Morris v. Dodge Country, Inc.,* 85 N.M. 491, 513 P.2d 1273 (Ct. App.), *cert. denied,* 85 N.M. 483, 513 P.2d 1265 (1973):

> For a conspiracy to exist there must be a common design or a mutually implied understanding; an agreement. (Cites

omitted.) A conspiracy may be established by circumstantial evidence; generally, the agreement is a matter of inference from the facts and circumstances, including the acts of the persons alleged to be conspirators. (Cite omitted.) *The question is whether the circumstances, considered as a whole, show that the parties united to accomplish the fraudulent scheme.* (Cite omitted.) . . . (Emphasis added.)

Id. at 492, 513 P.2d at 1274. The affidavit of C. R. Davis states that Wilson confirmed that the December 28 security agreement would not be filed and that it was clear to Davis, Wilson and Arrott that the agreement would apply only to the December 28 loan. Davis's deposition also states that there was a specific agreement by Davis, Wilson and Arrott that the security agreement would not be recorded. When these statements are considered with the statements contained in Wilson's affidavit, we cannot conclude that the circumstances as a whole establish the absence of any involvement by Wilson in a conspiracy. Therefore, we hold that a genuine issue of material facts exists concerning Wilson's involvement and that the trial court erred in granting Wilson's summary judgment motion as to count IV.

D. Count V

In this count, Founders alleges in part that Wilson owed it a duty not to participate in conduct to its detriment and that, as a direct and proximate result of Wilson's wrongful acts, C & H Construction was put out of business and, as a direct and proximate result of C & H Construction's being put out of business, Founders was uniquely and personally damaged. It is further alleged that Founders executed a continuing guarantee on the obligations of C & H Construction and, as a result of Wilson's wrongful acts, it has been called upon to pay a certain sum of money. Relying upon the court's determination that the appointment of a receiver was the sole cause of damage to C & H Construction, Wilson argues that his summary judgment motion was properly granted as to this count since Founders's claim of damages is derived strictly from the damages of C & H Construction. According to Wilson, the fact that he did not participate in the appointment of a receiver and thereby did not cause any damage to C & H Construction precludes any claim of damage by Founders against him. In light of our foregoing rulings, this argument is without merit.

Wilson's argument is based upon the assumption that the court's determination of proximate cause as a matter of law was correct. We have already held that the court erred in determining causation as a matter of law. This holding was based upon our ruling that reasonable minds could differ on the issue of whether the fraudulent procurement of the security agreement or Wilson's failure to act actually aided in producing C & H Construction's damages. Therefore, Wilson's reliance upon this assumption is misplaced. Additionally, in moving for summary judgment, Wilson failed to establish that he owed no duty to Founders or that, if he did owe such a duty, his conduct did not breach this duty. Thus he failed to carry his burden of showing that he is entitled to summary judgment as a matter of law. Accordingly, we hold that the court erred in granting Wilson's motion with respect to count V.

III. Citizens Bank's, Arrott's and Harvey's Motions

Citizens Bank moved for summary judgment based on the doctrines of res judicata, collateral estoppel, waiver, estoppel, laches, ratification, avoidable consequences and judicial immunity. Harvey's written motion, with the exception of avoidable consequences, is based on these same doctrines. Arrott's written motion is not based on any specific legal doctrine. At the hearing on these motions, all three appellees joined in the motion concerning res judicata and the equitable defenses. From the record, it ap-

pears that the trial court granted the motions based on the doctrines of res judicata, collateral estoppel, waiver, estoppel, laches, ratification, avoidable consequences and judicial immunity. We will first examine the doctrines of res judicata and collateral estoppel together and then the remaining asserted doctrines.

a. Res judicata and collateral estoppel

In *City of Santa Fe v. Velarde,* 90 N.M. 444, 564 P.2d 1326 (1977), our Supreme Court stated the difference between res judicata and collateral estoppel:

> The doctrines of res judicata and collateral estoppel by judgment involve different and distinct principles. Res judicata in its proper application operates where there are identical parties, causes of action, subject matter, and capacities in the two cases; collateral estoppel by judgment arises where the causes of action are different but some ultimate facts or issues may necessarily have been decided in the previous case. Stated another way, where the causes of action in the cases are identical in all respects, the first judgment is a conclusive bar upon the parties and their privies as to every issue which either was or properly could have been litigated in the previous case. But absent the identity of causes of action, the parties are precluded from relitigating only those ultimate issues and facts shown to have been actually and necessarily determined in the previous litigation. (Cites omitted.)

Id. at 445–46, 564 P.2d at 1327–28; *see also Lawlor v. National Screen Service Corp.,* 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955); Note, Developments in the Law—Res Judicata, 65 Harv.L.Rev. 818 (1952). Under the doctrine of collateral estoppel, those in privity with the parties are also precluded from relitigating issues and facts which were actually and necessarily determined in the previous litigation. *Meeker v. Walker,* 80 N.M. 280, 454 P.2d 762 (1969); 1B Moore's Federal Practice ¶ 0.441[2] at 3777, ¶ 0.441[3] (2d ed. 1974); 50 C.J.S. Judgments § 712 at 168–173 (1947).

From the record, it appears that Citizens Bank, relying upon the above doctrines, argued at the motions hearing that Founders did not have any claim against it. Apparently this argument was based on the assertions that;

(1) Since Founders through its president C. R. Davis and its director James Davis, knew of and participated in the proceedings to appoint a receiver in Citizens I and could have litigated its claim then, it is now barred in the present suit from asserting this claim against the bank; and

(2) Since a receiver was appointed in Citizens I, Founders's claim was actually and necessarily determined against the defendants in these proceedings to appoint a receiver. We hold that the court erred in granting the bank's motion based upon this argument.

It is undisputed that Founders was not a party to the Citizens I litigation. Therefore, in order for Citizens Bank to take advantage of the doctrines of res judicata and collateral estoppel, it must establish that Founders is in privity with the Davises or C & H Construction. The record of the motions hearing indicates that counsel for Harvey and for appellants asserted that Founders was in privity with C & H Construction. The bank did not join in this assertion and the record does not contain a stipulation concerning the issue of privity. However, no party disputed Founders's privity before the trial court. We assume at this point that Founders was in privity either with C & H Construction or C. R. Davis. The assertions supporting the bank's res judicata and collateral estoppel claims are based upon the receivership proceedings in Citizens I. It is well established that the doctrines of res judicata and collateral estoppel apply only to final judgments. *Eastern Air Lines v. Trans Caribbean Airways,* 29 A.D.2d 379, 288 N.Y.S.2d 317 (App. Div.1968); *Carroll v. Bunt,* 50 N.M. 127, 172

P.2d 116 (1946); *see Chronister v. State Farm Mutual Automobile Ins. Co.,* 67 N.M. 170, 353 P.2d 1059 (1960); *Albright v. Albright,* 21 N.M. 606, 157 P. 662 (1916). An order appointing a receiver is not a final judgment. *Lloyds of Texas v. Bobbitt,* 55 S.W.2d 803 (Com.App.Tex.1932); *Atchison, T. & S. Ry. Co. v. Osborn,* 148 F. 606 (8th Cir. 1906); *Isaac v. Milton Mfg. Co.,* 33 F.Supp. 732 (D.C.Pa.1940); 75 C.J.S. *Receivers* § 5 (1952). Therefore, no res judicata or collateral estoppel claim can be based upon the receivership proceedings in Citizens I. Accordingly, we hold that the court erred in granting the motion of Citizens Bank based upon these claims.

We assume, but do not decide, that Harvey and Arrott also sought summary judgment on the basis of res judicata and collateral estoppel. Their claims are also based on the receivership proceedings in Citizens I. Since both doctrines apply only to final judgments, we hold that the trial court erred in granting summary judgment in favor of Harvey and Arrott based upon these defenses. Accordingly, we need not discuss establishing Harvey's and Arrott's privity with Citizens Bank which is a prerequisite to the assertion of these defenses.

B. Waiver

Citizens Bank argues that Founders, through its agents C. R. Davis and James Davis, has waived any cause of action it may have against the bank. This argument is based upon the Davises' failure, despite their knowledge of the bank's claim in C & H Construction's accounts receivable, to undertake any legal action between January 1973 and May 1976 to cancel the December 28 security agreement, to challenge the recording of the accompanying financing statement or to file a declaratory judgment. In addition, the bank contends that the existence of a waiver may be shown by the Davises' acquiescence in the appointment of a receiver in Citizens I and by their assisting the receiver after his appointment. Arrott argues that C & H Construction and Founders, through their agent C. R. Davis, have also waived any claim they may have against him. As evidence of this waiver, Arrott points to the repeated renewal and eventual combination by C & H Construction of notes held by Citizens Bank, partial releases from the December 28 security agreement of accounts receivable obtained by C & H Construction and the absence of protest during the receivership proceedings in Citizens I. Arrott contends that this conduct plus a January, 1973 signing of a continuing guaranty by C. R. Davis and the failure to request a termination of the security agreement amount to an intentional relinquishment of appellants' claims. Harvey joins in these arguments and asserts that the above conduct constitutes a waiver of any claim C & H Construction and Founders may have against him. All three appellees argue that these acts establish the absence of any genuine issue of material fact concerning the existence of a waiver by appellants of their various claims. Appellants contend that there are material questions of fact concerning this conduct and the existence of an intent to relinquish any rights. We agree.

Our Supreme Court in *Cooper v. Albuquerque City Commission,* 85 N.M. 786, 518 P.2d 275 (1974) stated "that a waiver is the *intentional* relinquishment or abandonment of a known right, and . . . the act of waiver may be evidenced by conduct as well as by express words." (Emphasis added.) *Id.* at 790, 518 P.2d at 279; *accord, Ed Black's Chevrolet Center, Inc. v. Melichar,* 81 N.M. 602, 471 P.2d 172 (1970); *Clovis National Bank v. Thomas,* 77 N.M. 554, 425 P.2d 726 (1967). The intention to waive a right is ordinarily a question of fact. *Reinhart v. Rauscher Pierce Securities Corp.,* 83 N.M. 194, 490 P.2d 240 (Ct.App.1971). The record indicates that (1) C & H Construction and Citizens Bank were engaged in a series of financial transactions, (2) C & H Construction was financially dependent upon the continuing nature of these transactions and amicable relations with the bank, (3) the relationship between the bank

and C. R. Davis was a close and ongoing one, (4) the notes which were renewed and combined were marked unsecured and the bank did not demand a security interest or collateral as a condition of renewal, (5) in his deposition in the present case, C. R. Davis stated that he did protest the appointment of a receiver at the February 1, 1974 hearing and (6) early in the Citizens I receivership proceedings, Fidelity National Bank claimed an interest in C & H Construction's accounts receivable which later proved to be valid. Judged in the light of these facts, we rule that the conduct cited by the bank, Arrott and Harvey does not establish the absence of any factual issue concerning the existence of a waiver by appellants and that these facts raise genuine issues concerning appellants intention to relinquish any of their rights originating from the December 28 loan transaction and subsequent events. Accordingly, we hold that the court erred in granting the bank's, Arrott's and Harvey's motions based upon waiver.

In so holding, we remind appellees that it is not proper for either the trial court or appellate court to weigh the evidence in determining whether summary judgment should be granted. *Fresquez v. Southwestern Ind. Con. & Riggers, Inc.,* 89 N.M. 525, 554 P.2d 986 (Ct.App.), *cert. denied,* 90 N.M. 8, 558 P.2d 620 (1976); *Huerta v. New Jersey Zinc Company,* 84 N.M. 713, 507 P.2d 460, *cert. denied,* 84 N.M. 696, 507 P.2d 443 (1973). In order to find a waiver in the present case, we can only conclude that such an improper weighing of evidence must be undertaken. This we refuse to do. We also note that both Arrott and Harvey cite cases which generally stand for the proposition that once one discovers a fraud, he must act upon that discovery and in no way affirm the contract or he will be deemed to have waived any claim for damages resulting from the fraud. *See United Forest Products v. Baxter,* 452 F.2d 11 (8th Cir. 1971); *Phillips Petroleum Co. v. Rau Const. Co.,* 130 F.2d 499 (8th Cir. 1942); *United States v. Idlewild Pharmacy, Inc.,* 308 F.Supp. 19 (D.C.Va.1969). We have read these cases and conclude that they are not controlling at this stage of the proceedings. Given the facts of the present case, we cannot hold that appellants' actions constituted an affirmation of the December 28 security agreement or that appellants received substantial concessions with respect to that transaction. These are questions of fact which must be decided by the factfinder. Finally, we note that Citizens Bank cites cases in support of its position that Founders, by acquiescing in the appointment of a receiver, has waived any claim that the appointment was defective. *See Brown v. Lake Superior Iron Co.,* 134 U.S. 530, 10 S.Ct. 604, 33 L.Ed. 1021 (1890); *Rudd v. Crown International,* 26 Utah 2d 263, 488 P.2d 298 (1971). These cases involve the protesting of the appointment of a receiver based on a "technical objection" or the attempt to vacate such an appointment. They, therefore, are inapplicable to the conduct which is asserted to amount to a waiver of appellants' damage claims.

C. Estoppel

Citizens Bank contends that Founders is estopped from asserting any cause of action it may have against the bank. As support for this contention, the bank points to those same facts upon which it claims a waiver by Founders. Arrott and Harvey also relied upon estoppel in moving for summary judgment against C & H Construction and Founders. However, they did not argue this doctrine at the motions hearing nor do they argue it in their briefs. However, because they joined in the motion concerning equitable defenses, we assume that their argument is similar to the bank's.

In New Mexico, estoppel "is the preclusion, by acts or conduct, from asserting a right which might otherwise have existed, to the detriment and prejudice of another, who, in reliance on such acts and conduct, has acted thereon." *Reinhart v.*

Rauscher Pierce Securities Corp., supra 83 N.M. at 198, 490 P.2d at 244; *accord, Chambers v. Bessent,* 17 N.M. 487, 134 P. 237 (1913). It is apparent from this definition that, in order to establish estoppel, detriment, prejudice and reliance must be shown by the party asserting the defense. The record is devoid of any such showing. Therefore, we hold that the bank, Arrott and Harvey failed to carry their burden and that the court erred in granting their summary judgment motions based upon estoppel. *See Reinhart v. Rauscher Pierce Securities Corp., supra.* In arriving at this holding, we are aware that Harvey, in arguing the defense of laches, asserted the existence of injury or prejudice. However, it is settled that mere assertions made by a movant seeking summary judgment are meaningless unless supported by affidavits pursuant to N.M.R.Civ.P. 56(e), N.M.S.A.1978, or by other admissible evidence. *Martin v. Board of Education of City of Albuquerque,* 79 N.M. 636, 447 P.2d 516 (1968). Harvey's assertion lacks such support; nor does he point on appeal to any portion of the record providing such support. Therefore, because the requisite bases of proof are absent, we conclude that this assertion of injury or prejudice is not entitled to consideration.

D. Laches

In its motion against Founders, Citizens Bank also relied upon the defense of laches; Harvey also relied upon this defense in his motion against C & H Construction and Founders. At the motions hearing, Arrott joined in the defense and Harvey argued laches for these three appellees. The thrust of his argument was that the requisite elements of laches were present and that no issue of material fact existed concerning these elements. The court in *Cave v. Cave,* 81 N.M. 797, 474 P.2d 480 (1970), quoting from *Morris v. Ross,* 58 N.M. 379, 271 P.2d 823 (1954), listed the elements which must be shown 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."

Id. at 802–03, 474 P.2d at 485–86. In addition, to establish the defense, the evidence must show both that the delay was unreasonable and that it prejudiced the defendant. *Powell v. Zuchert,* 125 U.S.App.D.C. 55, 366 F.2d 634 (1966); *see Apodaca v. Tome Land & Imp. Co. (NSL),* 91 N.M. 591, 577 P.2d 1237 (1977); *Cave v. Cave, supra.* Ordinarily the reasonableness or unreasonableness of anything is viewed as a mixed question of law and fact which should be determined by a jury. 75 Am.Jur.2d *Trial* § 356 (1974); *see also Kennedy v. Bond,* 80 N.M. 734, 460 P.2d 809 (1969); *Huff v. McClannahan,* 89 N.M. 762, 557 P.2d 1111, *cert. denied,* 90 N.M. 8, 558 P.2d 620 (1976). Given the facts of this case, e. g. the financial arrangements between C & H Construction and the bank and C & H Construction's dependence upon these arrangements, we rule that there exists a genuine factual issue concerning the reasonableness of appellants' delay in asserting their rights. Accordingly, we hold that the court erred in granting appellees' motion based upon laches.

E. Ratification

Both Citizens Bank and Harvey relied upon the defense of ratification in their written motions for summary judgment. At the motions hearing, it appears

that the bank argued those same facts which it used to support its claim of waiver by Founders. Harvey contended that the renewal of notes and the partial releases from the December 28 security agreement amounted to a ratification.

In *Dunn v. Hite,* 27 N.M. 53, 195 P. 1078 (1921), our Supreme Court, quoting from a treatise on equity jurisdiction, stated:

> If the party possessing the remedial right has obtained full knowledge of all the material facts involved in the transaction, has become fully aware of its imperfection and of his own rights to impeach it, or ought, and might, with reasonable diligence, have become so aware, and all undue influence is wholly removed so that he can give a perfectly free consent and *he acts* deliberately, and *with the intention of ratifying the voidable transaction,* then his confirmation is binding, and his remedial right, defensive or affirmative, is destroyed. (Emphasis added.)

Id. at 58, 195 P. at 1079–80; *see generally Woods v. Van Wallis Trailer Sales Company,* 77 N.M. 121, 419 P.2d 964 (1966); *Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.,* 84 N.M. 524, 505 P.2d 867 (Ct.App.), *cert. denied,* 84 N.M. 512, 505 P.2d 855 (1972). Based upon the above statement, an intent to ratify must first be shown in order to establish ratification. Intent is usually a question for the jury. *Maxey v. Quintana,* 84 N.M. 38, 499 P.2d 356 (Ct. App.), *cert. denied,* 84 N.M. 37, 499 P.2d 355 (1972). After reading the record, we rule that Citizens Bank and Harvey failed to establish the absence of any material factual issue concerning C & H Construction's and Founder's intent to ratify the December 28 security agreement. This ruling is based upon those same facts referred to in our discussion of waiver. Accordingly, we hold that the court erred in granting Citizens Bank's and Harvey's motions based upon ratification. Again we remind appellees that it is improper for either the trial court or appellate court to weigh the evidence in determining whether summary judgment should be granted. *Fresquez v. Southwestern Ind. Con. & Riggers, Inc., supra; Huerta v. New Jersey Zinc Company, supra.*

F. Avoidable consequences, judicial immunity and judicial estoppel

Citizens Bank's written motion is based partly on the doctrine of avoidable consequences. At the motions hearing, this theory was argued by the bank in passing. On appeal, Wilson, Arrott and Harvey join the bank and contend that appellants' claims are barred by this doctrine. In its brief, the bank argues that Founder's claim is barred because of its execution, despite its knowledge of the bank's intention respecting the December 28 security agreement, of a continuing guaranty on January 23, 1974. Wilson, in his brief, argues that there were numerous occasions between January 1973, and February 1974, the date when a receiver was appointed in Citizens I, for appellants to have avoided the harm resulting from the bank's actions. Based upon this doctrine, appellees contend that summary judgment was properly granted against appellants. In so contending, appellees necessarily claim that there is no genuine issue of material fact concerning appellants' actions and this doctrine and that, because of the doctrine, appellees are entitled to judgment as a matter of law. Appellants argue that there remain material issues of fact with respect to this legal theory. We agree.

In *Rutledge v. Johnson,* 81 N.M. 217, 465 P.2d 274 (1970), our Supreme Court stated:

> Under the doctrine of avoidable consequences a person injured by the tort of another is not entitled to damages for harm which he could have avoided *by the use of due care* after the commission of the tort. (Emphasis added.)

Id. at 220, 465 P.2d at 277. This Court in *Selgado v. Commercial Warehouse Company,* 88 N.M. 579, 544 P.2d 719 (Ct.App.1975), by way of defining the doctrine, said:

> Under this doctrine, plaintiff cannot recover damages for injuries resulting from consequences after the accident occurred if plaintiff could *reasonably* have avoided these consequences. This is called the doctrine of "avoidable consequences." (Emphasis added.)

Id. at 581, 544 P.2d at 721. The use of due care involves a standard of reasonableness. *See Ferreira v. Sanchez,* 79 N.M. 768, 449 P.2d 784 (1969); *Archuleta v. Jacobs,* 43 N.M. 425, 94 P.2d 706 (1939). Therefore, integral to both of the above statements is the reasonableness of a party's actions. *Cf. Pillsbury v. Blumenthal,* 58 N.M. 422, 272 P.2d 326 (1954). We have already indicated that reasonableness is usually determined by a jury. In light of the present facts, e. g. the financial arrangements between C & H Construction and the bank, C & H Construction's dependence upon these arrangements, the close and ongoing relationship between C. R. Davis and the bank, C. R. Davis's statements that he protested the appointment of a receiver and Fidelity National Bank's early intervention into the Citizens I receivership proceedings, we rule that there exist genuine factual issues with respect to the reasonableness of appellants' actions. Therefore, we hold that the court erred in granting appellees' motions based upon the theory of avoidable consequences.

The written motions of Citizens Bank and Harvey are based in part on the theory of judicial immunity. The bank mentioned this theory in passing at three different points during the motions hearing; Harvey failed to argue the theory. Neither of these appellees argues the theory on appeal. We rule that such a cursory treatment falls short of carrying that burden required of the bank and Harvey with respect to this theory. Therefore, we hold that the court erred in granting the motions of these appellees based on judicial immunity.

Harvey contends, in his brief, that C & H Construction and Founders are prohibited from asserting their claims against him. This contention is based upon the doctrine of judicial estoppel. For support, Harvey points to appellants' knowledge of the alleged fraud in the procurement of the December 28 security agreement, their consent to the appointment of a receiver in Citizens I and their subsequent filing of the present suit based upon the alleged fraud and this appointment. Harvey claims this conduct is equivalent to maintaining an inconsistent position in a judicial proceeding which the doctrine was formulated to prevent. *See Citizens Bank v. C & H Const. & Paving Co., Inc., supra,* for a definition of judicial estoppel. Upon examining Harvey's contention, it is apparent that his argument is based upon the assertion that appellants consented or agreed to the appointment of a receiver in Citizens I. Appellants argue that there are material factual issues with respect to this consent. We agree.

We have already stated the record reveals that (1) C & H Construction and the bank were engaged in a series of financial transactions, (2) C & H Construction was financially dependent upon the continuing nature of these transactions and amicable relations with the bank, (3) the relationship between the bank and C. R. Davis was a close and ongoing one and (4) C. R. Davis claimed that he protested the appointment of a receiver. Because of these facts, we rule that a material factual issue exists as to whether appellants agreed to the appointment of a receiver. In addition, this Court in Citizens I concluded that the Davises had not consented to the appointment. This conclusion was based upon an analysis of the conduct of David F. Cargo, attorney for C & H Construction and C. R. Davis. We ruled that this conduct did not establish judicial estoppel as a matter of law. Therefore, the import of our ruling was that, at the very least, there was a factual question with respect to the application of this doctrine. Harvey points to no new facts in the present case which were not present in Citizens I. Therefore, we rule that his argument is without merit. Moreover, we again

remind appellees that it is improper for a trial or appellate court to weigh the evidence in deciding whether summary judgment should be granted.

In arriving at our final holding that the court erred in granting the motions of Citizens Bank, Harvey and Arrott, we are aware that the bank argues that the allegations of appellants' second amended complaint fail to state any cause of action against it. This argument is based first on the assertion that Founders, as a shareholder of C & H Construction, has no capacity to sue the bank. In making this assertion, Citizens Bank misapprehends the nature of Founder's claims. Founders is not suing as a shareholder of C & H Construction; rather it is suing as an individual entity for injuries sustained independently through the alleged fraudulent and wrongful acts of the bank. *Buschmann v. Professional Men's Association,* 405 F.2d 659 (7th Cir. 1969); *see Bank of New Mexico v. Rice,* 78 N.M. 170, 429 P.2d 368 (1967). Therefore, this assertion is not well taken. In addition, the fact that Founders might not have had any direct dealings with Citizens Bank does not necessarily preclude it from asserting a cause of action against the bank. We held in Citizens I that a party, despite the absence of any immediate contact with the alleged tort-feasor, may recover for damages suffered if they were the natural and probable consequences of the alleged fraudulent conduct. Secondly, Citizens Bank bases its argument on the assertion that Founders cannot recover damages as a guarantor without a specific allegation that it has paid on the guarantee. As support for this assertion, the bank relies upon *Bank of New Mexico v. Rice, supra.* We conclude that this assertion is incorrect and the bank's reliance upon that case is misplaced. In *Bank of New Mexico,* the court discussed what type of proof was necessary *in order to recover damages.* In the case at hand, we are dealing with what type of damage allegation is sufficient to overcome a contention that a complaint fails to state a cause of action. New Mexico adheres to the broad purposes of the Rules of Civil Procedure and construes the rules liberally, particularly as they apply to pleading. *See Biebelle v. Norero, supra; Hambaugh v. Peoples, supra.* As our Supreme Court stated in *Carroll v. Bunt, supra:* "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." *Id.* 50 N.M. at 130, 172 P.2d at 118. Guided by this principle, we rule that, at this stage of proceedings, Founder's allegation that it "has been called upon to pay under the continuing guaranty" is a sufficient allegation of damages to overcome a contention that its complaint fails to state a cause of action. Accordingly, the bank's assertion is without merit. In so ruling, we note finally that the bank's assertion overlooks other elements of damages which Founders claims and which are adequately pleaded in its complaint.

IV. Appellants' motion for partial summary judgment

In their written motion, appellants moved for partial summary judgment against Citizens Bank and Harvey based upon the doctrine of res judicata and collateral estoppel. On appeal, appellants abandon their motion against Harvey. Because the court granted the bank's motion to strike on the basis that the claims of C & H Construction against the bank were compulsory counterclaims, C & H Construction is necessarily not a party to the motion for partial summary judgment. Therefore, the motion is only between Founders and Citizens Bank. In its brief, Founders argues that the Citizens I litigation necessarily and finally determined that the bank fraudulently procured the December 28 security agreement. Accordingly, Founders concludes that the bank is collaterally estopped from denying the fraud in the present suit and that the trial court erred in denying its motion for partial summary judgment. We disagree.

The basic issue involved in Founder's conclusions is whether it may take advantage of the Citizens I determination of fraudulent procurement. Since Founders was not a party to Citizens I, in order to do so, it must establish privity with a party to the previous litigation. *Atencio v. Vigil,* 86 N.M. 181, 521 P.2d 646 (1974). Not only must such privity be shown, but because of *Atencio's* mandate that mutuality exist, the required privity must be with a party to the previous judgment. As stated in 1B Moore's Federal Practice ¶ 0.441[3] at 3781 (2d ed. 1974):

> Privity requires that a party against whom the conclusive effect of a judgment is invoked must be a party or a privy to the judgment; and *mutuality, modified by the privity concept, requires that the party invoking the judgment must similarly be bound by it, either as a party or as a privy.* . . . (Emphasis added.)

See City of Santa Fe v. Velarde, supra. In Citizens I, two judgments were entered which are relevant to the present issue, one on the counterclaim of C. R. and Alice Davis and one on the cross-claim of James Davis. Since C & H Construction was not a party to these judgments, and indeed did not even assert a claim in the proceedings, Founders must establish its privity with one of the Davises in order to invoke the judgments' binding effect. The record indicates that the only assertion of privity made by any of the parties was that between Founders and C & H Construction. No attempt was made by Founders to establish its privity with any of the Davises. Privity is initially a question of fact. *See* 1B Moore's Federal Practice ¶ 0.411[1] at 1253–55 (2d ed. 1974); *Meeker v. Walker, supra.* Not only did Founders make no attempt to establish the privity required by its motion but it also failed to show the absence of any material dispute concerning this question. Accordingly, we hold that it failed to carry its burden and that the court did not err in denying its motion for partial summary judgment.

In arriving at this holding, we note that on appeal Founders fails to argue that the court erred in denying its motion as to the issues of estoppel and waiver by the Davises. Because of this failure, Founders is deemed to have abandoned its attack on the trial court's ruling concerning these issues. *Wilson v. Albuquerque Board of Realtors,* 82 N.M. 717, 487 P.2d 145 (Ct.App. 1971); *see also State ex rel. State Hy. Dept. v. 1st Nat. Bank, etc.,* 91 N.M. 240, 572 P.2d 1248 (1977); *Perez v. Gallegos,* 87 N.M. 161, 530 P.2d 1155 (1974). In any event, the defenses of estoppel and waiver raised by the bank in Citizens I were based *inter alia* upon the assertion that the Davises did not oppose or object to the appointment of a receiver. It was upon these grounds that the jury was instructed. Other grounds have been asserted by appellees in the present suit to support their claims of estoppel and waiver. Accordingly, we conclude that these claims, in the posture presented to us, have not yet been necessarily and actually determined in Citizens I.

Based upon the foregoing, we reverse the court's orders granting appellees' summary judgment motions, affirm its order denying appellants' motion for partial summary judgment and remand.

IT IS SO ORDERED.

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

598 P.2d 211

Richard E. RUSHING, Plaintiff-Appellee,

v.

LOVELACE–BATAAN HEALTH PROGRAM, Defendant-Appellant.

No. 12315.

Supreme Court of New Mexico.

July 9, 1979.

Sutin, Thayer & Browne, Ronald Segel, Albuquerque, for defendant-appellant.

Wycliffe V. Butler, Albuquerque, for plaintiff-appellee.

OPINION

SOSA, Chief Justice.

Plaintiff brought suit in the District Court of Bernalillo County seeking a judgment declaring that he was entitled to coverage for surgery, pursuant to a group health agreement between his employer, the City of Albuquerque, and defendant, Lovelace-Bataan Health Program (LBHP). Defendant denied liability. The district court entered judgment for plaintiff in the amount of $5983.26. Defendant appeals. The question we address in this appeal is whether the court erred in concluding that plaintiff was entitled to reimbursement un-

der the health care agreement for the surgery he underwent.

Plaintiff was a member of LBHP. During the last week of March 1976, he sought approval from the Medical Director of LBHP for intestinal bypass surgery, which plaintiff desired for the purpose of weight reduction. The Medical Director disapproved the surgery. Nevertheless, plaintiff underwent the surgery on April 5, 1976. The district court found that the surgery had been wrongfully disapproved and concluded that plaintiff was entitled to payment of the reasonable medical expenses incurred by him for the surgery.

Defendant's first contention is that the court erred in finding that plaintiff had satisfied a condition precedent to bringing suit. Defendant contends that plaintiff's suit was premature and should have been dismissed because plaintiff failed to allege or to prove that he had complied with the grievance procedures provided for in Section VI, paragraph 14, of the group health agreement.

Plaintiff counters that defendant had sufficient knowledge of his claim and that defendant's log could be considered as his written request. Plaintiff also argues that defendant waived the formal claim requirement when it denied his claim. We disagree.

Section VI, paragraph 14, provides:

> DISPUTES: No action at law or in equity shall be brought upon a dispute between LBHP or any of its Providers and a Member *until that Member has made a written claim to LBHP and exhausted the remedies of the grievance procedure established by LBHP.* (Emphasis added.)

Paragraph 14 is clear and unambiguous. It provides that plaintiff was required to file a written claim with LBHP and to exhaust the available grievance procedure prior to filing any action. Plaintiff failed to do so. He orally requested approval for the surgery. His request was orally denied by the Medical Director. Plaintiff never made a written claim to LBHP of that denial. Instead, he chose to proceed with the surgery one week later, despite the Medical Director's verbal disapproval of the surgery. A contractual provision which is clear and unambiguous is conclusive. *See Woodson v. Lee,* 73 N.M. 425, 389 P.2d 196 (1963); *Shattuck v. Precision-Toyota, Inc.,* 115 Ariz. 586, 566 P.2d 1332 (1977). It is our opinion that under these facts the district court erred in concluding that plaintiff had satisfied a condition precedent to filing the action.

Defendant's second contention is that the court erred in finding that the surgery performed on plaintiff was medically reasonable, that it was not for cosmetic purposes, and that it was not experimental. The court found that plaintiff's surgery was medically reasonable and necessary in that his weight was causing him to have "dangerously high blood pressure placing his health in jeopardy." We have reviewed the entire record and find that there is no evidence to support this finding. Plaintiff stated in his affidavit that he had a breakdown, that he had severe emotional problems, and that he had built up a lot of tension. The doctor who performed the surgery stated that plaintiff's weight problem "predisposes him to a variety of health problems as he grows older, such as arthritis, gall-bladder disease, diabetes, heart disease, pulmonary insufficiency, and back pain." In addition, plaintiff's requested findings of fact and conclusions of law made no mention that plaintiff had dangerously high blood pressure. This finding is not sustained by any evidence and is in error. We hold that there is sufficient evidence to support the findings that the surgery was not for cosmetic purposes or experimental.

Defendant's third contention is that the court erred in finding that plaintiff's surgery was an emergency. Section I, paragraph 14 of the group health agreement defines "emergency service" as:

> Those services required for alleviation of severe pain, or immediate diagnosis and treatment of unforeseen medical condi-

> tions, which, *if not immediately diagnosed and treated,* could lead to disability or death. (Emphasis added.)

Section VII, paragraph 18, subparagraph (a) of the agreement states that coverage for emergency services is provided where

> [t]he condition so treated required treatment of such an *immediate nature* that the Member's health might have been jeopardized by the delay . . . or the shock or unconsciousness of a Member caused by the accident or illness . . . (Emphasis added.)

We have reviewed the entire record and fail to find evidence to support the court's finding that plaintiff's operation constituted "emergency services." Although plaintiff's weight may have presented a significant threat to his future health, we do not feel that it was of such an "immediate nature" that his health would have been jeopardized by filing a written claim and exhausting the available grievance procedures prior to undergoing the surgery. The contractual definition of what constitutes "emergency services" is conclusive. *Woodson, supra; Shattuck, supra.*

We hold that the district court erred in concluding that plaintiff was entitled to payment for the expenses he incurred in undergoing the surgery. The decision of the court is therefore reversed.

IT IS SO ORDERED.

McMANUS, Senior Justice and EASLEY, J., concur.

598 P.2d 213

E. R. COMER and Rosa E. Comer, Plaintiffs-Appellees,

v.

John B. HARGRAVE, Defendant-Appellant,

First National Bank of Port Arthur, Texas and all other unknown claimants of interest in the premises adverse to the plaintiffs, Defendants.

No. 12002.

Supreme Court of New Mexico.

July 31, 1979.

Harry L. Patton, Clovis, for defendant-appellant.

Quinn & Quinn, Stephen K. Quinn, Clovis, for plaintiffs-appellees.

Rowley, Hammond, Rowley & Tatum, David F. Richards, Clovis, for defendants.

OPINION

EASLEY, Justice.

Comer sued Hargrave to collect on a note and to foreclose a mortgage on real estate. Judgment was entered for Comer. Hargrave appeals. We reverse.

The issue we address is whether a vendor must give notice to a defaulting vendee of his intention to accelerate payments due on a note before the vendor is entitled to file suit to foreclose the mortgage securing payment of the note.

In 1973, the parties contracted for the sale of the real estate. The deed, mortgage and note were placed in escrow. Although the mortgage contained no provision for a grace period for payments, the printed form of the note provided that, should Hargrave remain in default for 30 days, Comer could declare the remainder of the note payable.

About February 22, 1977 Hargrave tendered the December 31, 1976 payment to the escrow bank. The bank returned the payment to Hargrave since tender had been made after the 30-day grace period. After the tender was refused, and without giving Hargrave any notice of his intention to accelerate all the note payments, Comer filed suit to foreclose the mortgage.

Comer claims that the absence of a provision for a grace period in the mortgage barred assertion of that right by Hargrave. However, when a note and mortgage are made at the same time and in relation to the same subject as parts of one transaction, they will be construed together as if they were parts of the same instrument. If there is conflict between the two, the provisions of the note control. *Samples v. Robinson*, 58 N.M. 701, 275 P.2d 185 (1954).

The briefs of the parties on appeal did not consider *Carmichael v. Rice*, 49 N.M. 114, 158 P.2d 290, 159 A.L.R. 1072 (1945) which is controlling here. *See* Annot., 5 A.L.R.2d 968, § 3 (1949). This Court stated that in order to exercise an optional acceleration clause in a promissory note, "[i]t is imperative that some act, signifying an intention to accelerate must appear . . ." *Carmichael*, at 117, 158 P.2d at 292; followed in *Gelman v. Public National Bank*, 126 U.S.App.D.C. 281, 377 F.2d 166 (1967), and *Moresi v. Far West Services, Inc.*, 291 F.Supp. 586 (D.Haw.1968). Failure to accept a tender before exercising the optional acceleration clause was held to constitute a waiver of the right to accelerate. *Carmichael*, 49 N.M. at 118, 158 P.2d at 293.

We see no reason to alter this rule. Comer waived his right to accelerate the note payments by refusing the overdue payments made prior to notice. We therefore reverse, and remand for further proceedings consistent with this opinion.

IT IS SO ORDERED.

SOSA, C. J., and PAYNE, J., concur.

598 P.2d 216

Tommy TOMSON, on behalf of himself and all others similarly situated, Plaintiff-Appellant,

v.

COUNTY OF DONA ANA, New Mexico, and the County Treasurer and County Assessor of Dona Ana County, New Mexico, Defendants-Appellees.

No. 3631.

Court of Appeals of New Mexico.

June 26, 1979.

Charles W. Cresswell, Martin, Martin & Lutz, Las Cruces, for plaintiff-appellant.

Joseph M. Holmes, Asst. Dist. Atty., Las Cruces, for defendants-appellees.

OPINION

WALTERS, Judge.

On April 8, 1975, plaintiff brought a class action to declare void a 5% penalty assessed against himself and other taxpayers who failed to declare their properties prior to March 1, 1974. Defendants did not answer. Instead, they filed a motion for summary judgment, and a hearing was held on the motion.

Two years later, absent any fault of the parties for delay, the district court entered an order sustaining the motion for summary judgment. The order read:

> THE COURT, after having taken into consideration the Complaint, the Affidavits attached to the Motion for Summary Judgment, and the exhibits attached thereto, is of the opinion that the motion should be sustained as the Plaintiff, in his pleadings has not shown any cause of action under the statutes of the state.
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Motion for Summary Judgment be and the same is granted.

The additional 5% on 1974 taxes was imposed on appellant pursuant to § 72–2–13, N.M.S.A.1953. That section and a large portion of the Property Tax Code was repealed by the 1974 legislature, to become effective January 1, 1975. In the same legislative session, however, a proviso was enacted excepting from the repealed Property Tax Code the "collection and administration of property taxes imposed in tax years prior to the 1975 tax year." Laws of 1974, ch. 92, § 33B(2).

Appellant argued that the attempt to collect the penalty was not an attempted collection of a tax so as to be within the exception. This question has not been decided in New Mexico, and there is no uniformity in the decisions of other jurisdictions. We are inclined to agree with those courts which have held that an assessed

penalty for taxpayers' delinquencies "is as much a part of the tax as the principal amount." *In re Knox-Powell-Stockton Co.*, 100 F.2d 979 (9th Cir. 1939); *see also Munkevitz Realty & Inv. Co. v. Diederich Schaefer Co.*, 231 Wis. 504, 286 N.W. 30 (1939). Appellant cannot deny that the penalty is directly tied to non-compliance with the taxpayer's duty to list and declare his property with the county assessor for taxation purposes, and that procedure is likewise undeniably part and parcel of the task of collecting and administering property taxes in any given year.

Appellant failed to declare his property between January 1 and March 1, 1974, as he was required to do under § 72–2–10.1, N.M.S.A.1953. The assessor imposed the additional 5% for his failure to so do, in accordance with § 72–2–13. The latter section did not become ineffective, as repealed, until January 1975. All taxes "prior to the 1975 tax year" were to be "imposed, collected and administered as provided by the law then in force." Laws of 1974, Ch. 92 § 33B(2). The law then in force was § 72–2–13, which directed the assessor, if he ascertained that any property subject to taxation had not been declared, listed, and valued, to extend the taxes against such property and "add thereto an amount equal to five (5%) per cent."

At the time the repeal took effect, appellant owed the additional five percent. Whether considered a tax or a penalty, nothing in the repealer of § 33 of Ch. 92 of the 1974 Laws excepted his obligation for its payment. His complaint alleged arbitrary, capricious and illegal assessment of that amount, and as the above discussion indicates, there simply is no basis in fact or law upon which the allegations of the complaint could be sustained.

The trial court correctly disposed of the matter, whether we choose to call it dismissal of the complaint or grant of summary judgment. See *Garver v. Public Service Co. of New Mexico*, 77 N.M. 262, 421 P.2d 788 (1966). The label is insignificant and to deny jurisdiction on that ground in order to dismiss the appeal, as suggested by our brother, is to exalt form over substance. *Akre v. Washburn*, 92 N.M. 487, 590 P.2d 635 (1979); *see also Westbrook v. Lea General Hospital*, 85 N.M. 191, 510 P.2d 515 (Ct.App.1973).

Since the judgment must be affirmed, the class action issue raised by appellee need not be considered.

The judgment is affirmed and IT IS SO ORDERED.

ANDREWS, J., concurs.

SUTIN, J., dissented.

SUTIN, Judge (dissenting).

I dissent.

As my sisters say, I exalt form over substance. They believe that the failure to state a cause of action allows entry of a summary judgment; that sustaining a motion for summary judgment constitutes a summary judgment; that an order sustaining a motion for summary judgment is a final judgment from which to appeal.

On April 8, 1975, plaintiff brought a class action to declare void a 5% penalty assessed against property listed and valued prior to March 1, 1974. Defendants did not answer. Instead, they filed a motion for summary judgment. A hearing was held.

Two years later, absent any fault of the parties for delay, the district court sustained the motion for summary judgment. It was entitled "ORDER SUSTAINING MOTION FOR SUMMARY JUDGMENT." In the Order entered, the district court stated that in his opinion, the motion should be sustained:

> . . . as the Plaintiff, in his pleadings has not shown any cause of action under the statutes of the State.

No finding was made "that there is no genuine issue as to any material fact," and that defendants are entitled to a judgment as a matter of law. Rule 56(c) of the Rules of Civil Procedure. A summary proceeding is used to determine whether an issue of fact exists, not to determine whether plaintiff's complaint states a claim for relief. *Rekart v. Safeway Stores, Inc.*, 81 N.M. 491, 468 P.2d 892, 38 A.L.R.3d 354 (Ct.App.1970).

Furthermore summary judgment was not entered for defendants. The Order states:

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the Motion for Summary Judgment be and the same is granted.

An appeal can only be taken from a final judgment. The granting of a motion for summary judgment is nothing more than a determination that the party is entitled to a judgment. It does not constitute the entry of a final judgment. *Felger v. Nichols*, 30 Md.App. 278, 352 A.2d 330 (1976); *Dowling v. Jensen*, 28 Ill.App.2d 174, 171 N.E.2d 107 (1960).

The Order granting defendants' motion was not submitted to the parties for approval as to form. Nevertheless, we have often cautioned attorneys to "Beware The Ides Of March." Defendants should have sought entry of a final judgment and plaintiff should not have taken an appeal from an Order sustaining a motion. The expense involved and the labor lost in the preparation of briefs and oral argument is viewed by me with antagonistic eyes.

Four years have passed since the complaint was filed. I look with disfavor of a class action of this kind even though it was filed before Rule 23(a) and (c) of the Rules of Civil Procedure was revoked and vacated by Supreme Court Order on July 22, 1976. *See* Braziel-Castoria, *The Future of Class Actions in New Mexico*, 7 N.M.L.Rev. 225 (1977).

This case should be remanded to the district court and plaintiff should be granted an opportunity to establish his claim.

598 P.2d 218

MORA-SAN MIGUEL ELECTRIC COOPERATIVE, INC., Plaintiff-Appellant,

v.

HICKS & RAGLAND CONSULTING & ENGINEERING CO., K & B Contractors and Thomas T. Castonguay, Defendants-Appellees.

No. 3571.

Court of Appeals of New Mexico.

June 28, 1979.

Steven P. Bailey, James C. Ritchie, Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for plaintiff-appellant.

Frank H. Allen, Jr., Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for Hicks & Ragland.

Frank Andrews, Montgomery, Andrews & Hannahs, P. A., Sante Fe, for K & B Contractors.

Sumner G. Buell, Jasper & Buell, Santa Fe, for Thomas T. Castonguay.

OPINION

HERNANDEZ, Judge.

This appeal arises out of a summary judgment granted the defendants, K & B Contractors (K&B), Hicks & Ragland (H&R), and Thomas T. Castonguay (Castonguay), against the defendant and third party plaintiff Mora-San Miguel Electric Cooperative, Inc. (Cooperative).

The Cooperative in the fall of 1964 had a power line constructed on the land of Castonguay. The line was designed and the construction supervised and inspected by H&R. K&B constructed the line. Plaintiff sustained an electric shock and was injured on April 28, 1974, when he grabbed a guy wire which had become charged accidentally. The Cooperative settled the plaintiff's claim and sought recovery from one or all of the other defendants. Plaintiff's complaint was filed on October 20, 1975.

The Cooperative alleges five points of error which will be considered in order. Section 37–1–27, N.M.S.A.1978, provides that:

> "No action to recover damages for any injury to property, real or personal, or for injury to the person, or for bodily injury or wrongful death, arising out of the defective or unsafe condition of a physical improvement to real property, nor any action for contribution or indemnity for damages so sustained, against any person performing or furnishing the construction or the design, planning, supervision, inspection or administration of construction of such improvement to real property, and on account of such activity, shall be brought after ten years from the date of substantial completion of such improvement; provided this limitation shall not apply to any action based on a contract, warranty or guarantee which contains express terms inconsistent herewith. The date of substantial completion shall mean the date when construction is sufficiently completed so that the owner can occupy or use the improvement for the purpose for which it was intended, or the date on

which the owner does so occupy or use the improvement, or the date established by the contractor as the date of substantial completion, whichever date occurs last."

The Cooperative's first point of error is that this section is not applicable to its claim against H&R and K&B because the power line in question was not a "physical improvement to real property." We do not agree. The word "physical" has several meanings. The most appropriate for these purposes is "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary." Webster's Third New International Dictionary (Unabridged). The word "improvement" likewise has several meanings and as used in the context of § 37–1–27, supra, the most applicable is "the enhancement or augmentation of value or quality: a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." Webster's Third New International Dictionary (Unabridged). It is our opinion that a given parcel of land which has electrical service available is more valuable than a comparable parcel without such service. The installation of the power line was a physical improvement which came within the intent and design of § 37–1–27, supra.

The Cooperative's second point is that § 37–1–27, supra, is inapplicable to its claim against H&R and K&B because it is based upon breach of contract and contracted indemnity. We have reviewed the Cooperative's contracts with these parties and we find absolutely nothing in the terms and conditions of either to support this contention.

The Cooperative's third point is that § 37–1–27, supra, is inapplicable to its claims against K&B and H&R because they are based upon facts which occurred prior to the enactment of this section and the legislature did not indicate that it should be given retrospective application. There is no merit to this contention. Any claims that the Cooperative might have had against K&B and/or H&R accrued at the time that it settled with the plaintiff in 1978, not in 1964 or 1965. That is the Cooperative had no vested rights against either of these parties when this section was enacted in 1967. As we pointed out in *Howell v. Burk,* 90 N.M. 688, 568 P.2d 214 (Ct.App.1977), there is no constitutional prohibition against the creation of new rights or the abolition of old ones to attain a legislative objective.

The Cooperative's fourth point is that § 37–1–27, supra, violates both the New Mexico and United States Constitutions in five respects: (1) impairment of contract obligations; (2) equal protection; (3) special legislation; (4) due process; and (5) subject-in-title clause. The first of these contentions we answered under point two that there was no breach of contract or contractual indemnity. The remaining four contentions we answered contrary to the position of the Cooperative in *Howell v. Burk,* supra, wherein they were considered with regard to § 37–1–27, supra. The Cooperative seeks to distinguish the *Howell* case from the instant one on a factual basis. Even though the facts may differ, the analysis in *Howell* is nonetheless applicable to this situation.

The last point of error is that the trial court erred in granting Castonguay's motion for summary judgment. The Cooperative summarizes its third-party complaint against Castonguay as follows: "that Thomas T. Castonguay breached his duty to exercise reasonable care to protect plaintiff against a dangerous condition of which he had actual knowledge or of which he would have discovered by conducting a reasonable inspection of his property . . . that the aforesaid negligence . . . was the proximate cause of plaintiff's injuries." Castonguay at his deposition testified that he bought the 398 acre tract in 1962: that he hauled a house trailer onto the property and had a well dug and a water pump installed. He also installed a water storage

tank which he intended to connect to the trailer but he never did because the trailer was vandalized and most of the contents were stolen. During the first year he and his wife would go up about once every two months and spend a weekend there. After the trailer was broken into his wife would not go up there anymore. He went up about once every two or three months. He was not consulted as to the location of the electric service line on his property nor was he consulted about the design or the way in which it was constructed. He also testified, during his periodic visits to the property, prior to plaintiff's accident in April of 1974, that the electric service line and the transformer, etc., seemed to him to be in proper condition. However, he did add that he had no education or experience with electrical installations of this kind and he was not sure that he would have recognized that something was amiss if it had been. He did notice that in September 1971 the meter had been removed and immediately wrote to the Cooperative, because he had not been notified beforehand that it was going to be removed. He also stated that he had no control over the service line and aside from having an electrician connect his trailer house and water pump to the meter, he never made any changes in the line.

Castonguay's testimony constituted a *prima facie* showing on his part that he was entitled to summary judgment. The burden then shifted to plaintiff to come forward and demonstrate that a genuine issue of fact existed as to the allegations of his complaint in regard to Castonguay. *Goodman v. Brock,* 83 N.M. 789, 498 P.2d 676 (1972). The plaintiff in his brief-in-chief cites nothing in the record that counters Castonguay's showing. The plaintiff did not meet the burden and the trial court correctly granted his motion for summary judgment.

We affirm.

IT IS SO ORDERED.

SUTIN, J., concurring in result only.

WALTERS, J., concurs.

SUTIN, Judge (concurring in result).

I concur in the result only because, whether affirmed or reversed, Mora-San Miguel Electric Cooperative, Inc. (Mora) has no third-party claims to pursue against Hicks and Ragland Consulting and Engineering Co. (Hicks), K & B Contractors (K & B), and Thomas T. Castonguay. This appeal should be dismissed.

This opinion opens in this fashion to suggest that if the time is not ripe to overrule *Howell v. Burk,* 90 N.M. 688, 568 P.2d 214 (Ct.App.1977), Sutin, J., dissenting, it should not be considered in this appeal. "A dissenting opinion may not show what the law is, but it sometimes shows quite clearly what the law is going to be." Osborn, The Problem of Proof, Preface to First Edition, p. XXII. Section 37–1–27, N.M.S.A.1978, the 10 year limitation statute is unconstitutional. I am sure that when a catastrophic event occurs which involves the death or serious injury of persons visiting in an old building that collapses, a new panel of judges will overrule *Howell,* and use the statements common to this practice:

> We recognize that this is a far-reaching decision that halts the harsh and unjust results which blind adherence to technical rules of statutory construction mandates. Public policy demands that *Howell v. Burk* be overruled. See, dissenting opinion.

The Supreme Court should not wait until the catastrophic event occurs. Of course, there are various methods of side-stepping the statute. *See,* Mora's Brief-In-Chief.

A. *Whether affirmed or reversed, Mora has no third-party claims to pursue.*

To understand the position of the parties in this appeal, and the errors claimed by Mora, we must note the following procedural background:

(1) Quintana sued Mora for damages for injuries sustained by suffering an electric shock from certain power transmission lines.

(2) Mora brought in as third-party defendants, Hicks, K & B, and Castonguay.

Mora sought judgment over against third-party defendants "for all or a portion of the amount of *any judgment that may be entered in this case in favor of Plaintiff and against Defendant and Third Party Plaintiff* . . . ." [Emphasis added.]

(3) Quintana then filed a second amended complaint and asserted claims for relief against Mora, Hicks and K & B.

(At this juncture, we have two separate claims: (1) *Quintana vs. Mora, Hicks & K & B*, not *Castonguay*, and (2) *Mora vs. Hicks, K & B* and *Castonguay*.)

(4) Castonguay filed a motion for summary judgment directed to Mora's third-party complaint, and also filed a cross-claim against Hicks and K & B.

(5) Hicks alone filed a motion to dismiss all claims for relief made by Quintana, Mora and Castonguay. At a hearing, K & B orally moved to dismiss. These motions were based on the fact that these actions were not commenced within ten years from the date of substantial completion of the electric system, and all claims for relief were barred by the ten year limitation statute.

(6) Omitting intermediate proceedings of an interlocutory appeal that was denied, the court ordered that all claims and cross-claims and third-party claims by all parties against *defendants Hicks and K & B* were dismissed with prejudice in that this action was not commenced within ten years.

(At this juncture, Hicks and K & B were removed from the case. The matters yet before the court were: plaintiff's complaint against Mora, Mora's third-party complaint against Castonguay, and Castonguay's motion for summary judgment.)

(7) A final Order was entered based upon Castonguay's motion for summary judgment directed to Mora's third-party complaint. The motion was granted and Mora's third-party complaint "and all causes of action stated therein or that could be stated therein are dismissed with prejudice."

(At this juncture, the only matter before the district court was Quintana's complaint against Mora.)

(8) *Quintana filed a motion to dismiss with prejudice* "the above styled and numbered cause, and all claims, demands and causes of action associated therewith." In this quoted language, a final Order of dismissal with prejudice was entered.

(At this juncture, all claims filed in district court had been disposed of.)

(9) Mora duly filed its notice of appeal (1) from the final Order that dismissed third-party claims of Mora against Hicks and K & B based upon the ten year limitation statute, and (2) from the final Order in which summary judgment was entered for Castonguay. Mora's Brief-In-Chief was confined to these two points.

Mora's third-party complaints sought judgment over against third-party defendants "for all or part of the amount of *any judgment that may be entered* in this cause in favor of Plaintiff and against the Defendant and Third Party Plaintiff . . . ."

Plaintiff dismissed his complaint against Mora with prejudice. No Judgment was obtained by plaintiff against Mora. As a matter of substantive law, a judgment must be entered in favor of plaintiff before Mora can seek contribution or indemnity against third-party defendants. In a different context, see *Marr v. Nagel,* 58 N.M. 479, 272 P.2d 681 (1954). The purpose of Rule 14 of the Rules of Civil Procedure is to avoid two separate actions which should be tried together "and to do away with the serious handicap to a defendant of a time difference between *a judgment against him,* and a judgment in his favor against the third-party defendant." 3 Moore's Federal Practice ¶ 14.04 (1978).

When Quintana dismissed his claim against Mora with prejudice, it sounded the death knell of Mora's third-party claims. Mora had no third-party claims to pursue. Let us assume that the judgments below are reversed. The only parties below are Mora vs. Hicks, K & B and Castonguay. Mora cannot proceed on the third-party claims because there can be no adjudication of the Quintana-Mora controversy.

Mora claims it compromised its claims with plaintiff and paid in full the amount of the negotiated settlement. Even if true, contribution and indemnity do not arise by reason of any settlement that Mora and plaintiff desire to negotiate. A settlement is not a substitute for a judgment. To protect itself, Mora had a duty to adjudicate plaintiff's claim to show that Mora was indebted to plaintiff. Mora could then pay and satisfy the judgment and pursue third-party defendants in the court below. Not having done so, Mora has no third-party claims.

Inasmuch as no claims existed by Mora against third-party defendants, third-party defendants should have filed a motion with the district court to seek a final order that:

> Plaintiff having dismissed his claims against Mora, Mora's third-party claims are dismissed with prejudice.

If this order had been entered, Mora would have had a valid basis for appeal.

B. *This appeal is moot as to contribution by joint tortfeasors but not as to indemnity.*

K & B and Hicks as joint tortfeasors claim that the settlement and order of dismissal have made moot on this appeal the issues of contribution and indemnity. They have two legal effects. The majority opinion does not discuss these issues.

(1) The settlement extinguished Mora's claim for contribution. Section 41–3–2(C) of the Joint Tortfeasors Act reads:

> A joint tortfeasor who enters into a settlement with the injured person is *not* entitled to recover contribution from another joint tortfeasor *whose liability to the injured person is not extinguished by the settlement.* [Emphasis added.]

The record is silent as to any settlement. If we assume that a settlement was made, its terms are absent. All that we have before us is the order that dismissed Quintana's claim with prejudice. It reads:

> ORDERED, ADJUDGED AND DECREED that the above styled and numbered cause, and all claims, demands and causes of action associated therewith, be, and the same hereby are, dismissed with prejudice.

Section 41–3–2(C) is not applicable. We do not know whether the joint tortfeasor's liability was extinguished.

In *United States v. Reilly,* 385 F.2d 225 (10th Cir. 1967) the United States sought contribution from Reilly, a joint tortfeasor. The court said:

> [W]e believe that the New Mexico courts would follow the weight of authority under the Uniform Contribution Among Tortfeasor Act which holds that a joint tortfeasor must be released *by name* in order for the settling joint tortfeasor to recover contribution, and this notwithstanding language in the settlement or order of approval purporting to satisfy "all claims" arising out of the incident. * * * [Emphasis by court.]
>
> * * * * * *
>
> We accordingly, conclude, as did the trial court, that Reilly's potential liability in tort to the injured children was not legally extinguished by the judicially approved settlement proceedings and that controlling New Mexico law dictated dismissal of the government's claim for contribution. [385 F.2d at 229.]

See, Rio Grande Gas Company v. Stahmann Farms, Inc., 80 N.M. 432, 457 P.2d 364 (1969).

"The right of a tortfeasor to secure a money judgment for contribution does not accrue until he has either, (1) discharged *the common liability of the joint tortfeasors* by payment, or (2) has paid more than his pro-rata share thereof." [Emphasis added.] *Garrison v. Navajo Freight Lines, Inc.,* 74 N.M. 238, 240, 392 P.2d 580, 582 (1964).

Mora did not comply with the Joint Tortfeasors Act and lost its right to seek contribution in the third-party claims against K & B and Hicks. Its appeal in this respect is moot.

(2) Mora's claim against K & B and Hicks for indemnity was dismissed by the Order of Dismissal set forth above under point A. K & B and Hicks do not explain how Quin-

tana's dismissal of its claim against Mora also dismissed Mora's claim of indemnity against K & B and Hicks. They say: "Mora's claim . . . is certainly encompassed by this language." I think they mean the language which says "and causes of action associated therewith." I won't attribute facetiousness to this argument. But before I can accept it I would need logic and authority to support the view that, upon motion by Quintana to dismiss "all causes of action associated therewith," the trial court can include Mora's third-party claims, unless Mora agreed. Mora "noted" the Order of Dismissal. But I cannot attribute agreement by Mora since its third-party claims had already been dismissed under the ten year limitation statute.

The appeal on the third-party claim for indemnity is not moot.

598 P.2d 641

In the Matter of Dale B. DILTS, Attorney at Law.
No. 12596.

Supreme Court of New Mexico.
Aug. 24, 1979.

This matter coming on for consideration by the Court upon Petition for Reinstatement, and the Court having considered said petition and acquiescence of Chief Bar Counsel to said petition, and now being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that Dale B. Dilts be and he hereby is reinstated to active membership in the State Bar of New Mexico.

598 P.2d 644

Tony E. MATNEY, Plaintiff-Respondent,

v.

Roger EVANS, Individually and as father and next friend of Robert T. Evans, a minor, Defendants-Petitioners.

No. 3909.

Court of Appeals of New Mexico.

May 8, 1979.

Rehearing Denied May 22, 1979.

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

Paul S. Wainwright, Robinson, Stevens & Wainwright, Albuquerque, for plaintiff-respondent.

OPINION

WOOD, Chief Judge.

A car driven by Robert Evans struck a bicycle being ridden by plaintiff. Summary judgments as to the liability of defendants were entered in favor of plaintiff. Defendants then raised issues concerning a guardian for Robert and an asserted indispensable party. We granted defendants' application for an interlocutory appeal. We consider (1) the propriety of the summary judgments; (2) the guardianship issue; and (3) the United States as an indispensable party.

Propriety of the Summary Judgments

In October, 1977, Judge Rozier Sanchez granted summary judgment "finding Roger Evans liable for the negligent acts of his son, Robert T. Evans, based on the Family Purpose Doctrine * * *." No issue is raised as to the propriety of this summary judgment.

In November, 1977, Judge Rozier Sanchez granted summary judgment on the basis that "Robert T. Evans was negligent and his negligence caused the injuries received by Plaintiff" and that "Plaintiff was free from any negligence concerning the accident * * *."

Attorney Eugene E. Klecan criticized Judge Sanchez's handling of the case; Judge Sanchez recused himself. The case was assigned to Judge Maloney.

Defendants moved for reconsideration of the summary judgments. The motion for reconsideration was heard in December, 1978. Judge Maloney affirmed the summary judgments previously granted by Judge Sanchez.

Defendants claim that Judge Sanchez incorrectly placed the burden of proof upon defendants in connection with the summary judgment motions. Defendants rely on language in a letter from Judge Sanchez which states, in regard to liability and contributory negligence, that nothing in the depositions supported defendants' theory. Defendants then assert that they had no burden under *Fidelity Nat. Bank v. Tommy L. Goff, Inc.*, 92 N.M. 106, 583 P.2d 470 (1978).

Fidelity National Bank, supra, holds that plaintiff's burden on summary judgment includes the burden of showing no material issues of fact existed as to defendant's affirmative defenses. In order to make a prima facie showing for summary judgment in this case, plaintiff was required to make a prima facie showing that defendants were negligent and, to meet the affirmative defense, that plaintiff was not contributorially negligent.

The transcript of the summary judgment hearing shows that plaintiff understood his burden, undertook to, and met his burden. The comments in Judge Sanchez's letter state no more than that defendants failed to show there was a disputed material issue of fact which would defeat the showing which entitled plaintiff to summary judgment.

Defendants assert there were factual issues as to whether Robert was negligent, whether any negligence of Robert was the proximate cause of the accident, and whether plaintiff was contributorially negligent. We disagree.

Yale is a north-south street. Kathryn comes into Yale from the east. Entry into Yale from Kathryn is controlled by a stop sign. Robert was driving north on Yale in the right-hand lane when his car collided with plaintiff's bicycle somewhere in the vicinity of the Yale-Kathryn intersection.

Plaintiff's showing, from the depositions, was that plaintiff was traveling north on Yale, in the curb lane, on a bicycle equipped with a front light, powered by a generator affixed to the rear fork. The investigating officers could not remember whether there was a generator-powered light to the rear, but the showing is uncontradicted that reflectors were attached to the pedals of the bicycle and another reflector was attached to the back of the bicycle seat.

The investigating officers were of the opinion that the bicycle was struck from the rear. They explained that the rear bicycle wheel, viewed vertically, had a large indentation consistent with the tire of the wheel being struck by the bumper of a car, pushing the rim of the wheel inwards toward the sprocket. One officer illustrated with a diagram. The officer also explained their opinions on the basis of the path of plaintiff's body—it crossed the hood, hit the right windshield and passed over the top and length of the car.

Robert observed nothing in his lane of travel until immediately before the collision he saw a flash of chrome. The accident happened around 11:00 p. m. During the course of the evening Robert had consumed two to three beers and admitted to being tipsy. There is testimony that the beer would have dulled Robert's perceptions.

Plaintiff's showing was that plaintiff was traveling north on Yale on a bicycle, equipped with a light and reflectors, in the proper lane of travel; that Robert never saw the bicycle in time to avoid the collision. Plaintiff made a prima facie showing that he was not contributorially negligent, that Robert was negligent in failing to keep a proper lookout and that this negligence was the proximate cause of the accident.

Defendants' theory of contributory negligence was that plaintiff entered Yale from Kathryn, that plaintiff either did not stop at the stop sign or else pulled into the path of Robert's car. The defense argument is based on gouge marks at the accident scene and on an affidavit.

After the accident, there was a gouge mark in the pavement. This gouge mark was located in the northeast quadrant of the intersection. The gouge mark was made by a pedal of the bicycle. The gouge mark was a straight line three feet west of what would have been the east curb of Yale if that curb had extended across Kathryn. The south end of the gouge mark was ten feet south, and the north end of the gauge mark was six feet south of what would have been the north curb of Kathryn if that curb had been extended across Yale. The south end of the gouge mark was approximately seven feet north of a projected centerline of Kathryn.

The point of impact was necessarily south of the gouge mark because it was the impact that knocked the bicycle down with the

resulting gouge mark. The officers placed the point of impact between four and thirty feet south of the south end of the gouge mark.

Defendants contend that a point of impact south of the gouge mark does not negate their contention that plaintiff entered Yale in the path of Robert's car. We agree; the physical location of the gouge mark and the actual point of impact indicate nothing about defendants' theory. Defendants assert that, consistent with *Fidelity National Bank v. Tommy L. Goff, Inc.*, supra, plaintiff had to negate defendants' theory. We disagree.

Fidelity National Bank reaffirms that "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." Plaintiff was not required to demonstrate beyond all possibility that no genuine issue of fact existed. Plaintiff was not required to show there was no possibility that he entered Yale into the path of the car. Plaintiff did show that there was nothing in the physical facts that caused the investigating officers to believe that plaintiff was westbound on Kathryn. Plaintiff's showing was a prima facie showing entitling him to summary judgment; defendants had the burden of elevating their speculation about entry into the path of the car into a fact issue. Defendants' arguments concerning gouge marks and point of impact did not meet this burden.

Defendants assert they met their burden by an affidavit they submitted. The affidavit was of Joseph A. Holland, who states that he is an accident reconstruction expert. This affidavit affirms the physical location of the gouge marks and states that damage to the bicycle "is not consistent with the bike being struck from the rear. Rather, the bike was at an angle to the car at impact." As we have pointed out, the location of the gouge marks adds nothing to defendant's theory. Holland does not explain his view concerning the striking of the bicycle. Holland concludes: "Based upon my investigation and analysis, it is my opinion that the bicycle pulled out directly in front of the oncoming vehicle." We agree with Judge Sanchez that the affidavit was no more than unsupported conclusions that were not entitled to consideration. Rule of Civ.Proc. 56(e) requires affidavits to set forth facts "as would be admissible in evidence * * *." See *Galvan v. City of Albuquerque*, 85 N.M. 42, 508 P.2d 1339 (Ct.App.1973); *Smith v. Klebanoff*, 84 N.M. 50, 499 P.2d 368 (Ct.App.1972). The Holland affidavit did not comply with Rule of Civ.Proc. 56(e).

Defendants also assert that summary judgment was improper because the trial court acted as a fact finder rather than determine whether the material facts were undisputed. See *Fresquez v. Southwestern Ind. Con. & Riggers, Inc.*, 89 N.M. 525, 554 P.2d 986 (Ct.App.1976). Defendants' argument is based on the fact that plaintiff brought the bicycle to the summary judgment hearing, invited Judge Sanchez to view it, and argued that "the physical evidence from this bicycle * * * shows there can be no dispute that the bicycle was struck from the rear." The record does not show whether the trial court viewed the bicycle; we assume it did. However, it does not follow from this "view" that Judge Sanchez was a "fact finder" at the summary judgment hearing. The letter from Judge Sanchez, announcing his decision, refers only to the depositions, it does not indicate the bicycle "view" played any part in the decision.

We cannot say that the bicycle "view" resulted in Judge Sanchez finding any fact, or that the "view" even suggested a disputed factual issue. The bicycle is not before us for view or review. Inasmuch as the defendants are relying on the bicycle in arguing the impropriety of the summary judgment, it was defendants' burden to see that the record before us was adequate to review the alleged impropriety. *State v. Duran*, 91 N.M. 756, 581 P.2d 19 (1978). Having failed to present the bicycle, defendants' bicycle view argument cannot be considered.

Defendants also present a scattershot of arguments that we do not answer individually. These arguments are to the effect that Judge Sanchez drew inferences from the depositions and decided factual questions. We have reviewed the depositions that go to the liability question. These depositions show that plaintiff made a prima facie showing that Robert was negligent, that this negligence was the cause of the accident, and that plaintiff was not contributorially negligent. Defendants had the burden of showing there was a material issue of fact and did not meet this burden. The summary judgments were properly granted.

The Guardianship Issue

Robert is a minor. The original complaint sued him directly. The amended complaint sued Robert through Roger, as father and next friend of Robert. After proceedings by writ of mandamus, the Supreme Court directed that "the next friend be appointed guardian ad litem so that the trial can proceed." Pursuant to the Supreme Court order, Judge Maloney appointed the father as guardian ad litem for Robert, finding that Roger had been "acting as father and next friend throughout these proceedings * * *." The guardian was appointed on October 5, 1978.

Defendant contends that the summary judgments entered against Robert prior to the appointment of the guardian ad litem were void because there was no jurisdiction in the trial court prior to the appointment. We do not discuss whether a judgment against a minor is void if the minor does not have a guardian. Nor do we discuss whether the Supreme Court decided such a question by its order. Such discussion is unnecessary.

Judge Maloney reconsidered the summary judgments and affirmed them on December 7, 1978. This was after the appointment of the guardian ad litem. Any defect in Judge Sanchez's summary judgments, because of lack of a guardian for Robert, was cured when the summary judgments were affirmed when Robert had a guardian. Stated another way, there was no defect in the parties when Judge Maloney affirmed the summary judgments; the affirmed summary judgments are valid regardless of any asserted defect in the parties before Judge Sanchez.

United States as an Indispensable Party

The amended complaint states:

> 6. As a result of the injuries, the Plaintiff has received and in the future will continue to receive medical and hospital care and treatment furnished by the United States of America. The plaintiff for the sole use and benefit of the United States of America under the provisions of 42 U.S.C. 2651–2653, and with its express consent, asserts a claim for the reasonable value of said past and future care and treatment.

Defendant moved to dismiss the complaint alleging that the United States was an indispensable party. Denial of this motion was not error.

Defendants' indispensable party claim is based entirely on New Mexico decisions involving insurance companies. Defendants overlook the fact that a federal statute is involved. Compare *White v. Sutherland*, 92 N.M. 187, 585 P.2d 331 (Ct.App.1978).

The federal statute, 42 U.S.C.A. (1973) § 2651, establishes an independent right of the United States to recover and states procedures by which to seek recovery. The procedures are not mandatory; an action, as here, for the sole use and benefit of the United States, is not excluded by the statute. The absence of the United States as a party in a "sole use and benefit" action does not subject the action to dismissal for lack of an indispensable party. *Albright v. R. J. Reynolds Tobacco Company*, 350 F.Supp. 341 (W.D.Pa.1972); *Palmer v. Sterling Drugs, Inc.*, 343 F.Supp. 692 (E.D.Pa.1972).

The summary judgments are affirmed. The order denying the motion to dismiss for asserted lack of an indispensable party is affirmed. The cause is remanded for trial on the issue of damages.

IT IS SO ORDERED.

LOPEZ, and WALTERS, JJ., concur.

598 P.2d 649

Manuel A. MARTINEZ and Patricia A. Martinez, Plaintiffs-Appellants,

v.

RIO RANCHO ESTATES, INC., and Amrep Construction Corporation, as New Mexico Corporations, Defendants-Appellees.

No. 3697.

Court of Appeals of New Mexico.

July 5, 1979.

David W. King, Albuquerque, for plaintiffs-appellants.

Richard A. Winterbottom, Jerrald J. Roehl, Jerrald J. Roehl & Associates, Albuquerque, for defendants-appellees.

OPINION

WALTERS, Judge.

The interesting question presented: Shall an engineer-expert, who is also an attorney and has signed one of the pleadings in the case but participated no further as an attorney, be excluded as an expert witness on matters not concerned with the attorney-client privilege? is not reached on this appeal, because we decide it on another ground.

Martinez complains on appeal that the trial court committed error in refusing to allow his engineering expert to testify on rebuttal. The same witness had originally signed an entry of appearance on behalf of defendant Rio Rancho, but although no withdrawal and substitution of counsel were filed, he did not, in fact, act any further as an attorney in the case. At oral argument counsel for appellant advised the court that he learned of the witness's expertise a few days before trial, and he sought to have him testify in appellant's case-in-chief. However, upon objection by Rio Rancho that the name of the witness was not included in the pre-trial order and that his testimony would be a surprise, the trial court sustained the objection and would not permit the witness to take the stand.

The witness had written a letter to Rio Rancho which might have had substantial bearing on Martinez's claim for punitive damages, and it was with respect to the contents of the letter that Martinez wished to examine the expert in the presentation of his case. In ruling that the witness could not testify, because of surprise to appellee, the court suggested that the letter be introduced through another witness. It was intimated at oral argument that Martinez inadvertently rested without introducing the letter, so counsel attempted to bring the witness back on rebuttal notwithstanding the court's earlier ruling that the witness would not be allowed to testify.

Rule 16, R.Civ.P., N.M.S.A.1978, provides that the trial court may enter a pre-

trial order which, "when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." It was said in *State ex rel. State Highway Dept. v. Branchau,* 90 N.M. 496, 565 P.2d 1013 (1977), that the justification behind this rule is to prevent surprise and to get away from the "sporting" theory of justice. Since appellant admits that he learned of the witness's expertise several days before trial but took no action to advise opposing counsel or to have the name included in the list of witnesses contained in the pre-trial order, the court acted well within its discretionary power in refusing to disregard the limitations of the pre-trial order both times the witness was called.

The trial court's suggestion that the damaging letter be introduced through another witness is further reason for us to support the manner in which it exercised its discretion. *See Tobeck v. United Nuclear-Homestake Partners,* 85 N.M. 431, 512 P.2d 1267 (Ct.App.1973).

Whereas rebuttal witnesses are not usually required to be listed in pre-trial orders because they cannot be anticipated, this is not such a case. The tender of the excluded evidence discloses that the witness's testimony would have parallelled testimony which was presented in plaintiff's case-in-chief by his other expert. Moreover, it was essentially an expansion of the same information as was contained in the letter which plaintiff failed to introduce. Thus it was not, technically, rebuttal evidence. The trial court's ruling was not error.

The judgment is affirmed.

IT IS SO ORDERED.

HENDLEY and ANDREWS, JJ., concur.

598 P.2d 650

CITY OF ALBUQUERQUE,
Plaintiff-Appellee,

v.

Victor D. JUAREZ, Defendant-Appellant.

No. 3943.

Court of Appeals of New Mexico.

July 5, 1979.

Ralph C. Binford, Municipal Defender, Albuquerque, for defendant-appellant.

Lauren E. Marble, Asst. City Atty., Albuquerque, for plaintiff-appellee.

OPINION

WALTERS, Judge.

On defendant's appeal from Municipal Court, he was convicted in a trial de novo in the district court of Bernalillo County of driving while his license was suspended, in violation of Albuquerque City Ordinance 96, § 4.17 of the Traffic Code.

The parties stipulated that on July 26, 1978 defendant was operating a motor vehicle within the city limits of Albuquerque, and if called to testify, he would state that he had not received notice that his license had been suspended and that, on July 26, 1978, he had no knowledge of the suspension.

A copy of the notice of suspension sent by certified mail to the defendant, and a copy of the envelope in which it was sent indicating that the notice had been returned unclaimed, were admitted into evidence. The notice stated that the discretionary suspension resulted from defendant's accumulation of "points" for various traffic violations. Defendant contends on appeal that his conviction for driving on a suspended license cannot stand absent a showing of actual knowledge on his part of the suspension. We are not prepared to hold that actual knowledge is a prerequisite to suspension; however, we agree that a conviction obtained under the circumstances of this case failed to meet due process requirements and must be reversed.

Three statutes are relied upon by the City to justify defendant's conviction. First is § 66–5–30, N.M.S.A.1978 by which the Motor Vehicle Division of the State Transportation Department is delegated the authority to suspend or revoke driver's licenses for various reasons. That section provides in part:

> A. The division is authorized to suspend the license of a driver without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee:
>
> * * * * * *
>
> (3) has been convicted with such frequency of offenses against traffic laws or regulations governing motor vehicles as to indicate a disrespect for traffic laws and a disregard for the safety of other persons on the highways;
>
> (4) is an habitually reckless or negligent driver of a motor vehicle;
>
> * * * * * *
>
> B. Upon suspending the license of any person as authorized in this section, the division shall immediately notify the licensee in writing and upon his request shall afford him an opportunity for a hearing as early as practicable within not to exceed twenty days . . . after receipt of such request in the county wherein the licensee resides . . . provided that the hearing request is received within twenty days from the date that the suspension was deposited in the United States mail. . . .

Section 66–2–11, N.M.S.A.1978, outlines the procedures to be followed when notice is necessary under the Motor Vehicle Code:

> Whenever the division is authorized or required to give any notice under the Motor Vehicle Code, or any other law regulating the operation of vehicles, unless a different method of giving notice is otherwise expressly prescribed, such notice shall be given either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person

at his address as shown by the records of the division. The giving of notice by mail is complete upon the expiration of seven days after such deposit of said notice. . . .

Finally, § 66–5–22, N.M.S.A.1978, provides:

Whenever any person, after applying for or receiving a driver's license, shall move from the address named in such application or in the license issued to him, . . . such person shall, within ten days thereafter, notify the division in writing of his new address, . . .

When the Division took action to suspend defendant's driving privileges, it mailed a notice to defendant at his address as shown in their records, in accordance with the notice provisions of §§ 66–5–30 and 66–2–11. Although the notice was correctly addressed, defendant did not receive it. After being arrested for the commission of another traffic offense, he was charged with driving while his license was suspended.

The necessity for procedural due process applies to the suspension of one's driver's license by the state. That was the precise issue in *Bell v. Burson,* 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), in which the Court determined that notice and opportunity for hearing are required by the Due Process Clause of the Fourteenth Amendment before termination of driving privileges, except in emergency situations. In declining to define due process in the suspension of licenses, the Supreme Court likewise did not enunciate the extent and type of notice necessary to meet the requirements of the Due Process Clause. It relied on the standard created in *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 657, 94 L.Ed. 865, 872 (1950) that the process must be "appropriate to the nature of the case."

More recently, the Court modified its position on the timing of the notice and hearing, noting that the public interest in administrative efficiency, in highway safety and "prompt removal of a safety hazard" militates against the necessity for pretermination hearings. *Dixon v. Love,* 431 U.S. 105, 114, 97 S.Ct. 1723, 1728, 52 L.Ed.2d 172, 181 (1977). *Dixon* was a constitutional attack on the statutory procedure which, like New Mexico's, permitted discretionary suspension of driving privileges prior to notice and hearing. In upholding the statute, the Court found the procedures for administrative suspension prior to notice and hearing constitutional. It did not, however, answer the question concerning the effect of the administrative suspension if actual notice of the opportunity to be heard is not received.

Cases are cited by the City in which a suspension or revocation has been upheld even when the licensee did not receive notice of the hearing and had no opportunity to contest the action, e. g., *Tobias v. State,* 586 P.2d 669 (Colo.App.1978); *Ryan v. Andrews,* 50 Ohio App.2d 72, 361 N.E.2d 1086 (1976); and *Bureau of Motor Vehicles v. Fisher,* 117 Ohio App. 59, 189 N.E.2d 744 (1962). Those cases reiterate the test of *Mullane, supra,* and recognize that the notice given must be that which is " 'reasonably calculated to produce the desired result without imposing unrealistically heavy burdens on the party charged with the duty of notification.' " *State v. Wenof,* 102 N.J.Super. 370, 246 A.2d 59 (1968), quoting from Gellhorn and Byse, Administrative Law 852 (4th ed. 1960). They decide that actual notice is not necessary for an administrative suspension. Thus, with respect to the suspension itself, it is not invalid because of failure to meet due process standards since the notice of suspension was reasonably calculated to reach the intended recipient while not imposing an undue burden on the Motor Vehicle Division.

The specific issue before us, however, is the degree of notice required to impose criminal sanctions. In determining that question, different considerations control.

In criminal cases it is basic that the prosecutor has the burden of establishing all requisite elements of proof. The necessity of proceeding by criminal complaint imposes a requirement of notice, thus placing the initial burden of proving notice upon the City. The City relies on § 66–2–11

as establishing a presumption of notice to defendant and, consequently, a presumption of knowledge also. However, there can be no conclusive presumptions in criminal cases, even if unrebutted. *See Bollenbach v. United States,* 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350 (1945); *State v. Jones,* 88 N.M. 110, 537 P.2d 1006 (1975).

Section 66–2–11 provides that notice is effective upon the expiration of seven days after deposit of such notice in the mail. The provision obviously assumes delivery within that time, absent some indication to the contrary. But here, the Division was made aware that the intended notice had not been received because it was returned "unclaimed." Once the mailing of the notice is shown, the defendant must rebut the statutory inference of receipt or stand convicted of the offense. The inference of receipt was rebutted when the "unclaimed" envelope containing the notice was admitted into evidence, and when the City stipulated that the defendant would testify he had no actual knowledge whatsoever of the suspension.

Two cases in which the conviction, not merely the suspension, was sustained, cited by the City, contain a salient fact not present in this case. In *People v. La Gana,* 85 Misc.2d 1039, 381 N.Y.S.2d 742 (1976), the denial of defendant's motion for dismissal of the charge of driving with a suspended license was upheld. The court's decision that actual notice of the suspension was not required was based on the defendant's failure to answer a traffic ticket, thus indicating the presence of some actual notice since a driver "should know that if he fails to answer a ticket, something is going to happen," *id.* 743. The court there suggested that the defendant might avoid conviction at trial if he lacked culpability.

No affirmative action, other than the mailing of the notice, was taken against the defendant here, and his suspension was discretionary rather than mandatory. This is the basis upon which the City's second case, *State v. Wenof,* 102 N.J.Super. 370, 246 A.2d 59 (1968), must be distinguished. In *Wenof,* the defendant received a summons for speeding which stated that driving privileges could be revoked for failure to appear to answer. The defendant failed to appear and moved without leaving a forwarding address.

Both *La Gana* and *Wenof* imply that some degree of wilful or voluntary avoidance of notice is necessary when notice has not been received. In the absence of some proof by the City tending to show voluntary avoidance on the part of the defendant, the presumption of notice relied upon by the City cannot be effective. Proof might be accomplished by showing that the defendant moved and did not comply with the change of address requirements of § 66–5–22, or by showing service or posting notice at the suspended licensee's residence. Compare the requirements of § 61–1–5, N.M.S.A.1978. This greater effort does not impose an undue burden on the Division since it is not until after the Division is made aware that its mailed notice has not been received that it must attempt personal service, or establish that the licensee has moved and failed to inform the Division of a change in his address. Moreover, due process demands the effort in proper instances.

The prosecution prevails on the notice issue when it shows (1) delivery and acknowledged receipt by the licensee; or (2) inability to notify because of voluntary avoidance by the licensee. The City did not establish either of these notice attempts, nor was there any evidence that the defendant had moved over ten days before the notice was sent or that he refused to claim the letter. Lacking such proof, the prosecution must show other good faith and accepted methods of notifying a driver that his license has been suspended. Defendant stands convicted for driving an automobile within the City of Albuquerque while in the possession of driver's license which, so far as he knew, was a valid license. His conviction must be reversed. *See In re Murdock,* 68 Cal.2d 313, 66 Cal.Rptr. 380, 437 P.2d 764 (1968).

IT IS SO ORDERED.

HENDLEY and ANDREWS, JJ., concur.

598 P.2d 654

Robert McDONALD, Plaintiff-Appellant,

v.

KERR-McGEE CORPORATION, Defendant-Appellee.

No. 3741.

Court of Appeals of New Mexico.

July 17, 1979.

Benjamin S. Eastburn, Hynes, Eastburn & Hale, Farmington, for plaintiff-appellant.

George W. Kozeliski, Glascock, McKim & Head, Gallup, for defendant-appellee.

OPINION

ANDREWS, Judge.

This is an appeal from a summary judgment order of the District Court of McKinley County dismissing the plaintiff's claim for benefits under the New Mexico Occupational Disease Disablement Law. The decisive question is whether the employer should be estopped from raising § 52–3–10(A)(2), N.M.S.A.1978 as a defense where it knew at the time it hired plaintiff that he was suffering from an occupational disease, but did not tell him.

Plaintiff, Robert McDonald, a forty-one year old Navajo applied for a job as a uranium miner with defendant-employer, Kerr-McGee on May 27, 1975. McDonald had worked as a uranium miner for the previous nineteen years in the State of Colorado. Since McDonald neither spoke nor wrote English, he was assisted in applying for the position by Kerr-McGee employee Harry Jackson, who acted as interpreter. About two days later, McDonald returned to Jackson's office and was given an appointment for a physical examination which, he was told, he would have to pass in order to be hired. He took his physical examination June 4. On June 5, McDonald returned to the mine and spoke to Jackson who did not yet know the results of the application. While McDonald waited, Jackson made a phone call and then told McDonald that since he had not heard anything, "everything must be all right." McDonald was photographed for an identification card and went to work June 6, 1975.

Part of the June 4 examination involved x-rays, the results, of which were reported by Dr. Ritter, the examining physician, as "pneumoconiosis—(silicosis?)." However, McDonald was not told at the time of his hiring nor at any time afterward that he had this condition. Kerr-McGee admits that "[a]t the time Defendant hired Plain-

tiff, Defendant had knowledge of Dr. Ritter's report and of Dr. Ritter's conclusions therein", but "nonetheless hired Plaintiff to work in Defendant's mines. . . . "

On March 24, 1977, and April 15, 1977, McDonald was examined by separate U.S. Public Health Service doctors who both concluded that because he suffered from silicosis he "should not work underground", and that he was incapacitated from further work in the mines. Kerr-McGee raises § 52-3-10(A)(2), as a defense to paying benefits under the New Mexico Occupational Disablement Law:

> [N]o compensation shall be paid in case of silicosis or asbestosis unless during the ten years immediately preceding the disablement the injured employee shall have been exposed to harmful quantities of silicon dioxide dust or asbestos dust for a total period of *no less than twelve hundred fifty work shifts in employment in this state*, and unless disablement results within two years from the last day upon which the employee actually worked for the employer against whom compensation is claimed. For the purpose of computing work shifts under this section, employment for less than one-half of a normal shift shall be disregarded, and employment for one-half or more of a normal shift shall be deemed a full shift. (Emphasis added.)

If Kerr-McGee is permitted to rely on the emphasized portion of this provision, it is dispositive of this cause. To avoid this result, the employee asserts that the employer should be estopped from raising such defense where its conduct has induced the employee to "forbear from doing, something he would not have done but for such conduct." *Tome Land & Improvement Co. v. Silva*, 83 N.M. 549, 494 P.2d 962 (1972).

Applying estoppel to a proceeding under the New Mexico Occupational Disease Disablement Law is a matter of first impression. However, the doctrine has been applied in cases arising under the Workmen's Compensation Act after which it is closely patterned.[1] As stated in *Anaya v. City of Santa Fe*, 80 N.M. 54, 451 P.2d 303 (1969):

> Even though our Workmen's Compensation Act does not specifically provide for equitable defenses, nevertheless, this court has considered equitable claims and defenses in workmen's compensation proceedings. *Tocci v. Albuquerque & Cerrillos Co.*, 45 N.M. 133, 112 P.2d 515 (1941)—fraud or mutual mistake; *Hudson v. Herschbach Drilling Co.*, 46 N.M. 330, 128 P.2d 1044 (1942)—incapacity to contract; *Lance v. New Mexico Military Institute*, 70 N.M. 158, 371 P.2d 995 (1962)—estoppel; *Winter v. Roberson Construction Co.*, 70 N.M. 187, 372 P.2d 381, 96 A.L.R.2d 933 (1962)—question of whether plaintiff was estopped; *Herrera v. C & R Paving Co.*, 73 N.M. 237, 387 P.2d 339 (1963)—fraud and misconduct; *Durham v. Gulf Interstate Engineering Co.*, 74 N.M. 277, 393 P.2d 15 (1964)—fraud or other inequitable conduct; *Thomas v. Barber's Super Markets, Inc.*, 74 N.M. 720, 398 P.2d 51 (1964)—fraud, undue influence, misrepresentation or coercion; *Gray v. J. P. (Bum) Gibbins, Inc.*, 75 N.M. 584, 408 P.2d 506 (1965)—fraud. These cases are cited to show that equitable considerations apply to workmen's compensation claims and defenses and may be applied to the instant case. 80 N.M. 54 at 56, 451 P.2d 303 at 305.

Pursuant to this authority, we conclude, by analogy, that if the elements of estoppel are established, the doctrine can be applied in a case arising under the New Mexico Occupational Disease Disablement Law.

There are certain essential elements which usually exist in order to constitute an equitable estoppel:

> There must be conduct—acts, language or silence—amounting to a representation or concealment of material facts. These must be known to the party estopped at the time of his said conduct, or at least

1. *See Salazar v. Kaiser Steel Corporation*, 85 N.M. 254, 511 P.2d 580 (Ct.App.1973), cert. denied 85 N.M. 229, 511 P.2d 555.

the circumstances must be such that knowledge of them is necessarily imputed to him. The truth concerning these facts must be unknown to either party claiming the benefit of the estoppel at the time when such conduct was done and at the time when it was acted upon by him. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and proper that it will be acted upon. The conduct must be relied upon by the other party, and thus relying, he must be led to act upon it. He must in fact act upon it in such a manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights consistent with it. *Chambers v. Bessent*, 17 N.M. 487, 134 P. 237 (1913).[2]

See also Tome Land & Improvement Co. v. Silva, supra; Porter v. Butte Farmers Mutual Insurance Company, 68 N.M. 175, 360 P.2d 372 (1961); *State v. City Council of Hot Springs*, 56 N.M. 118, 241 P.2d 100 (1952).

Whether or not the conduct of Kerr-McGee constitutes estoppel, thereby precluding its reliance on the defense available under § 52–3–10(A)(2) can be determined only through an analysis of the facts. The district court has not yet had an opportunity to review the facts pertinent to this issue. We therefore reverse and remand for proceedings to establish whether or not the conduct of Kerr-McGee constitutes estoppel, acted upon by McDonald to his detriment; and if so, whether McDonald has a "disablement" as defined in § 52–3–4(A), N.M.S.A.1978.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

2. Compare *Dye v. Crary*, 13 N.M. 439, 85 P. 1038 (1906), requiring that five specific elements be present in order to constitute an estoppel by conduct.

598 P.2d 1155

LOCAL 2238, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL–CIO, Petitioner-Appellee,

v.

NEW MEXICO STATE HIGHWAY DEPARTMENT et al., Respondents-Appellants.

NEW MEXICO STATE HIGHWAY DEPARTMENT et al., Petitioners-Appellants,

v.

LOCAL 2238, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL–CIO, Respondent-Appellee.

No. 12005.

Supreme Court of New Mexico.

July 26, 1979.

Toney Anaya, Atty. Gen., Richard L. Russell, Chief Counsel Asst. Atty. Gen., V. Henry Rothschild, III, Deputy Chief Counsel Asst. Atty. Gen., Santa Fe, for appellants.

David L. Norvell, Jon T. Kwako, Albuquerque, for appellee.

OPINION

PAYNE, Justice.

Local 2238, of the American Federation of State, County and Municipal Employees, brought a mandamus action in district court against the State Highway Department, the State Department of Finance & Administration, and the Governor to compel compli-

ance with an arbitration decision awarding increased per diem payments to union members. The trial court held that the arbitration award was binding and awarded the union $343,174.60 in damages. The Highway Department appeals.

The arbitrator held that the Highway Department was obligated under its collective bargaining agreement with the union to pay a "special living allowance" to any union employee who regularly reports to a work site away from the district or general office of the Department and outside of the municipal limits of the employee's place of residence. The Highway Department contends that this decision is unenforceable because it violates § 10–8–4 B, N.M.S.A. 1978 of the New Mexico Per Diem and Mileage Act, which provides:

> Every salaried public officer or employee who is traveling within the state but away from his home and away from his designated post of duty on official business shall receive not to exceed twenty-four dollars ($24.00) a day for each day spent in the discharge of his official duties.

The arbitrator rejected the Highway Department's contention that the contractural provision violates § 10–8–4 B.

To clearly understand the arbitrator's decision it is necessary to review the history which led up to the collective bargaining agreement.

Since 1960 the Highway Department has paid per diem or a special living allowance to certain of their employees who were called to work away from their regular place of employment. In 1965 the Highway Department began to pay five dollars per day to construction crew employees whose work site was more than thirty-five miles from their district office. In 1970 a new policy was issued by the Highway Department whereby a special living allowance in the amount of seven dollars per day was paid to certain employees whose work was confined to specific areas more than thirty-five miles away from their "home base" and where the work continued for a considerable period of time. This policy also required that the employee remain overnight.

The first contract between the Highway Department and the union was executed in 1973. It provided that "to be eligible for per diem, an employee must be thirty-five (35) miles away from his duty station, and the nature of his assignment normally require him to remain overnight." Since 1973 the Highway Department's application of this provision has ignored the requirement that an employee remain away from his duty station overnight in order to qualify for the allowance. The Highway Department has never made an effort to determine whether or not employees physically remained overnight. If the work site was more than thirty-five miles from the general or district office, an employee was eligible for and received the payment.

The negotiations, which led to the contract that is now in dispute, were conducted in 1975. In these negotiations the Highway Department proposed to divide the expense reimbursement policy into two categories, "per diem" and "special living allowance." Special crews who were regularly away from the district or general office and at one location for several consecutive days would receive the special living allowance. Employees of the general or district office who were away from such office only on sporadic intervals and not in one particular location for any lengthy period would receive per diem. This distinction was eventually adopted by the parties in their bargaining agreement.

From the beginning of the negotiations the union insisted that the thirty-five mile radius be deleted as a condition for receiving the special living allowance. The Highway Department consistently sought to maintain that requirement.

The union took the position that it was willing to have the affected employees report to their district office or home base for each day of work to be transported to the job site by the Highway Department. The Highway Department rejected this proposal.

During the last day of negotiations the thirty-five mile radius requirement was de-

leted from the special living allowance provision of the bargaining agreement, but it was retained in the per diem provision. The bargaining agreement was signed by the parties and was subsequently approved by the State Personnel Board and the Office of the Attorney General. The special living allowance provision was approved by the Department of Finance & Administration.

In light of the bargaining history and the fact that a thirty-five mile condition was retained in only the per diem clause, we agree with the arbitrator and the district court that it was clear that the parties intended that the thirty-five mile condition would not apply to the special living allowance provision. It should be borne in mind that the thirty-five mile restriction and the overnight requirement are two separate and distinct issues. The thirty-five mile restriction was not imposed by statute nor has it been shown to be a rule or regulation. Consequently, the Highway Department, once it agreed to drop the restriction during negotiations, cannot now be allowed to enforce it.

The special living allowance provision, as finally adopted, provides in part:

> Members of the bargaining unit . . . shall be placed on a special living allowance rate of $1.60 per hour while traveling away from their duty station. . . . This special living allowance shall be paid for a maximum of eight (8) hours per day.

We do not agree with the Highway Department's contention that payment of this allowance violates § 10–8–4 B of the Per Diem and Mileage Act.

The New Mexico Per Diem and Mileage Act does not on its face prohibit partial per diem payments. It does not specify how far a person must travel to be "away from his home and away from his designated post of duty." Nor does it specify what is meant by the use of the phrase "for each day spent in the discharge of his official duties."

The director of the Department of Finance & Administration testified that he was charged with the responsibility of implementing the provisions of the Per Diem and Mileage Act or of designating the heads of the various departments to do so in his stead. He testified that it had been the policy of the Department of Finance & Administration in applying the Act to other agencies to break a day into one-quarter segments for the purpose of reimbursement for mileage and per diem. He also stated that he had allowed the Highway Department to act as its own fiscal agent in the payment of partial per diem payments under the Act.

The Highway Department agreed in the collective bargaining agreement to make partial per diem payments in the form of the special living allowance. Although the amount of these allowance payments exceeded the normal amount of payments allowed by the Department of Finance & Administration for other agencies, they did not exceed the maximum twenty-four dollars per day limit imposed by the Act. There is nothing in the Act which is in conflict with the interpretation given to it by either the director of the Department of Finance & Administration or the Highway Department. Therefore, we cannot say that the special living allowance provision agreed upon by the parties is violative of § 10–8–4 B.

We affirm the decisions of the arbitrator and the district court upholding these partial payments.

IT IS SO ORDERED.

SOSA, C. J., and EASLEY, J., concur.

598 P.2d 1158

Elizabeth Salmans BARKER, Petitioner-Appellant,

v.

Warren Hall BARKER, Respondent-Appellee.

No. 12384.

Supreme Court of New Mexico.

Aug. 22, 1979.

Arthur H. Coleman, Albuquerque, for petitioner-appellant.

Adams & Foley, Quincy D. Adams, Albuquerque, for respondent-appellee.

OPINION

FEDERICI, Justice.

The questions we address in this appeal are (1) whether the trial court's judgment which approved a property settlement between husband and wife is modified by case law handed down by the Supreme Court after judgment was entered and filed, and (2) whether wife's petition to set aside the final divorce decree pursuant to N.M.R. Civ.P. 60(b), N.M.S.A.1978 was properly denied. The trial court held that its original judgment was not modified and denied wife's petition to set aside the final decree. Wife appeals. We affirm.

Counsel for the parties appeared before the trial court on October 14, 1977, and stipulated to a property settlement. The trial court approved the stipulation of the parties that husband pay alimony to wife in the amount of $550 per month and that all of husband's retirement benefits, including any account in P.E.R.A., would remain his sole and separate property.

On January 13, 1978, the final decree dissolving the marriage was entered; on the same day this Court filed its decision in *Hughes v. Hughes*, 91 N.M. 339, 573 P.2d 1194 (1978). On February 21, 1978, this Court filed its opinion in *Copeland v. Copeland*, 91 N.M. 409, 575 P.2d 99 (1978). On April 4, 1978, forty-two days after *Copeland* was filed and nearly three months after this Court announced its decision in *Hughes*, wife petitioned to set aside the final decree, based upon the rules of law announced in *Hughes* and *Copeland*. On August 15, 1978, her petition was taken as being made pursuant to Rule 60(b). The trial court denied wife's motion to set aside the final decree and property settlement.

On appeal, wife contends that *Hughes* and *Copeland* apply to this case and that the property settlement should, therefore, be set aside. We disagree.

In this case judgment was entered and filed prior to the filing of the opinion in *Copeland* and on the same day as *Hughes* was filed. Wife did not take a timely appeal. Instead, she proceeded under Rule 60(b) some time after *Hughes* and *Copeland* were filed. We hold that the principles and rules of law announced in *Hughes* and *Copeland* apply prospectively only. The principles and rules announced in *Hughes* and *Copeland* are limited in their application to cases which, at the time *Hughes* and *Copeland* were filed, were pending and in which no final judgment had been entered, cases in which a final judgment had been entered but the time for appeal has not expired, and cases which are filed in the future. *See Wehrle v. Robison,* 92 N.M. 485, 590 P.2d 33 (1979); *Hicks v. State,* 88 N.M. 588, 544 P.2d 1153 (1976).

In addition, the stipulation and agreement were entered into without fraud or imposition and were approved by the trial court. The stipulation and agreement may not now be set aside. *Esquibel v. Brown Construction Company, Inc.,* 85 N.M. 487, 513 P.2d 1269 (Ct.App.1973), *cert. denied,* 85 N.M. 483, 513 P.2d 1265 (1973).

Wife's second argument on appeal is that Rule 60(b) was proper authority for granting her petition to set aside the final decree and settlement. Rule 60(b) may not be used to toll the time for taking an appeal. *Wehrle, supra. See Chavez v. Village of Cimarron,* 65 N.M. 141, 333 P.2d 882 (1958).

The trial court's denial of wife's requested relief is affirmed.

IT IS SO ORDERED.

SOSA, C. J., and EASLEY, J., concur.

598 P.2d 1159

Michael W. FISCHER and Nancy J. Fischer, Plaintiffs-Appellees,

v.

Pedro MASCARENAS and Jennie Mascarenas, Defendants-Appellants.

No. 12218.

Supreme Court of New Mexico.

Aug. 23, 1979.

Thomas G. Rice, Las Vegas, for defendants-appellants.

Felker & McFeeley, Randolph B. Felker, Santa Fe, for plaintiffs-appellees.

OPINION

EASLEY, Justice.

The Fischers (Fischer) sued Mr. and Mrs. Mascarenas (Mascarenas) to enjoin the latter from interfering with real property claimed by Fischer. Mascarenas counterclaimed to quiet title to the property. Mascarenas' counterclaim was dismissed on Fischer's motion for summary judgment, and Mascarenas appeals. We reverse.

We inquire if an affidavit of an attorney stating that he has examined title to the land and has found that Fischer has good title is sufficient to negate an affidavit by Mascarenas that he owns the same land, which is identically described in deeds of the respective parties, so as to entitle Fischer to summary judgment.

Mascarenas has three deeds which he contends give him good title to the land. However, an uncontradicted affidavit of a surveyor states that two of these deeds, executed in 1922, in Mascarenas' chain of title do not describe the property in question or any part of it. The third deed, executed in 1978, contains the same description as Fischer's deed. Both sides claim title from a common predecessor in title, several times removed.

Mascarenas paid taxes on the property for some twenty years. He claims to have "possessed" the property and erected "no trespassing" and "no parking" signs on the property some time prior to the filing of this action.

Fischer introduced an affidavit of an experienced real estate attorney, which states that he examined the records and determined that Fischer has fee simple title. However, instruments showing the full chain of title of the two parties were not introduced into evidence.

Mascarenas relies upon his deed describing the exact property in question, his unequivocal assertion of ownership of the land contained in his affidavit, the payment of taxes, and his "possession" of the land and claims this creates a question of fact as to ownership, precluding summary judgment.

Fischer answers that Mascarenas has admitted that his claim to the land is based on one of the three deeds or on adverse possession. Fischer alleges that, since all of these claims are shown to be defective by the uncontradicted affidavits before the court, summary judgment was proper.

Since the uncontradicted evidence of the survey indicates that the 1922 deeds do not describe the land in question, those deeds cannot be the basis of a valid claim and cannot provide color of title for purposes of adverse possession. *Sanchez v. Garcia*, 72 N.M. 406, 384 P.2d 681 (1963). The 1978 deed describes the correct property and establishes color of title, but the statutory period for adverse possession has not elapsed since the deed was given. § 37–1–22, N.M.S.A.1978.

Mascarenas also argues that summary judgment was not proper because Fischer failed to establish his own title to the property. Fischer responds that the affidavit of the attorney which states the opinion that the land is held by Fischer in fee simple is adequate evidence on this point. Considering the disposition we make of the case, it is not necessary to decide this issue.

Summary judgment, being an extreme remedy to be employed with great caution, cannot be substituted for a trial on the merits as long as one issue of material fact is still present in the case. *Pharmaseal*

Laboratories, Inc. v. Goffe, 90 N.M. 753, 568 P.2d 589 (1977); N.M.R.Civ.P. 56(c), N.M.S. A.1978. The remedy should not be employed where there is the slightest doubt as to the existence of an issue of material fact. *Spears v. Canon de Carnue Land Grant*, 80 N.M. 766, 461 P.2d 415 (1969). Even where the basic facts are undisputed, if equally logical but conflicting inferences can be drawn from the facts, summary judgment should be denied. *Barber's Super Markets, Inc. v. Stryker*, 81 N.M. 227, 465 P.2d 284 (1970); *Ute Park Summer Homes Ass'n v. Maxwell Land Gr. Co.*, 77 N.M. 730, 427 P.2d 249 (1967); *Hewitt-Robins, Inc. v. Lea County Sand & Gravel, Inc.*, 70 N.M. 144, 371 P.2d 795 (1962). *See also United States v. Diebold, Inc.*, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); *Exnicious v. United States*, 563 F.2d 418 (10th Cir. 1977).

The deed to Mascarenas conveying this specific property, the payment of taxes, the "possession" by Mascarenas, the presence of a common predecessor in the chain of title of both parties and the other circumstances supporting the Mascarenas claim raise an issue of material fact as to the ownership of the land. Although most of these facts are not disputed, equally logical but conflicting inferences can be drawn, making summary judgment impermissible. *Pharmaseal, supra; Yeary v. Aztec Discounts, Inc.*, 83 N.M. 319, 491 P.2d 536 (Ct. App.1971). The evidence of Fischer, at its best, proves only that he has legal title. It does not rule out an inference that equitable title is in Mascarenas, and does not preclude an inference of mistaken description in the deed to persons in the Mascarenas chain of title from the common predecessor in title of the parties.

We reverse the decision of the trial court and remand the case for trial.

IT IS SO ORDERED.

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

598 P.2d 1161

Larry W. SPARKS and Roberta C. Sparks, his wife, Plaintiffs-Appellants,

v.

MELMAR CORPORATION, a New Mexico Corporation, Third-Party Plaintiff-Defendant-Appellee,

v.

Leroy WILLIAMS et al., Third Party Defendants.

No. 12111.

Supreme Court of New Mexico.

Aug. 23, 1979.

Wollen & Segal, Ronald T. Taylor, Albuquerque, for plaintiffs-appellants.

Keleher & McLeod, Arthur O. Beach, Albuquerque, for third party plaintiff-appellee.

Coors, Singer, Anaya, Brennan & Stratton, Robert N. Singer, Albuquerque, for third party defendant Leroy Williams.

Shaffer, Butt, Jones, Thornton & Dines, Briggs F. Cheney, Albuquerque, for third party defendant United States Gypsum.

OPINION

EASLEY, Justice.

Sparks sued Melmar for breach of warranty in the construction of a house, alleging that the wall texturing and paint on the interior walls was continually peeling off. Melmar brought in Williams as a third-party defendant on a claim for indemnification. The trial court granted summary judgment to Melmar, and Sparks appealed. We reverse.

We inquire (1) whether the evidence raises an issue of fact that the defect was due to faulty workmanship or materials, (2) whether the one-year limited warranty provided in the contract applies, (3) whether Sparks was contributorily negligent as a matter of law, and (4) whether Sparks' claim was discharged by an accord and satisfaction.

Sparks moved into the residence in December 1972. Within a month paint and texturing began to chip off of several of the interior walls. Sparks notified Melmar of the problem, and Melmar sent someone out from Albuquerque Dri-Wall, who had subcontracted the construction of the interior walls. The chipped spots were sanded, retextured and repainted in an attempt to repair the defect.

The problem continued, and Sparks again contacted Melmar. This time a representative of U. S. Gypsum, who had manufactured the wallboard, and a representative from Pittsburgh Paint, which had manufactured the paint, were sent out to the Sparks' home. They took samples of the texturing and paint for analysis. Some time later, in 1974, Melmar suggested that a different kind of paint should be tried. Sparks agreed to pay for the paint, and Melmar agreed to supply the labor. In the rooms where chipping had occurred, the

walls were repainted from floor to ceiling. Within six months, the chipping reappeared.

Although Sparks continued to contact Melmar and to complain about the situation, nothing was ever done by Melmar to rectify it. Sparks contacted a painting contractor, who advised them that he would not paint the interior of their home without a signed release because he felt that repainting would merely be a cosmetic measure and that the problem would reappear. Other painting contractors were contacted either by Sparks or Melmar, but the proper repairs were never made.

Paragraph 7 of the Building Agreement provides:

> *Contractor to Remedy Defects.* The Contractor shall remedy any defects due to faulty materials or workmanship, and shall pay for any damage to other work resulting therefrom, which shall appear within a period of one year from the date of final payment or from the date of the owner's occupancy, whichever is earlier . . . .

In June 1977, four and one-half years after moving into the house, Sparks filed suit for breach of contract seeking damages for the defect and for deprivation of the use and benefit of the residence. Sparks also sought damages for mental anguish based on unreasonable harassment. The claim for mental anguish was abandoned by Sparks at oral argument on this appeal.

Melmar argues that the defect which occurred within the one-year warranty period was rectified, and that the subsequent problems resulted after the one-year period, and are therefore not compensable. However, the deposition of Ms. Sparks clearly raises an issue as to whether the original defect, which occurred and was reported within the one-year warranty period, was the cause of all the problems complained of.

In determining whether there is a genuine issue of any material fact, the evidence, including all reasonable inferences therefrom, must be viewed in the light most favorable in support of the right to trial on the issues. *Wisehart v. Mountain States Telephone & Tel. Co.*, 80 N.M. 251, 453 P.2d 771 (Ct.App.1969), *cert. denied*, 80 N.M. 234, 453 P.2d 597 (1969).

Melmar also argues that Sparks was contributorily negligent in that the chipping was mainly in areas within five feet of the floor, and may have been caused by Sparks' children riding their tricycles in the house. We would have to hold as a matter of law that Sparks was contributorily negligent in order to sustain this claim. This is patently unwarranted.

Next, Melmar argues that the agreement between Melmar and Sparks to repaint the house, wherein Sparks agreed to pay for the paint and Melmar agreed to supply the labor, represented an accord and satisfaction and thereby discharged Melmar from any further liability. In considering the existence of an accord and satisfaction, it must be shown that the debtor made an offer in full satisfaction of the debt, and that the offer was accepted in full satisfaction of the debt. *Smith Const. Co. v. Knights of Columbus, Coun.*, 86 N.M. 50, 519 P.2d 286 (1974). The evidence here does not show that the agreement was ever intended to be in full satisfaction. Ms. Sparks' deposition is evidence that the agreement was to try to repair the defect, and does not indicate that Sparks at any time agreed that the repainting would discharge Melmar from further liability.

Finally, Melmar contends that Sparks' claim is barred by the applicable statute of limitations. Melmar recognizes that if the claim is based on a written contract, the applicable statute of limitations is six years. § 37–1–3, N.M.S.A.1978. However, Melmar asserts that the claim is really based on an unwritten contract, to wit: an unwritten warranty. The statute of limitations for an action based on an

unwritten contract is four years. § 37–1–4, N.M.S.A.1978.

Melmar claims that it repaired the defects which appeared within one year as provided in the written contract, but that any defects occurring thereafter were not based on the written contract because they were outside the one-year limited warranty. Therefore, Melmar argues that the action must be based on an unwritten warranty. The decision of this issue also turns on a question of fact. If the original defect was not adequately repaired, and the chipping which occurred after the one-year period was still the result of the original defect which appeared and was reported during the one-year period, then the action would still be based on the written contract. There is ample evidence to raise an issue of material fact as to this point; and granting summary judgment was error.

We reverse and remand to the district court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

SOSA, C. J., and PAYNE, J., concur.

598 P.2d 1165

SUPREME COURT OF NEW MEXICO

Denials of Certiorari

Title	Docket Number	Date of Denial	Opinion below (if reported)
AAMCO Transmissions, Inc. v. Taxation and Revenue Department	12659	8/30/79	93 N.M. 389, 600 P.2d 841
Brazfield v. Mountain States Mutual Casualty Co	12674	8/31/79	93 N.M. 417, 600 P.2d 1207
County of Bernalillo v. Ames	12640	8/17/79	
Goldsmith v. United Nuclear Corp.	12660	8/30/79	
Haddenham v. State	12656	8/30/79	93 N.M. 394, 600 P.2d 846
Haddenham v. State	12661	8/31/79	93 N.M. 394, 600 P.2d 846
Uslife Title Co. of Albuquerque v. Campbell	12657	8/30/79	
Valdez v. State	12650	8/30/79	
Vallejos v. State	12646	8/17/79	93 N.M. 387, 600 P.2d 839

Writ Quashed

Hyder v. Brenton	12620	8/30/79	93 N.M. 378, 600 P.2d 830

598 P.2d 1166

STATE of New Mexico,
Plaintiff-Appellee,

v.

John DOE, Defendant-Appellant.

No. 3701.

Court of Appeals of New Mexico.

Feb. 13, 1979.

Rehearing Denied Feb. 27, 1979.

John B. Bigelow, Chief Public Defender, Martha A. Daly, Asst. App. Defender, Santa Fe, Charles A. Wyman, Asst. Public Defender, Roswell, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Michael A. Kauffman, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

The appeal in this Children's Court case involves: (1) criminal sexual contact of the groin; (2) seizure of marijuana; (3) need of care or rehabilitation; and (4) disposition of the child.

Criminal Sexual Contact of the Groin

The court found that the child committed criminal sexual contact. Section 30–9–12, N.M.S.A.1978 defines the offense to include the unconsented intentional touching of the unclothed intimate parts of another. "For purposes of this section 'intimate parts' means the primary genital area, groin or anus."

There is no evidence going to a touching of the primary genital area or anus. The child asserts there is no evidence of a touching of the groin, and contends that groin is so indefinable that one cannot determine where the groin is located.

Not having defined "groin" in the statute, and nothing to the contrary appearing, the Legislature is presumed to have used the common meaning of "groin". *State v. Garcia*, 78 N.M. 777, 438 P.2d 521 (Ct.App.1968). The common meaning, in Webster's Third New International Dictionary (1966) is "the fold or depression marking the line between the lower part of the abdomen and the thigh; also: the region of this line".

The victim, awakened, felt something on her legs. Asked to describe the part of the leg, she replied: "Right here. (Indicating). Right on my thigh, right here. (Indicating)." The court saw the area to which the victim was pointing. At trial, the child conceded that the evidence showed a touching of "her [the victim's] upper thighs and the inner portion of her thighs." The court stated: "She did testify that she did feel someone, John Doe, touching her on her upper thigh, inner thigh, or

upper inner thigh". It must be remembered that the court observed the gesture of the victim when the victim testified. We hold there was evidence of a touching of the victim's upper, inner thigh.

A touching of the upper, inner thigh is a touching in the region of the line between the lower part of the abdomen and the thigh. The touching was a touching of the groin.

Seizure of the Marijuana

A week after the sexual incident discussed above, the child was observed driving in excess of 40 miles per hour in a residential area. He was followed five or six blocks by a police officer. The child turned into the driveway of the residence of his brother-in-law, got out of the car leaving the car door open, and headed to the house. The officer called the child over to the police car and ascertained the child had no driver's license. The child was arrested for no driver's license and attempting to elude a police officer. The child was placed in the police car.

The officer, standing by the open door, approximately two feet from the child's car, observed a baggie of marijuana on the floorboard of the car on the driver's side. He also observed roaches (marijuana cigarette butts) and rolling paper on top of the console of the car. These were in plain view and were not discovered as a result of a search. See *State v. Luna*, 91 N.M. 560, 577 P.2d 458 (Ct.App.1978).

The child moved to suppress the marijuana as evidence, arguing no probable cause for a search. Since there was no search, this is not argued on appeal. The child's appeal concedes there was no search, but contends seizure of the marijuana, the roaches and the rolling paper was not justified under the "plain view" doctrine because the officer was not justified in being in the position where he observed these items. "If, then, the officer was justified to be in that location, the marijuana was validly seized under the plain view doctrine."

Rodriguez v. State, 91 N.M. 700, 580 P.2d 126 (1978) states:

> If an officer is lawfully in a position which exposes contraband or evidence to plain view, the evidence may be seized without benefit of a search warrant. Merely seeing those objects which are in plain view does not constitute a search.

The officer was lawfully on the driveway of the residence, checking the driver's license of the driver of a vehicle which had been speeding. After arresting the child and placing the child in the police car, the officer's presence did not become unlawful. Looking into the car through the door left open by the child was appropriate, and lawful, under the circumstances.

Need of Care or Rehabilitation

On a petition alleging delinquency, the adjudicatory proceedings involve two aspects: (1) whether the child committed the delinquent act, and (2) whether the child is in need of care or rehabilitation. Section 32–1–31(E), N.M.S.A.1978; *Doe v. State*, 92 N.M. 74, 582 P.2d 1287 (1978).

The court found that the child committed three delinquent acts: Criminal sexual contact, driving without a driver's license and possession of less than one ounce of marijuana. The court also found that the child was in need of care and rehabilitation. See *State v. Doe*, 90 N.M. 249, 561 P.2d 948 (Ct.App.1977).

The child contends the court's judgment, based on the above findings, is jurisdictionally defective because of a total absence of evidence as to the child's need for care and rehabilitation.

Section 32–1–31(E), supra, states:

> E. 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 acts by reason of which he is alleged to be delinquent* . . . it may, in the absence of objection, proceed immediately to hear evidence on whether or not the child is in need of care or rehabilitation and file its findings thereon. In the absence of evidence to the contrary, *evidence of the commission of an act which*

constitutes a felony is sufficient to sustain a finding that the child is in need of care or rehabilitation. [Our emphasis.]

Applying the above language, footnote 1 to *Doe v. State*, 92 N.M. 74, 582 P.2d 1287, supra, states that 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.

The State asserts that one of the delinquent acts which the child committed was a felony. The act on which the State relies is the criminal sexual contact. This contention disregards the proceedings in the Children's Court. Criminal sexual contact may be either a felony or a misdemeanor. See § 30–9–12, supra. At the beginning of the adjudicatory hearing, the Children's Court attorney agreed that the criminal sexual contact charged was a misdemeanor.

None of "the acts" by reason of which the child was alleged to be delinquent were felonies. This, however, does not end the matter. In quoting the statute, we emphasized statutory language which distinguishes between "the acts" charged and "an act" which amounts to a felony. If there is evidence of "an act" which constitutes a felony, in the absence of contrary evidence, that evidence sustains a finding that the child is in need of care or rehabilitation, whether or not the felony act was charged in the petition.

In this case the evidence shows two felonies.

The evidence shows the child made an unauthorized entry of the residence of the victim, at night, with the intent to commit the offense of criminal sexual penetration. This was the third degree felony of burglary. Section 30–16–3, N.M.S.A. 1978. After entering, he attempted to commit, at the least, the crime of criminal sexual penetration in the third degree. This attempt was a fourth degree felony. Section 30–28–1, N.M.S.A.1978.

There being no evidence to the contrary, the evidence of either of the felonies sustains the finding that the child was in need of care and rehabilitation.

Disposition

The dispositional part of the judgment reads:

> IT IS THE FURTHER ORDER OF THE COURT that John Doe be committed to the New Mexico Boy's School at Springer, New Mexico for a period of two (2) years or until released as provided by law.
>
> IT IS THE FURTHER ORDER OF THE COURT that said commitment be stayed and that said child be committed to the Youth Diagnostic Center at the New Mexico Girl's Welfare Home in Albuquerque, N.M., for a sixty (60) day diagnostic evaluation.
>
> IT IS THE FURTHER ORDER OF THE COURT that upon completion of evaluation, that said child be returned to this Court for final disposition herein.

The child presents two contentions concerning the disposition—absence of a hearing, and length of the commitment.

A dispositional hearing was held. Section 32–1–31(G), N.M.S.A.1978. The transcript shows that a predisposition report had been made to the court by probation services. Section 32–1–32(A), N.M.S.A.1978. At the hearing, the child's attorney stated that he had no evidence to present. However, a diagnostic evaluation was requested and the court ordered such an evaluation. See § 32–1–32(D), N.M.S.A.1978. After the evaluation, the judgment provided for a "final disposition".

Upon receipt of the evaluation, the court entered the following order:

> 1. JOHN DOE was heretofore committed to the New Mexico Boys' School with commitment stayed pending receipt of a diagnostic evaluation from the Youth Diagnostic Center.
>
> 2. The Youth Diagnostic Center has recommended his commitment, in which recommendation the Court concurs.
>
> IT IS THEREFORE ORDERED that commitment to the New Mexico Boys' School issue, and . . . .

There was no hearing prior to entry of the foregoing order. This absence of hearing was contrary to § 32–1–27(J), N.M.S.A.1978, which gave the child a right to be heard concerning the diagnostic evaluation. *State v. Doe*, 90 N.M. 404, 564 P.2d 207 (Ct.App.1977). See also Children's Court Rule 49(a).

The commitment to the Boys' School for two years was improper under § 32–1–38(A), N.M.S.A.1978. *State v. Doe*, 92 N.M. 109, 583 P.2d 473 (Ct.App.1978); see *State v. Doe*, 92 N.M. 100, 583 P.2d 464 (1978).

That part of the judgment of the Children's Court, finding the child to be delinquent and in need of care and rehabilitation, is affirmed. The dispositional part of the judgment is reversed. The cause is remanded for a "final disposition" hearing.

IT IS SO ORDERED.

LOPEZ and WALTERS, JJ., concur.

598 P.2d 1170

Tom SANCHEZ, Jr., Plaintiff-Appellant

v.

ATTORNEY GENERAL (for Judge Caldwell), Defendant-Appellee.

No. 3963.

Court of Appeals of New Mexico.

June 26, 1979.

OPINION

WOOD, Chief Judge.

Does a district court have authority to compel handwriting exemplars from a person who has not been charged with a crime, has not been arrested and has not been directed to appear before an investigative agency pursuant to statutory authority? In answering this question in the negative, we (1) outline concepts on which our answer is not based, and (2) discuss the authority of a district court.

An investigator for the Attorney General filed a document in district court entitled affidavit and motion for order for handwriting exemplars. This document recited that: 1. Nineteen false Medicaid claims have been located. 2. These claims involve medications which were neither prescribed by the attending physician nor received by the patient. 3. All of the claims were submitted from Ruppe Drug Store. 4. A pharmacist intern at the drug store, Polito Martinez, admits signing 18 of the 19 false claims. 5. Martinez states that he "had no control over inventory, business records or money" at the drug store. 6. Martinez states he "often processed and signed a number of Medicaid claims although he did not himself prepare the claim and dispense the medication." 7. The State paid the false claims. 8. The claims were paid to the drug store. 9. Any benefit from submitting the false claims inured to the owner of the pharmacy. 10. Tom Sanchez, Jr. was either the sole or part owner of the drug store. 11. Sanchez was responsible for the pharmacy operation in the drug store. 12. Sanchez has refused the request of the Attorney General to voluntarily provide handwriting exemplars.

Judge Maloney issued an ex parte order directing Sanchez to provide exemplars. Sanchez refused to comply with the order within the specified time. After a hearing before Judge Caldwell on the Attorney General's motion that Sanchez be held in contempt, Judge Caldwell ruled that Sanchez had not been properly served with Judge Maloney's order. Judge Caldwell also ruled that 1) the investigator's affida-

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James L. Brandenburg, Albuquerque, for plaintiff-appellant.

Jeff Bingaman, Atty. Gen., Suzanne Tanner, Asst. Atty. Gen., Santa Fe, for defendant-appellee.

vit set forth "sufficient probable cause" to support an order for compelled exemplars, 2) such an order was proper under the Rules of Criminal Procedure and "applicable case law," and 3) Sanchez was to provide the exemplars within ten days.

Judge Caldwell orally stated that if Sanchez failed to provide exemplars within the specified time and a motion was made to hold Sanchez in contempt "you had best bring your toothbrush." The order of Judge Caldwell provides that a failure to provide the exemplars "shall subject Respondent to contempt of this Court, and incarceration and/or fine as may be imposed by this Court for such contempt."

Sanchez appealed Judge Caldwell's order.

Concepts on Which Our Decision is Not Based

(a) Sanchez' handwriting exemplars could be compelled on pain of contempt once Sanchez was before the court. *State v. Archuleta*, 82 N.M. 378, 482 P.2d 242 (Ct.App.1970). The Attorney General argues that Sanchez was before the court because he appeared and contested the contempt motion which resulted in the ruling that he had not been properly served with Judge Maloney's ex parte order. This argument goes to physical presence; that is, jurisdiction over the person of Sanchez.

What is involved here is jurisdiction in the sense of the court's authority to issue the order concerning handwriting exemplars. *Heckathorn v. Heckathorn*, 77 N.M. 369, 423 P.2d 410 (1967); *State v. Patten*, 41 N.M. 395, 69 P.2d 931 (1937). Absent such authority, Sanchez' physical presence could not validate the court's order and could not bring the matter within *State v. Archuleta*, supra. *State v. Chacon*, 62 N.M. 291, 309 P.2d 230 (1957). See *State v. Halsell*, 81 N.M. 239, 465 P.2d 518 (Ct.App.1970) which uses the phrase "before the court" in the sense of presence pursuant to a criminal charge. See also *Hammond, et al. v. 8th Jud. Dist. Ct.*, N.M., 30 N.M. 130, 228 P. 758, 39 A.L.R. 1490 (1924). The court's authority to issue the order for handwriting exemplars may not be resolved on the basis that Sanchez was physically before the court.

(b) The appeal concerns the court's authority to issue the order for handwriting exemplars. No issue concerning self-incrimination or search and seizure is presented. See *United States v. Mara*, 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed.2d 99 (1973); *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973); *State v. Archuleta*, supra.

(c) Handwriting exemplars could be compelled if the requirements for a search warrant were met. *Maryland Penitentiary v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). The authority for a search warrant is stated in Rule of Crim. Proc. 17. Setting aside the question of probable cause, which we do not discuss, we consider the purposes for which a search warrant may be issued.

Rule of Crim.Proc. 17(a) states three purposes for which a search warrant may be issued. The investigator's affidavit concluded that the exemplars were for the third purpose—to obtain evidence which "would be material evidence in a criminal prosecution." The affidavit, however, refutes its own conclusion. The affidavit seeks handwriting exemplars in order to compare the handwriting of Sanchez with handwriting on the false claims. This comparison is desired because the investigator does not know whether Sanchez is involved in the false claims. The affidavit contains nothing indicating Sanchez' handwriting exemplars "would be" evidence. The requirements for issuance of a search warrant were not met. The court's authority to issue the order compelling handwriting exemplars may not be resolved on the basis that the order was, in effect, a search warrant.

We have excluded search warrants as a decisional ground in order to emphasize that the issue is the court's authority to compel the handwriting exemplars. The Attorney General does not claim that the court's authority to issue search warrants was, in this case, authority to order the handwriting exemplars.

The Court's Authority to Compel Handwriting Exemplars

No complaint, information or indictment has been filed which names Sanchez; no criminal prosecution has been commenced. Rule of Crim.Proc. 5. Sanchez is not an "accused" or a "defendant." Section 31–1–2, N.M.S.A.1978. Sanchez has not been arrested and no warrant for his arrest has been issued. Specifically, no action is pending against Sanchez. These circumstances present a case of first impression in New Mexico. See *State v. Hudman*, 78 N.M. 370, 431 P.2d 748 (1967) where the handwriting specimen was obtained by false pretense, but after arraignment; *State v. Sneed*, 78 N.M. 615, 435 P.2d 768 (1967) and *State v. Renner*, 34 N.M. 154, 279 P. 66 (1929) where the handwriting exemplar was obtained voluntarily, but after arrest; *State v. Barela, et al.*, 23 N.M. 395, 168 P. 545, L.R.A. 1918B 844 (1917) where there was compulsory comparison of footprints, but after arrest. In each of these cases the appellate issue concerned self-incrimination. Compare *State v. Jamerson*, 85 N.M. 799, 518 P.2d 779 (Ct.App.1974).

In support of his claim that the court had no authority to issue the order for handwriting exemplars, Sanchez cites *United States v. Holland*, 552 F.2d 667 (5th Cir. 1977), opinion withdrawn, 565 F.2d 383 (5th Cir. 1978). *Holland*, supra, is quite similar to this case; there, the United States attorney filed a motion to compel handwriting exemplars. Pointing out that federal district courts were courts of limited jurisdiction and that Congress had not conferred jurisdiction on federal district courts to compel handwriting exemplars prior to arrest or charge, the circuit court held the district court lacked authority to compel the handwriting exemplars. Holland was not in contempt of court for violating an order entered without authority.

In holding that federal district courts were of limited jurisdiction, *United States v. Holland*, supra, comments that most state trial courts are courts of general jurisdiction. The Attorney General points out that New Mexico district courts are courts of general jurisdiction and, on the basis of this general jurisdiction, concludes the district court had authority to compel the exemplars. This poses the question in this case; however, it does not provide the answer.

N.M.Const., art. VI, § 13 states: "The district court shall have original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as may be conferred by law . . . ."

Matters and causes excepted from the Constitution are not involved. In this case, the above-quoted constitutional provision confers authority upon the district court in two ways—by "original jurisdiction in all matters and causes" and by jurisdiction conferred by law.

No statute confers jurisdiction upon the district court to order the furnishing of handwriting exemplars in this case. A grand jury could issue a subpoena for the exemplars and the district court could enforce the subpoena. Section 31–6–12, N.M.S.A.1978. This procedure was not followed. A former statute, compiled as § 41–3–8 (Second), N.M.S.A.1953 (1st Repl. Vol. 6) authorized the prosecuting attorney to subpoena witnesses in limited situations "on approval of the district judge . . . ." Assuming that the Attorney General, in this case, was proceeding as a prosecuting attorney (however, see *State v. Reese*, 78 N.M. 241, 430 P.2d 399 (1967)), the repeal of this statute by Laws 1972, ch. 71, § 18, removed any authority conferred by § 41–3–8 (Second), supra. See *State v. Chavez*, —— N.M. ——, 599 P.2d 1067 (1979).

If the order compelling exemplars is likened to an order compelling compliance in an administrative matter, the absence of authorizing legislation concerning the compelling of handwriting exemplars is to be compared with specific authorizing legislation in certain administrative matters. Concerning the Organized Crime Commission, see § 29–9–5(D), N.M.S.A.1978; see *In re Investigation No. 2, Etc.*, 91 N.M. 516, 577 P.2d 414 (1978). Compare *State ex rel. Environmental v. Albuquerque Pub.*, 91 N.M. 125, 571 P.2d 117 (1977); *State v.*

Galio, 92 N.M. 266, 587 P.2d 44 (Ct.App. 1978). Concerning unemployment compensation, see § 51–1–29, N.M.S.A.1978. Concerning witnesses to gambling, see § 30–19–14, N.M.S.A.1978 and the restrictive interpretation of that statute in 1961–62 Attorney General Opinions, No. 61–88.

The Rules of Criminal Procedure do not authorize the order for handwriting exemplars. Rule of Crim.Proc. 14, pertaining to arrest warrant and summons, requires a criminal action. Rule of Crim.Proc. 28, pertaining to disclosure of evidence by a defendant, and Rule of Crim.Proc. 29, pertaining to depositions, apply after the filing of an information or indictment. Rule of Crim.Proc. 33, pertaining to pretrial motions, contemplates a pending criminal proceeding as does Rule of Crim.Proc. 36, pertaining to pretrial hearings. Rule of Crim. Proc. 48 pertains to securing the attendance of witnesses in criminal cases. No criminal proceeding exists at this point.

There being neither statute nor rule authorizing the order to compel exemplars, does such authority exist under the constitutional grant of "original jurisdiction" in N.M.Const. art. VI, § 13?

The constitutional grant of "original jurisdiction" means the district courts are courts of general jurisdiction. *Trujillo v. State*, 79 N.M. 618, 447 P.2d 279 (1968); *State v. Patten*, supra. Compare *Board of County Com'rs of Torrance County v. Chavez*, 41 N.M. 300, 67 P.2d 1007 (1937) which refers to "general powers."

What, however, is included within the meaning of general jurisdiction? Criminal cases are included, *State v. Vaughn*, 74 N.M. 365, 393 P.2d 711 (1964), but we have no criminal case because there has been neither charge nor arrest.

The "original jurisdiction" of N.M. Const., art. VI, § 13, that is, the general jurisdiction of the district courts, covers those matters known "to the common law and equity practice of England prior to 1776 . . . ." *In re Forest*, 45 N.M. 204, 113 P.2d 582 (1941); see *Postal Finance Company v. Sisneros*, 84 N.M. 724, 507 P.2d 785 (1973).

To the extent that an order compelling handwriting exemplars in aid of a criminal investigation may be likened to depositions in a criminal case, *State v. Armijo*, 72 N.M. 50, 380 P.2d 196 (1963) states: "[T]here is no question but that under the common law, the defendant had no right to perpetuate the testimony or to take depositions of witnesses, either for or against him." No authority is cited in *Armijo*, supra, in support of the quoted statement. The annotation, Ann.Cas. 1916 A, 1066, suggests the quoted statement is too broad, that in certain limited situations (not applicable in this case) depositions could be used in criminal proceedings. Nevertheless, the annotation, generally, supports *State v. Armijo*, supra.

To the extent that an order compelling handwriting exemplars in aid of a criminal investigation may be likened to an order compelling the production of documents for inspection, the sparse authority found indicates that production was extremely limited.

Discussing an 1851 English statute authorizing the inspection of documents, Pollock, *Power of the Courts of Common Law to Compel the Production of Documents for Inspection*, (T. & J. W. Johnson, Philadelphia, 1853), states that prior to enactment of the 1851 statute, discovery in equity was not permissible in any proceeding "not purely of a civil character . . . ." In addition, "[b]efore this act [the 1851 statute] came into operation, the Courts always required that an application for inspection should be made after action brought." See II Chitty, *Archbold's Practice of The Court of Queen's Bench*, Sixth Edition, Chap. XIV (Sweet, Chancery Lane, London, 1838). In civil cases, inspection prior to "action pending" seems to have been limited to a mandamus proceeding upon a claim of right. *Hodges v. Atkis*, 96 English Reports (Full Reprint) 516; *The King v. Tower*, 105 English Reports (Full Reprint) 795.

The order compelling handwriting exemplars was not entered in a proceeding

"purely of a civil character"; it was entered before "action brought" or "action pending" in aid of a criminal investigation. We have not been cited to any authority suggesting such an order was authorized either at common law or equity prior to 1776, and we have found no such authority.

We hold that, absent legislative authorization, Judge Caldwell had no authority to order Sanchez either to produce handwriting exemplars or be held in contempt, prior to arrest or charge. This holding is consistent with our Rules of Criminal Procedure which limit discovery to situations where a criminal proceeding has been commenced. This holding is also consistent with *Application of Mackell*, 59 Misc.2d 760, 300 N.Y.S.2d 459 (1969). In *Mackell*, the district attorney applied for an order directing that a suspect's beard be shaved before putting the suspect in a lineup. The suspect was in jail, on an unrelated matter, but was not a defendant in the case for which a lineup was sought. The application was denied "for want of power."

The order directing Sanchez to furnish handwriting exemplars, or be held in contempt, is reversed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

598 P.2d 1175

Patricia MYERS, next friend of Billy White, Plaintiff-Appellant,

v.

Nick P. KAPNISON and George Manjoros, Defendants-Appellees.

No. 4058.

Court of Appeals of New Mexico.

July 12, 1979.

Ronald T. Taylor, Wollen & Segal, P. C., Albuquerque, for plaintiff-appellant.

William C. Marchiondo, Marchiondo & Berry, P. A., Albuquerque, for defendants-

appellees; M. Terrence Revo, Albuquerque, of counsel.

OPINION

WOOD, Chief Judge.

We granted an interlocutory appeal under § 39–3–4, N.M.S.A.1978 to review the trial court's order striking plaintiff's jury demand. We hold that the jury demand was waived because not timely filed under Rule of Civ.Proc. 38. We also hold the trial court did not err in refusing to order a jury trial under Rule of Civ.Proc. 39(a).

The complaint was filed October 17, 1978. The attorney for defendants accepted service on October 20, 1978. On November 20, 1978 an attorney for plaintiff contacted a secretary for defendants' attorney and was advised that the answer had been filed on November 3, 1978. The uncontradicted showing is that the answer had never been received by plaintiff's attorneys. A copy of the answer was mailed to plaintiff's counsel on November 22, 1978 and received on November 27, 1978. Plaintiff's jury demand was filed on December 5, 1978 and delivered to defendants' attorney on that date.

Defendants moved to strike the jury demand on the basis that it "was not timely filed." Because no jury demand was filed until December 5, 1978, the trial court struck the jury demand.

New Mexico decisions have referred to a presumption of delivery of a document that has been "properly mailed," and the presence or absence of evidence to overcome the presumption. *Garmond v. Kinney*, 91 N.M. 646, 579 P.2d 178 (1978); *Adams v. Tatsch*, 68 N.M. 446, 362 P.2d 984 (1961); *State v. McHorse*, 85 N.M. 753, 517 P.2d 75 (Ct.App. 1973). See *Associated Petroleum Transport v. Shepard*, 53 N.M. 52, 201 P.2d 772 (1949). Decisions in other jurisdictions have referred to a contrary presumption. Where, as in this case, the showing is of nonreceipt of a document, a presumption of nonmailing has been applied. *Employers' Liability Assurance Corp. v. Maes*, 235 F.2d 918 (10th Cir. 1956); *Teichberg v. D. H. Blair & Co.*, 63 Misc.2d 1073, 314 N.Y.S.2d 284 (1970).

We do not decide this case upon the existence or nonexistence of an unrebutted presumption. We do not do so because of specific rule provisions.

Rule of Civ.Proc. 38(a) states that in civil actions "[a]ny party may demand a trial by jury . . . by serving upon the other parties a demand therefor in writing . . [but] not later than 10 days after service of the last pleading . . . ." As applied to this case, plaintiff had ten days within which to serve the jury demand after service of the answer upon plaintiff.

Defendants' answer was to be served upon plaintiff's attorney. Rule of Civ.Proc. 5(a), 5(b) and 7. A permissible method of service is by mailing to the last known address. "Service by mail is complete upon mailing." Rule of Civ.Proc. 5(b). "This is significant. Non-receipt of the paper does not affect the validity of the service." 2 Moore's Federal Practice, ¶ 5.07. See *Williams v. Blitz*, 226 F.2d 463 (4th Cir. 1955); *In re Mack*, 330 F.Supp. 737 (S.D.Tex.1970); *Kiki Undies Corporation v. Promenade Hosiery Mills, Inc.*, 308 F.Supp. 489 (S.D.N.Y. 1969); *Rifkin v. United States Lines*, 24 F.R.D. 122 (S.D.N.Y.1959).

The party relying on service by mail has the burden of proving the mailing. *Employers' Liability Assurance Corp. v. Maes*, supra; see *Gendron v. Calvert Fire Ins. Co.*, 47 N.M. 348, 143 P.2d 462, 149 A.L.R. 1310 (1943).

Concerning service of the answer filed November 3, 1978, there are two items of proof. One item is a copy of a "TRANSMITTAL MEMORANDUM" from the file of defendants' attorney, dated either November 2nd or 3rd, 1978. This memorandum states that an answer was enclosed. If mailed, this memorandum shows the answer was mailed to the address of plaintiff's attorneys. The second item is the certificate of service by defendants' attorney, see Rule of Civ.Proc. 5(f), which appears on the answer. This certificate recites that a copy of the answer "was mailed to the opposing counsel of record this 3rd day of Nov. 1978."

Unchallenged, the attorney's certificate was sufficient proof of mailing. *Timmons v. United States*, 194 F.2d 357 (4th Cir. 1952). Here, the fact of mailing was chal-

lenged. Four affidavits were submitted on behalf of plaintiff. Three were by attorneys for plaintiff; all stated that they had not received or seen either the answer purportedly mailed on November 3, 1978 or the transmittal memorandum. All stated they had received mail that had been delayed in its delivery but knew of no correspondence which was lost in the mail and never delivered. In addition, there is an affidavit of the receptionist for plaintiff's attorneys. She stated that she receives and distributes "all of the mail"; that she had not received or seen the answer prior to receipt of a copy of the answer mailed November 22, 1978. These affidavits raised a factual question as to whether the answer was mailed on November 3, 1978.

The transmittal memorandum says nothing about mailing. The attorney's certificate concludes that the answer was mailed, but states nothing in support of that conclusion. There is no reference to postage or to placing in a mail box of any kind. See *Davis v. Pennsylvania R. R.*, 7 F.R.D. 622 (N.D.Ohio E.D.1947). Compare the certificate in *Timmons v. United States*, supra. See N.M.Crim.App. 301(b) which states: " 'Mailing' shall include deposit in an outgoing mail container which is maintained in the usual and ordinary course of business of the serving attorney."

There being no proof of mailing of the answer on November 3, 1978, plaintiff was not served with the answer by a mailing on November 3, 1978. This, however, does not dispose of the appeal.

There is proof that an answer was mailed on November 22, 1978. This is established by the affidavits of two of plaintiff's attorneys, and the receptionist. The fact that this answer was not received until November 27, 1978 does not aid plaintiff because service is complete upon mailing, and a mailing on November 22, 1978 is not disputed. The jury demand, served on December 5, 1978, was not served within ten days of service of the answer. Rule of Civ.Proc. 38(a). The jury demand not having been served within ten days of service of the answer, plaintiff waived jury trial. Rule of Civ.Proc. 38(d).

Rule of Civ.Proc. 39(a) authorizes the trial court, in its discretion, to order a trial by jury. The trial court refused to order a jury trial under this rule, pointing out that plaintiff knew, on November 20, 1978, that an answer had been filed on November 3, 1978, yet did nothing toward obtaining a jury trial until December 5, 1978 when the jury demand was filed. The appellate issue is whether the refusal to order a jury trial under Rule of Civ.Proc. 39(a) was an abuse of discretion. *Hazelrigg v. American Fidelity & Casualty Company*, 241 F.2d 871 (10th Cir. 1957); See *Keeth Gas Co., Inc. v. Jackson Creek Cattle Co.*, 91 N.M. 87, 570 P.2d 918 (1977). We cannot say the trial court abused its discretion in refusing to order a jury trial because of plaintiff's delay in filing a jury demand. As to the meaning of abuse of discretion, see *Independent Etc. Co. v. N. M. C. R. Co.*, 25 N.M. 160, 178 P. 842 (1918); *State v. Hargrove*, 81 N.M. 145, 464 P.2d 564 (Ct. App.1970).

The order striking the jury demand is affirmed.

IT IS SO ORDERED.

HENDLEY and WALTERS, JJ., concur.

598 P.2d 1177

Elizabeth CUNNAN, as mother and next friend of Patrick K. Strickland, a minor, Plaintiff-Appellant,

v.

BLAKLEY AND SONS, INC., a New Mexico Corporation, Security Insurance Company of Hartford, and Rhoda Ann Strickland, Defendants-Appellees.

No. 3820.

Court of Appeals of New Mexico.

July 24, 1979.

Terry M. Word, Richard E. Ransom, Smith, Ransom & Gilstrap, Albuquerque, for plaintiff-appellant.

Larry D. Beall, Alonzo J. Padilla, Albuquerque, for appellees Blakley and Sons, Inc. and Security Ins. Co.

Mark Klecan, Klecan & Roach, P.A., Albuquerque, for appellee Rhoda Ann Strickland.

OPINION

HENDLEY, Judge.

Joseph K. Strickland, Jr. was killed on September 8, 1976, while performing services arising out of and in the course of his employment. He was survived by his widow and her son, Paul, and his son, Patrick, who was living with the mother and stepfather. The insurance carrier was paying the benefits to the widow for a surviving spouse and two surviving children. The widow was not paying any portion of the workmen's compensation benefits to Patrick. Patrick demanded that the carrier pay a portion of the benefits to him, but the carrier refused. This action was then commenced on November 29, 1977.

The trial court made the following findings of fact and conclusions of law:

6. Rhoda Ann Strickland is the widow of decedent and presently has the care and custody of the one stepson.

7. Rhoda Ann Strickland and her minor children were totally dependent upon the defendant [sic] at the time of his death.

8. Patrick K. Strickland is the surviving son of the decedent by a former marriage between the decedent and the plaintiff, Elizabeth Cunnan.

9. Patrick K. Strickland although under the age of 18 was not at the time of his father's death, dependent upon his father for support or maintenance but was in fact supported by his mother and stepfather.

10. Security Insurance Company of Hartford is paying the maximum compensation benefits pursuant to the law in the amount of $114.61 per week to the widow, Rhoda Ann Strickland, and has been paying such full benefits since the death of the above-named decedent.

11. Security Insurance Company of Hartford has failed and refused to pay to Patrick K. Strickland all or part of the compensation benefits being paid to Rhoda Ann Strickland.

CONCLUSIONS OF LAW

1. The minor children, Paul Strickland and Patrick Strickland, are surviving children of the decedent as defined in Section

59–10–12.11 of the New Mexico Workmen's Compensation Act.

2. Under Section 59–10–18.7(C) Rhoda Ann Strickland is entitled to receive fifty-five percent (55%) of the decedent's average weekly wage for herself and for the benefit of Paul Strickland and the plaintiff is entitled to five percent (5%) of the decedent's average weekly wage for the benefit of Patrick Strickland, all as limited by Section 59–10–18.2 of the New Mexico Workmen's Compensation Act.

* * * * * *

4. Compensation benefits in that amount are payable to the plaintiffs from the date of filing of this lawsuit, which was November 29, 1977, until the end of the compensation period.

* * * * * *

The trial court then entered judgment on September 7, 1978, as follows:

1. The Plaintiff is entitled to compensation benefits in the amount of $9.55 per week, such amount to be deducted from Defendant, Strickland's weekly checks and made payable by the Defendant Security Insurance Company of Hartford. The compensation benefits in that amount are payable from November 29, 1977 through the period of compensation provided by the New Mexico Workmen's Compensation Act.

2. The Defendant, Security Insurance Company of Hartford is ordered to deduct $9.55 per week from the Defendant, Rhoda Ann Strickland's bi-weekly checks until Defendant, Security Insurance is repaid the sum of $9.55 per week which represents the overpayment to her from November 29, 1977, to August 15, 1978, the date of judgment.

3. Defendant, Security Insurance Company of Hartford, shall continue to pay to Rhoda Ann Strickland the sum of $105.06 until further order of the Court.

* * * * * *

Plaintiff's appeal concerns the amount of the weekly compensation he will receive and the failure of the trial court to award him some percentage of the money paid to the widow for two children, when she, in fact, only had one child.

Section 59–10–18.7(C), N.M.S.A.1953 (2nd Repl.Vol. 9, pt. 1, Supp.1975), subsequently amended, see § 52–1–46(C), N.M.S.A.1978, states:

C. if there are eligible dependents entitled thereto, compensation shall be paid to the dependents or to the person appointed by the court to receive the same for the benefit of the dependents in such portions and amounts, to be computed and distributed as follows:

(1) to the child or children, if there be no widow or widower entitled to compensation, thirty-five per cent [35%] of the average weekly wage of the deceased, with fifteen per cent [15%] additional for each child in excess of two [2];

(2) to the widow or widower, if there be no children, fifty per cent [50%] of the average weekly wage of the deceased, until remarriage;

(3) to the widow or widower, if there be one [1] child, fifty-five per cent [55%] of the average weekly wage of the deceased;

(4) to the widow or widower, if there be two [2] children, sixty per cent [60%] of the average weekly wage of the deceased; or

(5) to the widow or widower, if there be three [3] or more children, sixty-six and two-thirds per cent [66⅔%] of the average weekly wage of the deceased

. . . .

Section 59–10–12.10(A) and (E), N.M.S.A. 1953 (2nd Repl.Vol. 9, pt. 1), subsequently amended, see 52–1–17, N.M.S.A.1978, states:

Dependents. As used in the Workmen's Compensation Act [59–10–1 to 59–10–37], unless the context otherwise requires, the following persons, and they only, shall be deemed dependents and entitled to compensation under the provisions of the Workmen's Compensation Act:

A. [A] child under eighteen [18] years of age or incapable of self-support and unmarried.

* * * * * *

E. [Q]uestions as to who constitute dependents and the extent of their dependency, shall be determined as of the date of the injury, and their right to any death benefit shall cease upon the happening of any one of the following contingencies:

(1) [U]pon the marriage of the widow or widower.

(2) [U]pon a child reaching the age of eighteen [18] years, unless said child at such time is physically or mentally incapacitated from earnings, or upon a dependent child becoming self-supporting prior to attaining said age.

(3) [U]pon the death of any dependent.

Section 59–10–12.11, N.M.S.A.1953 (2nd Repl.Vol. 9, pt. 2), now 52–1–18, N.M.S.A. 1978, provides in part that "child" includes stepchild as well as natural child. Under the foregoing state of the record (no transcript having been filed), we must decide what the percentage of the average weekly wage Patrick is to receive.

Former § 59–10–18(a)(2), N.M.S.A. 1953, subsequently repealed by the Laws of 1959, ch. 67, § 32, provided in part:

If there be dependents entitled thereto, such compensation shall be paid to such dependents or to the person appointed by the court to receive the same for the benefit of such dependents in such portions and in such amounts as the court, bearing in mind the necessities of the case and the best interests of such dependents and of the public, may determine, to be computed on the following basis, and distributed to the following persons: . . .

A comparable provision does not appear elsewhere in the Workmen's Compensation Act as it existed on September 8, 1976, nor is there any legislative guidance given in the Workmen's Compensation Act for a situation such as exists in the present case. However, in *Anaya v. City of Santa Fe*, 80 N.M. 54, 451 P.2d 303 (1969), our Supreme Court held that, although the Workmen's Compensation Act did not specifically provide for equitable defenses, the court had considered equitable claims and defenses in workmen's compensation proceedings and that equitable considerations would apply in workmen's compensation claims and defenses. Thus, the trial court was not without authority to make an equitable allocation.

Absent a transcript of the proceedings, we cannot say that the trial court did not properly apportion the award equitably, having in mind the necessities of the case and the best interests of the dependents. This is further verified by the court's finding that the widow and the stepchild were totally dependent upon the decedent, and that the natural son, Patrick, was not dependent upon decedent, but was, in fact, dependent upon the mother and stepfather.

Accordingly, we cannot say as a matter of law that the trial court abused its discretion in making the allocation award. In so holding, we do not say that given a change of circumstance the trial court would be precluded from changing the percentage of distribution. Such would be within the equitable powers of the trial court. *Anaya v. City of Santa Fe*, supra; cf. § 52–1–56, N.M.S.A.1978.

If Patrick was eligible for a percentage of the benefits, his eligibility started the same date as the other dependents—September 8, 1976. The cause is remanded to the trial court for a determination of benefits to Patrick from September 8, 1976. That amount will be paid to Patrick by defendant, Security Insurance Company. Security Insurance Company shall deduct from Rhoda Ann Strickland's award the sum of $9.55 per week until Security Insurance Company is repaid.

Plaintiff is awarded $1,500 attorney fees from Security Insurance Company on the appeal. *Herndon v. Albuquerque Public Schools*, 92 N.M. 287, 587 P.2d 434 (1978).

The cause is remanded to the trial court for proceedings consistent herewith.

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

SUTIN, J., dissenting.

SUTIN, Judge (dissenting).

This case comes before this Court solely on the record proper. Contained herein are the court's findings of fact and conclusions of law and the judgment entered.

The trial court concluded that plaintiff was entitled to 5% of decedent's weekly wage for the benefit of Patrick K. Strickland, natural son of decedent when married to plaintiff; that plaintiff was entitled to receive 5/60 or 1/12th of the weekly compensation benefits, or $9.55 per week, payable from the date of filing this lawsuit which was November 29, 1977, until the end of the compensation period.

Defendant, Rhoda Ann Strickland, widow of decedent, argues that plaintiff's appeal has not been preserved for review on two grounds: (1) there was no attack on the findings of fact and conclusions of law and (2) the transcript of the record was not included in the praecipe.

At first blush, it would appear that Rhoda was right. Plaintiff's attorney did not reply or seek a reprieve, nor did the majority opinion respond. Under these circumstances, I feel constrained to step in as plaintiff's advocate to see that justice is done. If the Supreme Court grants certiorari and reverses, this opinion will not be published. Nevertheless, the ultimate question to be reached is a matter of first impression and the serious problems raised by Rhoda should be answered.

Rhoda submits the case of *Reliance Insurance Company v. Marchiondo*, 91 N.M. 276, 573 P.2d 210 (1978) which states the issue:

> The issue is whether under the state of this record we can justify overturning conclusions of law made by the trial court that appear on their face to be properly supported by the trial court's findings of fact. . . . [91 N.M. at 278, 573 P.2d at 212].

In the instant case, the conclusions of law are not supported by the findings of fact, those which constitute a proper statement of ultimate facts. Without a transcript of the record, the ultimate facts cannot be challenged. We are only concerned with whether the trial court properly distributed compensation benefits as provided by statute. The distribution percentage appears only in the conclusions of law. Ofttimes, findings and conclusions are mixed questions of fact and law. Facts stated which misstate the law cannot be considered as an ultimate fact.

The trial court found that:

> 8. Patrick K. Strickland is the surviving son of the decedent by a former marriage between the decedent and the plaintiff, Elizabeth Cunnan.
>
> 9. Patrick K. Strickland although under the age of 18 *was not at the time of his father's death, dependent upon his father for support or maintenance but was in fact supported by his mother and stepfather.* [Emphasis added.]

Finding No. 9 states facts which are irrelevant under the law. True, heretofore, children under 18 years of age, to be eligible dependents had to be actually dependent upon the deceased because the statute so provided. *Houston v. Lovington Storage Company*, 75 N.M. 60, 400 P.2d 476 (1965). Actual dependency was deleted by Laws 1973, ch. 47. Section 52–1–17(A), N.M.S.A. 1978 now provides that "[A] child under eighteen [18] years of age or incapable of self-support and unmarried," shall be deemed a dependent and entitled to compensation benefits.

It cannot be gainsaid that Patrick was an eligible dependent and entitled to compensation benefits despite the fact that he was not supported by his father.

Section 59–10–18.7(C)(1), N.M.S.A.1953 (2nd Repl.Vol. 9, pt. 1, Supp.1975), subsequently amended, see § 52–1–46(C)(1), N.M. S.A.1978, provides for distribution "to the child . . . if there be no widow . . entitled to compensation, thirty-five per cent [35%] of the average weekly wage of the deceased . . . ." The legislative intent was to provide compensation benefits to Patrick because his mother was not a widow entitled to compensation. Otherwise, a natural son of divorced parents would be "Gone With The Wind." To deny Patrick compensation benefits would ob-

struct the spirit of the Workmen's Compensation Act.

Section 59–10–18.7(C)(2), (3), (4) and (5) speak in terms of a surviving widow of decedent *entitled to compensation benefits* with one, two, three or more children. Contra, *Allstate Erectors, Inc. v. Boshell*, 301 A.2d 316 (Del.Super.1972), aff'd, *Boshell v. Allstate Erectors, Inc.*, 305 A.2d 619 (Del. 1973); *Farmer v. Farmer*, 562 S.W.2d 205 (Tenn.1978). I disagree with these cases because in my opinion (C)(1) was intended to cover a separate household concept. This concept is supported by subsection (F) which reads as follows:

> F. the event of the death or remarriage of the *widow . . . entitled to compensation benefits as provided in this section, the surviving children* shall then be entitled to compensation benefits computed and paid as provided in Paragraph (1) of Subsection C of this section for the remainder of the compensable period;

If Rhoda dies or remarries, there is no widow entitled to compensation benefits. Her child is placed in the same category as Patrick. In other words, we do have a separate household concept. As long as Rhoda remains alive and unmarried she is entitled to 55% of the average weekly wage. Patrick is entitled to 35%.

We should avoid "equitable allocation" and judicial discretion. The statute does not provide for it. A spate of disputes would come along. To enumerate the legal problems that arise under these judicial rules is to play "ring around the rosy" with the idiosyncratic attitude of each district judge. The Workmen's Compensation Act should not be subject to judicial tortuosities. I interpret the Act to mean what in my mind and experience is a fair adjudication of the serious problem that confronts children left by the wayside in family instability.

The trial court's conclusion that plaintiff is entitled to 5% of decedent's weekly wage is not supported by the findings of fact. Plaintiff was entitled to 35% of decedent's weekly wage of $114.61, which is $40.11, the amount to which plaintiff was entitled for the benefit of Patrick, not from the date of filing the lawsuit, but from the date of decedent's death until the end of the compensation period.

The compensation benefits are due and payable by decedent's employer. The purpose of the Workmen's Compensation Act is to avoid uncertainty in litigation and to assure dependents of a deceased workman prompt payment of compensation. Absent litigation in the instant case, it was the duty of the employer to search for eligible dependents, to determine whether decedent left children surviving by a previous marriage. To rely upon decedent's widow is to put "the cart before the horse," ofttimes a Trojan horse.

Whether the employer is entitled to any reimbursement from Rhoda, or whether $40.11 should be deducted from Rhoda's weekly payments depends upon the facts disclosed at the trial. Upon reversal of the trial court's judgment, this case should be remanded to the trial court to make the determination.

598 P.2d 1182

STATE of New Mexico ex rel. HEALTH AND SOCIAL SERVICES DEPARTMENT, Petitioner-Appellee,

v.

NATURAL FATHER and Natural Mother, Respondents-Appellants.

In the Matter of John DOE, Jane Doe, and Tom Doe, Children.

No. 3789.

Court of Appeals of New Mexico.

July 24, 1979.

Emmett C. Hart, Albuquerque, for respondents-appellants.

Jeff Bingaman, Atty. Gen., Santa Fe, Elaine Watson, Asst. Atty. Gen., Albuquerque, for petitioner-appellee.

OPINION

WOOD, Chief Judge.

The children's court ruled that the three children were neglected; legal and physical custody of the children was awarded to the Department of Human Services. The parents appeal. There are (1) three constitutional issues, (2) one issue of statutory interpretation, and (3) two evidentiary issues.

Constitutional Issues

(a) Title of the Children's Code

The Children's Code defines a "neglected child" and provides for disposition of the neglected child. Sections 32–1–3(L) and 32–1–34(A), N.M.S.A.1978. It is not claimed that transfer of legal and physical custody is unauthorized by the Code. Such a transfer removes the custody from the previous custodians, in this case, the natural parents.

The relationship of parent and child is of fundamental importance, opinion of Judge Hernandez in *Huey v. Lente*, 85 N.M. 585, 514 P.2d 1081 (App.1973), approved by the Supreme Court, 85 N.M. 597, 514 P.2d 1093 (1973). That relationship is affected by the change in custody. The parents contend that legislation authorizing an alteration in the parent-child relationship is unconstitutional unless the title to the authorizing legislation gives reasonable notice that the legislation affects parental rights.

The parents' claim is based on N.M. Const., art. IV, § 16 which states that the "subject of every bill shall be clearly expressed in its title . . . ." The title to the Children's Code is: "AN ACT RELATING TO CHILDREN; ENACTING A CHILDREN'S CODE; AND AMENDING AND REPEALING CERTAIN SECTIONS OF NMSA 1953."

The "subject" of the Code is children, and that subject is clearly expressed. Provisions within the Code authorizing a change in the custody of a neglected child is a

detail provided for accomplishing the legislative purpose of protecting children. This detail need not be set forth in the title. There was no violation of N.M.Const., art. IV, § 16. *City of Albuquerque v. Garcia*, 84 N.M. 776, 508 P.2d 585, 71 A.L.R.3d 1 (1973); *Davy v. McNeill et al.*, 31 N.M. 7, 240 P. 482 (1925). Compare *Huey v. Lente*, 85 N.M. 597, 514 P.2d 1081, supra.

(b) Vagueness

The definitions of neglected child pertinent in this appeal read:

L. "neglected child" or "abused child" means a child:

* * * * * *

(2) who is without proper parental care and control or subsistence, education, medical or other care or control necessary for his well-being because of the faults or habits of his parents, guardian or custodian or their neglect or refusal, when able to do so, to provide them; or

(3) whose parents, guardian or custodian are unable to discharge their responsibilities to and for the child because of their incarceration, hospitalization or other physical or mental incapacity; or . . .

A statute may violate due process if it is so vague that persons of common intelligence must necessarily guess at its meaning. *State v. Najera*, 89 N.M. 522, 554 P.2d 983 (App.1976).

The parents contend that the words "other care or control" in subparagraph 2 and "mental incapacity" in subparagraph 3 are unconstitutionally vague. This claim goes to the words "as written." See *State v. Gurule*, 90 N.M. 87, 559 P.2d 1214 (App.1977). We do not agree that the words are unconstitutionally vague.

In determining vagueness, we consider the words in the context in which they are used. *State v. Najera*, supra. The "other care or control," according to the statute, is care and control other than subsistence, education and medical attention, but is care or control necessary for the child's well-being. Similarly, "incapacity" includes either a physical or mental incapacity other than an incapacity resulting from incarceration or hospitalization. The statute gives notice that a child is neglected if the parents lack the mental capacity to provide the care or control necessary for the child's well-being. There will be differences of opinion, as in this case, as to what is "necessary," but such a difference of opinion does not make the statutory words unconstitutionally vague. The vagueness doctrine is based on notice. *State v. Najera*, supra. The statute gives fair warning of what amounts to neglect of a child.

Minor Children of F.B. v. Caruthers, 323 S.W.2d 397 (Mo.App.1959) held that " 'otherwise without proper care, custody or support' " was not unconstitutionally vague. *Matter of D.T.*, 89 S.D. 590, 237 N.W.2d 166 (1975) held that the phrases " 'lacks proper parental care,' " and " 'whose environment is injurious to his welfare' " were not unconstitutionally vague. *In re Neglected Child*, 130 Vt. 525, 296 A.2d 250 (1972) held the phrase " 'is without proper parental care or control, or subsistence, education, medical or other care or control necessary for his well-being' " was not unconstitutionally vague. Note the similarity between this last phrase and our statutory language. Concerning mental incapacity, *In re Williams*, 297 So.2d 458 (La.App.1974) held that the phrase " 'incapable of caring for himself or his personal safety' " was not unconstitutionally vague. These decisions support our holding of no unconstitutional vagueness.

(c) Unconstitutional Delegation

The parents assert that the statutory definitions, quoted above, are an unconstitutional delegation of legislative power because of an absence of standards within the definitions by which "proper parental control" and "mental incapacity" can be determined. See *State v. Jaramillo*, 83 N.M. 800, 498 P.2d 687 (App.1972). This issue is not a vagueness argument based on the above-quoted words. The contention is that absent a legislative provision defining the quoted words, the Department of Human Services makes the law by its determi-

nation of the meaning of the quoted words. The answer is that the meaning and application of the statute is not left to the Department of Human Services. The meaning and application is determined by a court, there is no missing standard. *State v. Gurule*, supra.

Statutory Interpretation

The trial court concluded that each of the three children was a neglected child "by reason of the conduct and mental incapacity" of the parents. The conclusion as to "mental incapacity" is based on findings of mental retardation. The conclusion as to "conduct" is based on findings concerning living conditions, the lack of improvement in living conditions after "[n]umerous attempts" to help by various government agencies, the lack of "proper parenting" and the limited ability of the parents to learn "proper parenting skills."

The parents assert that these findings and conclusions are based on a meaning of "other care or control" and "mental incapacity" which is contrary to the meaning of those phrases, as used in the statute.

The parents contend that "other care or control" is a general phrase, limited in meaning by the enumeration which precede the phrase in the statute. That enumeration is "subsistence, education, medical . . . ." The parents also contend that "mental incapacity" is a general phrase, limited in meaning by the words "incarceration, hospitalization . . . ." The parents assert such a limited meaning is required by the doctrine of ejusdem generis. On the basis that the two phrases have limited meanings, the parents contend the conclusion of "neglect" is unsupported by the findings because the findings failed to use the limited meanings of the two phrases. The parents' contention is incorrect because the doctrine of ejusdem generis is not applicable.

Grafe v. Delgado, Sheriff, 30 N.M. 150, 228 P. 601 (1924) states that under the doctrine

> general words in a statute, which follow a designation or enumeration of particular subjects, objects, things, or classes of persons, will ordinarily be presumed to be restricted so as to embrace only subjects, objects, things, or classes of the same general character, sort or kind, to the exclusion of all others.

This doctrine, however, is no more than a rule of construction, *Grafe v. Delgado, Sheriff*, supra, which "is resorted to merely as an aid in determining legislative intent." *State v. Gonzales*, 78 N.M. 218, 430 P.2d 376 (1967). When the statutory words are unambiguous, there is no basis for utilizing a rule of construction to determine legislative intent; rather, intent is determined from the statutory language. *State v. McHorse*, 85 N.M. 753, 517 P.2d 75 (App.1973).

"Other care or control" appears in the phrase "without proper parental care and control or subsistence, education, medical or other care or control necessary for his well-being . . . ." Section 32–1–3(L)(2), supra. "Mental incapacity" appears in the phrase "unable to discharge their responsibilities to and for the child because of their incarceration, hospitalization or other physical or mental incapacity . . ." Section 32–1–3(L)(3), supra. Both phrases unambiguously use "other" in the sense of "distinct from . . . those first mentioned"; "different." Webster's Third New International Dictionary (1966). There being no ambiguity, there is no basis for application of the doctrine of ejusdem generis.

The trial court did not err in failing to apply a limited meaning to the two phrases.

Evidentiary Issues

(a) Propriety of the Findings

The trial court found:

6. When the children were living with the respondents, MOTHER failed to properly maintain the home, resulting in filthy living conditions and a continuous stench.

7. FATHER realized that the living conditions in the home were very bad, but did nothing to improve the situation.

8. MOTHER and FATHER failed to provide a proper home environment con-

ducive to the normal mental, emotional and social development of the children.

9. Numerous attempts were made to help the family by agents from several different agencies including Peanut Butter and Jelly Therapeutic Pre-School, the Family Resource Center, and the Family Health Center, but the family made no progress while the children were living in the respondents' home.

10. MOTHER is retarded mentally, emotionally and socially.

11. MOTHER is retarded in her ability to exercise good judgment, in understanding the consequences of her actions, in understanding the needs of her children, in controlling her impulses, and in her capability for providing a minimally adequate home for the children.

12. FATHER is retarded mentally and emotionally.

13. FATHER has poor judgment and cannot directly provide the day-to-day care and supervision that the children need.

14. FATHER cannot provide the supervision of MOTHER which is necessary for the maintenance of a minimally adequate home for the children.

15. Psychological evaluations establish that the ability of MOTHER and FATHER to learn proper parenting skills is poor.

16. JOHN DOE, JANE DOE and TOM DOE are all severally retarded mentally, emotionally and socially.

17. The cause of the children's retardation is a continuing lack of proper parenting by MOTHER and FATHER.

18. The children would suffer further and more severe emotional and mental harm if returned to the custody of either or both their parents. The respondents' lack of proper parenting for the children has caused the disintegration of the parent-child relationship.

19. Since the children have been removed from the respondents' care and custody and placed in foster care, they have all dramatically improved mentally, emotionally, and socially.

The parents challenge most of these findings either as irrelevant, as evidentiary rather than ultimate facts, or not based on evidence that is clear and convincing. The parents also complain of the failure of the children's court to adopt their requested findings to the contrary.

We comment on one of the findings. As to the other findings, whether evidentiary or ultimate, they support the conclusion that the three children were neglected. The trial court ruled that the evidence was clear and convincing; we agree. *Huey v. Lente*, 85 N.M. 597, 514 P.2d 1093, supra; see *Matter of Valdez*, 88 N.M. 338, 540 P.2d 818 (1975). The evidence being sufficient to support the findings made, the children's court did not err in refusing the contrary findings requested by the parents. *Seven Rivers Farm, Inc. v. Reynolds*, 84 N.M. 789, 508 P.2d 1276 (1973).

Finding No. 16 states that each of the three children was severely retarded mentally, emotionally and socially. The evidence is sufficient to support this finding as to John. The evidence as to Jane and Tom (the younger two) was that they were developmentally retarded and that Jane was showing signs of developing the same mental and emotional problems as John; however, there is no clear and convincing evidence to support Finding No. 16 as to Jane or Tom. This does not aid the parents, however, because Finding No. 16 is superfluous. As defined in § 32–1–3(L)(2) and (3), supra, evidence that the child is severely retarded is not required for a ruling that the child is neglected. *Compare Matter of Pernell*, 92 N.M. 490, 590 P.2d 638 (App.1979). An erroneous finding, unnecessary to support the conclusion of neglect, is not grounds for reversal. *Mathieson v. Hubler*, 92 N.M. 381, 588 P.2d 1056 (App.1978).

(b) Limiting the Parents' Evidence

The "neglect" proceedings involved three of five children in the family. The parents' theory was that the developmental problems of the three children were not because of their care or because of their environment. In support of this theory,

evidence was introduced that the other two children "were healthy, normal, bright children for their age, and that their care and environment was the same as the other children." The parents contend the children's court erred in not allowing them to "fully and completely" develop this evidence.

The children's court limited this evidence, remarking: "[I]f you're trying to show they have two children that are still there and they apparently have been able to maintain the home for the children, you've had that established about fifteen times."

It was not an abuse of discretion and, therefore not error, to restrict the submission of cumulative evidence. Evidence Rule 403; *State v. Brown*, 91 N.M. 320, 573 P.2d 675 (App.1977), cert. denied, 436 U.S. 928, 98 S.Ct. 2826, 56 L.Ed.2d 772 (1978).

The amended judgment and disposition is affirmed.

SUTIN and HERNANDEZ, JJ., concur.

599 P.2d 382

Roy L. PARR and Flora E. Parr, his wife, James Howard Parr and Walter R. Parr, Plaintiffs-Appellees,

v.

L. B. WORLEY and Tenneye Maye Worley, his wife, Morris T. Worley and C. Kemble Worley, Defendants-Appellants.

No. 12090.

Supreme Court of New Mexico.

Aug. 27, 1979.

Matkins & Martin, W. T. Martin, Jr., Carlsbad, for defendants-appellants.

Crouch, Parr & Valentine, Walter R. Parr, Las Cruces, for plaintiffs-appellees.

OPINION

EASLEY, Justice.

Parr sued Worley to quiet title to the mineral interest in land occupied by a public highway. Worley counterclaimed to quiet title in himself. The court granted summary judgment for Parr. We reverse.

The questions are whether a deed conveying land "lying to the East of" the highway includes the east one-half of the highway and whether a designation of the acreage is controlling in determining the intent of the grantor.

In 1949, Parr conveyed to Worley a portion of land described as "lying to the East of" the highway, "containing 25 acres, more or less." The actual area of the land, as disclosed by a survey prepared for this action, was 25.80 acres if measured from the eastern edge of the highway right-of-way, and 31.57 acres if measured from the center of the highway. Parr later purported to convey to a third party the mineral interest

under both sides of the highway with a description of the land as "lying west of the east right-of-way line of" the highway.

The trial court found no facts in dispute, and we therefore discuss whether, as a matter of law, the mineral interest in the eastern portion of the highway right-of-way was vested in Worley.

> It is a rule practically without exception that a conveyance of land abutting on a road, highway, alley, or other way, is presumed to take the fee to the center line of the way. The presumption, however, is a rebuttable one. After all, it depends upon the intention of the parties to the deed, to be ascertained from its language, viewed in the light of the surrounding circumstances. The presumption may be overcome either by express words or by the use of such words as necessarily exclude the highway from the description of the premises conveyed; but in case the language is of doubtful meaning, the presumption will prevail. (Citations omitted.)

Nickson v. Garry, 51 N.M. 100, 106, 179 P.2d 524, 527–28 (1947). *See Weldon v. Heron*, 78 N.M. 427, 432 P.2d 392 (1967); 3 American Law of Property § 12.112 (A. J. Casner ed. 1952); G. Thompson, *Commentaries on the Modern Law of Real Property*, Vol. 6, § 3068 (Repl. ed. 1962); H. Tiffany, *The Law of Real Property*, Vol. 4, § 996 (1975); Annot., 49 A.L.R.2d 982 (1956). *See also Tagliaferri v. Grande*, 16 N.M. 486, 493, 120 P. 730, 732, (1911) where a deed calling for an acequia as a boundary was held to carry title to the center of the acequia in which this court stated:

> We deem it, therefore, the law of this jurisdiction that a boundary call for an irrigating ditch goes, in the absence of some contrary intent manifested in the instrument, to the middle of the ditch.

Parr makes three arguments: (1) the reasons which justify the presumption do not exist in the present case; (2) the deed to Worley contains language that expressly excluded the highway from the conveyance, thus, the presumption is rebutted; and (3) Worley had constructive notice that Parr claimed title to the mineral interest under the highway and acquiesced thereto. We discuss the first two arguments together since they involve construction of the deed.

Parr cites *Stuart v. Fox*, 129 Me. 407, 409, 152 A. 413, 415 (1930) as authority that the presumption is justified "on the theory that the grantor could not have intended to retain the ownership in a long narrow strip of land of no apparent benefit to himself." Parr argues that the retention of mineral interest is of clear apparent benefit, and therefore the presumption should not apply. However, Parr could have, but did not, reserve the mineral interest in his deed to Worley.

There are other reasons which support the presumption.

> The reasons for the rule are variously assigned as public policy to prevent disputes and litigation over narrow gores of land, that a highway being a monument, the call should run to the center, or that the small strip is of little value to the grantor as compared with the grantee. (Footnotes omitted.)

G. Thompson, *supra* at 671–72. *See* H. Tiffany, *supra* at 216.

Generally, the theory that a small, narrow strip of land was of little value to the grantor grew out of a line of cases involving, essentially, subdivisions where larger plots of land were sold by lot, usually with provisions for alleys, highways, roads, etc. *See e. g., Pilkington v. Fausone*, 11 Cal. App.3d 349, 90 Cal.Rptr. 38 (1970); *Hixson v. Jones*, 253 Cal.App.2d 860, 61 Cal.Rptr. 883 (1967). Frequently in these cases, the roadways or alleys were later abandoned, and questions then arose concerning title to them. We note that, as Thompson, *supra*, has phrased the issue, the question goes to the "value to the grantor *as compared with the grantee*." In the present case, the mineral interest in question is clearly of as much value to the grantee as to the grantor. However, we need not rely solely on this fact, because another theory which justifies this presumption is also present in this case.

The deed in question described the property as "[a]ll that part of the Southeast Quarter [of a certain section] lying to the East of United States Highway No. 62 and 180. . . ." Similar references in deeds to highways or streets have been considered to indicate monuments, and the general rule is that the line runs through the center of a monument. *Tagliaferri, supra.* "The statement in the deed that the land was all north of the pike has reference to a well known highway, which we may regard as a monument." *Haverstick v. Beaver*, 37 N.E.2d 650, 654 (Ct.App.Ohio 1941). *See also Moody v. Palmer*, 50 Cal. 31, 36 (1875); *City of Laconia v. Morin*, 92 N.H. 314, 30 A.2d 479 (1943); and, *Hofer v. Carino*, 4 N.J. 244, 72 A.2d 335 (1950) and cases cited therein at 72 A.2d 338.

The area, as stated in the deed, is the only other fact, either from the deed or from the surrounding circumstances, which could arguably indicate that the reference to the highway was not intended by the parties as a monument indicating the boundary. This fact alone is not sufficient. "[A]n order of precedence has been established among different calls for the location of boundaries, and other things being equal, resort is to be had first to natural objects or landmarks, next to artificial monuments, then to adjacent boundaries, then to courses and distances, and *lastly to quantity.*" *Haverstick*, 37 N.E.2d at 654–55 (emphasis in original; citation omitted). *Accord*, 23 Am.Jur.2d, Deeds, § 240 (1965); 26 C.J.S. Deeds § 100 (1956). In *Haverstick*, the issue was whether a call for area in a deed extended the conveyance *beyond* the center line of a highway which was called for as a monument. The court held that it did not overcome the presumption that the center line of the highway was the true boundary. *See Askins v. British-American Oil Producing Co.*, 201 Okl. 209, 203 P.2d 877, 880–81 (1949), in which the court stated:

> We are unwilling to hold that the mere statement of quantity in the deeds clearly and plainly disclosed that such was the intention of the parties, and in such case the doubt should be resolved against the grantor. (Citation omitted.)

See also Bowers v. Atchison, T. & S. F. Ry. Co., 119 Kan. 202, 237 P. 913 (Kan.1925).

We subscribe to the above language in *Askins* and hold that the Parr deed did not clearly and plainly disclose an intention to exclude the east side of the highway from the description. We construe the deed to refer to the highway as a monument, and as such, the deed passes title to the center line. *Cordova v. Town of Atrisco*, 53 N.M. 76, 201 P.2d 996 (1949); *Tagliaferri, supra.*

Parr argues that, in the phrase "lying to the East of [the highway]", the word "to" was intended to be a word of exclusion; and thus, the highway is excluded from the grant. However, the cases cited by Parr to support this point are clearly distinguishable on their facts.

Parr makes two arguments based on the subsequent acts of the parties: (1) that the subsequent acts are relevant to the practical construction which the parties gave to the deed, and (2) that the subsequent acts constitute acquiescence. The subsequent acts relied on are the actions of just one party, Parr. He relies on the later mineral leases, filed of record, which purported to cover the disputed area. Parr argues that Worley should have been aware of these leases, and yet he did nothing.

Acquiescence in a boundary line requires some form of knowledge. *Platt v. Martinez,* 90 N.M. 323, 563 P.2d 586 (1977). In the absence of some indication that Worley was or should have been aware of the subsequent filing of mineral leases by Parr, the doctrine of acquiescence does not apply.

We reverse and remand this case to the trial court for entry of judgment in favor of Worley.

IT IS SO ORDERED.

SOSA, C. J., and PAYNE, J., concur.

599 P.2d 385

STATE of New Mexico,
Plaintiff-Appellee,

v.

Michael A. GUTIERREZ,
Defendant-Appellant.

No. 2693.

Court of Appeals of New Mexico.

Feb. 1, 1979.

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

Jeff Bingaman, Atty. Gen., Santa Fe, Charlotte Hetherington Roosen, Asst. Atty. Gen., Albuquerque, for plaintiff-appellee.

OPINION

WALTERS, Judge.

The defendant appeals his jury conviction of robbery with a deadly weapon, and con-

tends that the mandatory enhancement of the sentence by the trial court upon the jury's specific finding of defendant's use of a firearm is violative of the constitutional double jeopardy prohibition.

Aside from the constitutional argument, which we find to be without merit since it raises the identical question answered adversely to defendant in *State v. Gabaldon,* 92 N.M. 230, 585 P.2d 1352 (Ct.App.1978), defendant urges (1) that he was denied effective assistance of counsel, and (2) that "mugshot" books and a police photo of himself were improperly admitted into evidence.

It should be noted that defendant was represented by private counsel at trial and by the Public Defender's Office upon appeal.

The basis of defendant's complaint of ineffective counsel rests on his attorney's failure to voir dire the potential jurors, failure to challenge for cause a seated juror when the court was advised by a listed prosecution witness that he recognized the juror as a former fellow worker, and failure to object to continued testimony of and references by the police officer witnesses to "mug shots" and the "mugshot" books. Insofar as the last claimed "failure" of the trial counsel is concerned, there is an inevitable overlap into defendant's second contention respecting erroneous admission of the police mugshot records and photo of defendant.

■ Defense counsel's decision to examine or not to examine jurors on voir dire is a matter of strategy. He is not forced to do so, and he may have been satisfied, after examination by the court and the State's attorney, that the mental attitudes, probable bias, competency or incompetency of each juror had been sufficiently probed to assure a fair and impartial jury. We cannot say that failure of defendant's counsel to conduct voir dire during selection of the jury is indicative of incompetence. *State v. Trejo,* 83 N.M. 511, 494 P.2d 173 (Ct.App. 1972); *State v. Selgado,* 78 N.M. 165, 429 P.2d 363 (1967).

■ The trial court questioned the impaneled juror acquainted with one of the prosecution witnesses after learning of the former work relationship between them and was satisfied that it would not affect his ability to serve fairly and conscientiously. Trial counsel for defendant was not required to challenge the juror for cause or peremptorily; indeed, the bias necessary to sustain a challenge for cause was dispelled by the juror's responses to the court's questioning, and the prejudicial circumstances of *Mares v. State,* 83 N.M. 225, 490 P.2d 667 (1971), were not present in this case.

Trial counsel failed to object to repeated testimony from two police officers concerning the victim's identification of defendant after he had viewed police "mugshot" albums, and to the prosecutor's continual references to "mugshots" and "mug books." Nor did he object when another prosecution witness testified that he showed the victim a photo array of five persons whom he identified to the jury as "individuals on parole supervision in the State of New Mexico and he identified Mr. Gutierrez from those photographs."

Justice McManus observed in *State v. Trivitt,* 89 N.M. 162, 168, 548 P.2d 442, 448 (1976) that:

> It is relatively easy for different counsel on an appealed case to differ on trial tactics used during the trial of a cause. Hindsight is not always better than foresight in the course of litigation from beginning to end.

Who is to say that defendant's counsel did not deliberately weigh the risk of adding emphasis to these slightly-veiled references to defendant's past criminal character by objections, against the hope of minimizing the attention the jury might focus on the significance of such comments?

Defendant was identified in court by the gas station attendant, the State's first witness, as the robber who held a shotgun on him during the robbery. Subsequently, the sheriff's officers were called by the prosecutor. It was during their testimony that the frequent references to "mugshots" and police photos of defendant were made, and

State's Exhibits 2 and 3, the "mugshot" albums of the Bernalillo County Sheriff's Department, and 3(a), the photo of defendant taken from one of those albums, were introduced, admitted, and passed to the jury over counsel's objections to the relevancy of the exhibits.

The date of each person's arrest was shown on the face of all of the pictures in the albums. The offense here charged occurred on January 16, 1976; defendant's photograph shown to the jury carried the date of his arrest previously on February 14, 1974. At this stage of the trial, defendant had not testified and he did not later take the stand, although five alibi witnesses were called during presentation of his defense.

Generally, evidence of a defendant's prior criminal record, and thus his character, is not permitted to prove conduct or that he acted in conformity with such character, unless presented to rebut character evidence offered by the accused. N.M.R. Evid. 404(b) N.M.S.A.1978 [formerly § 20–4–404(b), N.M.S.A.1953 (Repl. Vol. 4, Supp. 1975)]; *State v. Ross,* 88 N.M. 1, 536 P.2d 265 (Ct.App.1975).

The State argues that the exception to Rule 404 on the issue of identity applies. But at the time the evidence and exhibits concerning the mugshots and albums were received, defendant had already been identified by the victim as the armed robber. It also argues that *State v. Jacobs,* 91 N.M. 445, 575 P.2d 954 (Ct.App.1978), and *State v. Gallegos,* 92 N.M. 370, 588 P.2d 1045 (Ct.App.1978), upheld admission of mugshots to prove the accused's identity. In each of those cases, however, the mugshot of the accused was taken after he had been arrested on the charge for which he was being tried, and conveyed no information to the jury that the accused had a *prior* criminal record. The situation here—introduction of a police photo of the accused showing an arrest date two years before the date of the alleged offense—has not been considered previously in this jurisdiction.

Since objection was made that the exhibits were irrelevant and cumulative, we examine the test to determine relevancy. Rule 401 of our Rules of Evidence defines relevant evidence as that which has "any tendency to make the existence of any fact that is of consequence * * * more probable or less probable than it would be without the evidence." Certainly the mugshot albums containing police photos of several hundred arrestees were not relevant to prove defendant's identity, but would be relevant to demonstrate that the victim was capable of identifying defendant out of approximately 200 males of Spanish-American heritage. Thus, the fact of correct identification would be made more probable than not. It was relevant to the credibility of the eyewitness. The photo of defendant extracted from the albums, State's Exhibit 3(a) was relevant to corroborate the victim's in-court identification. But was defendant so prejudiced by the date of his prior arrest shown on the exhibits and his documented association with other prior arrestees, that Rule 403 (N.M.R.Evid. 403, N.M.S.A.1978) excluding relevant evidence should apply?

For this answer we turn to the decisions of other courts, keeping in mind the general rule stated above and the fact that proof of defendant's character had not been offered at the time the exhibits were introduced (nor was it ever) by the defense. In *Roberts v. Commonwealth,* 350 S.W.2d 626 (Ky. App.1961), a conviction was reversed partially because the appellate court was impressed that introduction of a " 'mug' photograph * * * would unquestionably convey to the jury the clear inference that it had been made while appellant was in a police line-up or was in the toils of the law in some manner. There was utterly no excuse for using it at trial in the way it was employed."

Oklahoma has held that it is clearly reversible error to put the defendant's character or reputation at issue before it has been raised by the defendant. *Harvell v. State,* 479 P.2d 586 (Okl.Crim.App.1971).

In *State v. Cumbo,* 9 Ariz.App. 253, 451 P.2d 333 (1969), where mugshots taken at the time of the arrest for the offense charged and which had been altered to

block out the identifying police numbers were admitted, the court declared that suggestion of a criminal record was error and use of the term "mugshot" prejudicially implied a previous criminal record.

And in *Barnes v. United States,* 124 U.S. App.D.C. 318, 365 F.2d 509 (D.C.Cir.1966), the Court of Appeals likened the front and profile mugshot picture introduced in that case to the "wanted" posters so familiar in post offices, motion pictures and television, and found that the inference of a prior criminal record (or, at least, past trouble with the police), was a natural and perhaps automatic response by the jury, and thus impermissibly prejudicial.

We believe the element of prejudice was sufficiently called to the attention of the trial court in counsel's objections of irrelevance and cumulativeness for, as our Supreme Court ruled in *Albertson v. State,* 89 N.M. 499, 554 P.2d 661 (1976), an objection based on relevancy implicitly asserts the policy behind the rules prohibiting evidence of prior convictions. It would likewise alert the trial court to the rule of law denying admission of evidence of a prior criminal record when the defendant's character has not yet become an issue for the jury.

We hold, therefore, that State's Exhibits 2, 3, and 3(a) were inadmissible under the facts of this case. We hold, further, that considered as a whole, the trial was not a sham, farce or mockery of justice resulting from any conduct of the defense attorney so as to support the claim of ineffective counsel. *State v. Sabo,* Ct.App. No. 2418, decided January 11, 1979.

But having found error in the admission of the exhibits discussed, the crucial question is whether it was reversible error in this case. In *United States v. Rixner,* 548 F.2d 1224 (5th Cir.), *cert. denied* 437 U.S. 932, 97 S.Ct. 2639, 53 L.Ed.2d 248 (1977), the appellate court held that other strong evidence of defendant's guilt and an in-court identification of defendant reduced the erroneous admission of police photographs to harmless error, noting, however, that:

> * * * government prosecutors should take heed regarding the introduction of mugshots during trial and if this practice is continued, future cases may very well be reversed.

In-court identification is present in this case. The gas station attendant (the victim), positively linked defendant to the crime, and related several occasions when he had served defendant at this and another gas station where he had previously worked. He recognized defendant's voice, and clearly saw his face on the date of the robbery. He went through one album and half of another before he found defendant's picture. At no time did he deviate from his initial identification. *State v. Gallegos,* 92 N.M. 370, 588 P.2d 1045 (Ct.App.1978). The other prosecution witnesses merely repeated how the attendant had initially described the robbers to the investigating officers, and corroborated his testimony regarding the manner in which he had examined photographs and mugshot albums in identifying defendant. Their cumulative testimony was limited solely to the mechanical procedures of description and mugbook identification by the victim. Their evidence on that single issue at that point in the trial, especially since the defendant had already been identified in court by the victim, had no real purpose other than to imprint upon the jury the defendant's prior criminal character and arouse the prejudices of the jury against the defendant. Compare *State v. Day,* 91 N.M. 570, 577 P.2d 878 (Ct.App. 1978). The same criticism might not be warranted had it been rebuttal evidence.

To determine that the exhibits received through the testimony of the State's police witnesses constituted harmless error, evidence of defendant's guilt must be so overwhelmingly persuasive that under no reasonable probability could the exhibits have induced the jury's finding of guilt. *State v. Day, supra; State v. Self,* 88 N.M. 37, 536 P.2d 1093 (Ct.App.1975); *State v. Mason,* 79 N.M. 663, 448 P.2d 175 (Ct.App.1968). There was substantial evidence from the attendant's testimony alone to support the conviction. The evidence from defendant's alibi witnesses sufficient to shake this

"strong evidence of defendant's guilt" was not forthcoming. They told a plausible story of defendant's presence elsewhere on some January evening, but none of the witnesses could state with any certainty that their recollection of defendant's whereabouts coincided with the date on which the crime was committed. A sister-in-law distinctly knew where he was *the following morning,* and she was the only witness who was sure of a date or time of the month.

We find that proof of defendant's guilt was overwhelmingly persuasive, and the erroneous admission of the exhibits was harmless error. In doing so, however, we take notice that ten years ago this court expressed its disapproval of the use of the term "mugbook" or words having similar import, in criminal trials. *State v. Tapia,* 79 N.M. 344, 443 P.2d 514 (Ct.App.1968). It is apparent that, after testimony from the victim, all of the prosecution witnesses here were called only to tell the jury that identification had been made from a group of photos of parolees, from police albums and an old police photo of defendant on file in the Sheriff's office, and to introduce the "mugshot" and the "mug books." This tactic had to be a deliberate effort to prejudice the jury against the accused since the testimony from those three separate prosecution witnesses added absolutely nothing to what the State's first and principal witness had already told the jury. Offering the exhibits in evidence simply compounded the intended prejudice. Such prosecutorial zeal does not contribute to assurance of a fair trial.

This court would be remiss in its duties if it were not to condemn, for the future, such misplaced fervor. The reversal of criminal convictions is, more often than not, frequently believed to result from an appellate court's oversensitivity to what is popularly termed "mere technicalities." But the responsibility for reversal should not be imputed solely to the court's rightful concerns for constitutional infringements. Many times it should be placed at the feet of unrestrained prosecutors who deliberately, mischievously, and unfairly abuse the rules of evidence. We speak of those who, well knowing the insidious impact of prejudicial evidence, nevertheless insist upon getting before a jury inadmissible, or even slightly probative but highly questionable, facts which they hope will aid them in obtaining a guilty verdict. We will no longer tolerate prosecutorial references to "mugshots" or "mug books," or the introduction of "mugshots" in a criminal case under the circumstances brought to our attention here. *United States v. Rixner, supra.*

The judgment is affirmed.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

599 P.2d 389

STATE of New Mexico,
Plaintiff-Appellee,

v.

Charles BROWN, Defendant-Appellant.

No. 3730.

Court of Appeals of New Mexico.

March 22, 1979.

Jeff Bingaman, Atty. Gen., Janice M. Ahern, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Ron H. Ricks, Santa Fe, William D. Teel, John L. Walker, Albuquerque, for defendant-appellant.

OPINION

WOOD, Chief Judge.

This Court reversed defendant's conviction of assault, with a firearm, upon two police officers with intent to commit a violent felony. *State v. Brown*, 91 N.M. 320, 573 P.2d 675 (Ct.App. 1977). Defendant has been retried and again convicted of those offenses. Section 30–22–23, N.M.S.A. 1978. He again appeals. 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). 1. All but one of the issues briefed are answered summarily. 2. We discuss the self-defense instructions.

Issues Answered Summarily

(a) Section 30–22–23, supra, requires the assault to have been upon officers in the lawful discharge of their duties. Defendant claims he was entitled to a directed verdict because the officers were not in the lawful discharge of their duties when defendant shot the officers. Assuming, but not deciding, that there was evidentiary

support for the several lawful discharge claims made, defendant was not entitled to a directed verdict. The lawful discharge question was for the jury to decide; the instructions submitted the question to the jury. See *State v. Doe*, 92 N.M. 100, 583 P.2d 464 (1978) for a definition of lawful discharge of duties.

(b) Defendant asserts due process was violated because he was convicted of crimes not shown by the evidence to have been committed. Arguing that assault is an attempted battery that failed, defendant claims he committed battery, and not assault, because some of his shots hit the officers. This contention disregards § 30–22–21(A)(2), N.M.S.A. 1978, which defines assault to include an unlawful act which caused the officers to reasonably believe they were in danger of receiving an immediate battery. The fact that defendant's gunfire hit the officers does not show an absence of evidence of assault, because there was evidence of an assault under § 30–22–21(A)(2), supra. Defendant also claims "the officers were not fearful and did not consider themselves in danger until after the battery occurred." This claim ignores the testimony, of the officers and defendant, that the officers were scared and reasonably believed they were in danger of receiving an immediate battery before defendant began shooting.

(c) The first paragraph of an instruction, requested by defendant, was given by the trial court. This paragraph quoted the municipal ordinance on "concealing identity". Defendant claims the trial court erred in refusing to give the second paragraph of the requested instruction. This second paragraph would have informed the jury that the "Ordinance does not impose criminal liability for failing to speak to police officers . . . ." Inasmuch as the jury had been instructed as to what the ordinance *did cover* (concealing identity with intent to hinder a police officer), there was no error in refusing to instruct the jury as to what was *not covered* by the ordinance.

(d) Another requested instruction of defendant, going to the propriety of a police officer stopping a person for identification, was properly refused because the basis for an investigatory stop was covered in other instructions.

(e) A defense witness testified as to the contents of several exhibits, however, the exhibits themselves were excluded by the trial court. Defendant recognizes that exhibits I through O were properly excluded under Evidence Rule 803(18). Defendant complains of the exclusion of exhibits P through S. Inasmuch as the jury heard testimony from the defense witness, as to the contents of the exhibits, the question is whether the trial court abused its discretion. The taped transcript does not show an abuse of discretion. *State v. Bell*, 90 N.M. 134, 560 P.2d 925 (1977).

Self-Defense Instructions

U.J.I. Crim. 41.41 is a self-defense instruction approved for use when the defendant kills the victim. Defendant requested, and the trial court gave, a modified version of this instruction. The modification was necessary because neither of the police officers was killed. The modification eliminated the references in U.J.I. Crim. 41.41 to "killed" and "killing" and substituted "shot at" and "shooting".

U.J.I. Crim. 41.51 is another self-defense instruction. This instruction was requested by the prosecution and given without modification. As given, the instruction included bracketed paragraph 3 in the approved instruction. This paragraph reads: "The force used by defendant ordinarily would not create a substantial risk of death or great bodily harm . . . ." The Use Note states that this bracketed paragraph is to be used "only if the defendant's action resulted in death or great bodily harm." We emphasize that this portion of the instruction goes to the force used by defendant and not the force against which defendant was defending.

Another Use Note to U.J.I. Crim. 41.51 states that the instruction is to be used "if defense from non deadly attack or defense

from deadly attack." This goes to the force being defended against. Use of the instruction in connection with a "deadly attack" raises a question as to the appropriateness of the Use Note. Why? Because the opening sentence of U.J.I. Crim. 41.51 limits this instruction to defense from "an attack which ordinarily would not have resulted in death or great bodily harm."

The questionable reference to "deadly attack" in the Use Note to U.J.I. Crim. 41.51 points up the problem with framing the appropriate self-defense instructions in this case. If the defense was from an attack which ordinarily *would* result in death or great bodily harm, U.J.I. Crim. 41.51 would not be applicable. Yet, if the defense did not result in a killing, U.J.I. Crim. 41.41 would not be applicable. Faced with this problem, the trial court properly gave a modified version of U.J.I. Crim. 41.41.

In settling the instructions, the trial court explained that both self-defense instructions would be given because there was evidence which, if believed by the jury, supported both instructions. Defendant does not claim an insufficiency of the evidence to support these two instructions.

In the trial court, defendant objected to the instruction taken from U.J.I. Crim. 41.-51 claiming it was an incorrect statement of the law. No such claim is argued on appeal.

Defendant's appellate claim is that the two instructions are conflicting and confusing. They are not. Modified instruction U.J.I. Crim. 41.41 applied to a defense based on the appearance of death or great bodily harm to the defendant. U.J.I. Crim. 41.51 applied to a defense from an attack which ordinarily would not have resulted in death or great bodily harm. The jury could apply either or neither of the instructions, depending on its determination of the facts of the case.

The wording of each instruction states when that instruction would be applicable. An additional instruction, explaining that the applicability of the two defense instructions depended on the jury's determination of the facts, might have been helpful. Such an additional instruction was not requested. Defendant did not claim, in the trial court, that the two instructions conflicted or were confusing. See N.M.Crim.App. 308. There is no problem in this case comparable to the instruction problems discussed in *State v. Day*, 90 N.M. 154, 560 P.2d 945 (Ct.App. 1977); *State v. Durham*, 83 N.M. 350, 491 P.2d 1161 (Ct.App. 1971); and *State v. Buhr*, 82 N.M. 371, 482 P.2d 74 (Ct.App. 1971).

There being a basis in the evidence for each of the self-defense instructions, and each instruction stating the basis for its factual application, the instructions were neither conflicting nor confusing. In these circumstances it would not have been error to refuse an additional instruction explaining how to apply the self-defense instructions, and it was not error to fail to give such an additional instruction which was not requested. Rule of Crim.Proc. 41(d).

The judgment and sentences are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

599 P.2d 392

STATE of New Mexico, Plaintiff-Appellee,

v.

William DUNN, Defendant-Appellant.

No. 3924.

Court of Appeals of New Mexico.

March 27, 1979.

John B. Bigelow, Chief Public Defender, Martha A. Daly, Asst. App. 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's conviction for escape from the penitentiary was reversed on the basis of *Esquibel v. State*, 91 N.M. 498, 576 P.2d 1129 (1978). During the retrial of defendant, the trial court ordered a mistrial because of an answer made by a defense witness during cross-examination. We granted an interlocutory appeal (see § 39–3–3(A), N.M.S.A.1978), because defendant may not be again tried on the escape charge if the mistrial was improperly granted. *State v. De Baca*, 88 N.M. 454, 541 P.2d 634 (Ct.App.1975); *State v. Sedillo*, 88 N.M. 240, 539 P.2d 630 (Ct.App.1975).

Defendant and Cody escaped from the penitentiary together. Both were prosecuted for the escape. Both asserted duress as a defense. See *Esquibel v. State*, supra. Cody was acquitted. Prior to defendant's retrial, the trial court prohibited "the defense case from any reference by whatever means to the jury that a defense witness, Denny B. Cody, had been acquitted of the identical charge in a companion case to that at bar."

During cross-examination the prosecutor asked the following question, and Cody gave the following answer:

"Q. (Mr. Berardinelli) How can you explain to this jury that both of you [defendant and Cody] have claimed that you escaped to save your lives; that both of you have claimed that notes were put on your beds and threats were made from unknown individuals because you were both supposed to be snitches?

A. (Mr. Cody) Because that is true. You forget to mention that I was found not guilty of this same crime—

(Mr. Berardinelli) Objection, your honor."

The trial court instructed the jury to disregard the answer, explaining that what may have been determined with regard to Cody was "completely irrelevant to the issues in this case."

The jury was then excused. The trial court inquired of defense counsel regarding compliance with its pretrial ruling to refrain from any reference to Cody's acquittal. Defense counsel informed the trial court "that he had adequately instructed the witness regarding this prohibition." Cody was then found to have been in contempt of court; this contempt ruling is not involved in this appeal.

After the contempt ruling, the prosecutor moved for a mistrial. Defendant opposed the granting of a mistrial. The trial court ordered a mistrial, finding:

> [T]hat because of the intentional and unjustified injection of the testimony above-referred to, the Plaintiff [State] cannot obtain a fair trial, and that no amount of admonition to the jury and no less drastic procedure would cure the error or eliminate the prejudice to the State's case, and that manifest necessity has arisen thereby sufficient to justify granting said Motion, over objection by the defense.

The trial court found an "intentional and unjustified injection" of Cody's acquittal into defendant's trial. Although the finding is not specific, our understanding is that this intentional and unjustified conduct was by Cody, hence the finding of contempt.

The question was an open-ended one; the prosecutor asked Cody to "explain to this jury" the similarity of the defenses to the escape charges. The answer cannot be characterized as totally unsolicited by the question that was asked. Compare *State v. Baca*, 89 N.M. 204, 549 P.2d 282 (1976). Although the answer improperly interjected Cody's acquittal into the case, this error can be viewed as having been invited by the prosecutor's question.

Viewing the prosecutor's question as having invited the improper answer, how does the open-ended question affect the propriety of the mistrial order? In this case it has no effect. The plurality opinion in *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971) points out that the trial court's decision to grant a mistrial requires "a scrupulous exercise of judicial discretion" and that such discretion is not to be exercised "according to rules based on categories of circumstances . . . ." *Jorn* states:

> [W]e cannot evolve rules based on the source of the particular problem giving rise to a question whether a mistrial should or should not be declared, because, even in circumstances where the problem reflects error on the part of one counsel or the other, the trial judge must still take care to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal.

There are no "bright-line rules based on . . . the source of the problem . . . ." *United States v. Jorn*, supra. However, the double jeopardy clause "bars retrials where 'bad-faith conduct by judge or prosecutor,' . . . threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant." *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). See *Lee v. United States*, 432 U.S. 23, 97 S.Ct. 2141, 53 L.Ed.2d 80 (1977).

The transcript does not show that the prosecutor's open-ended question was asked in bad faith or was in any way designed to obtain a declaration of a mistrial. The trial court did not find that the prosecutor acted improperly in asking the question. Accordingly, the prosecutor's conduct plays no part in our decision as to the propriety of the mistrial order. Nor does the intentionalness of Cody's answer play a part. The propriety of the mistrial is to be determined by whether there was a manifest necessity for the mistrial order, or by whether "the ends of public justice would be defeated by carrying the first trial [in

this case the retrial] to a final verdict." *State v. Aragon*, 89 N.M. 91, 547 P.2d 574 (1976).

Cody's answer informed the jury that he had been acquitted "of this same crime". Because of this answer, the trial court found that the State could not obtain a fair trial. Our function, on appeal, is to determine whether the trial court abused its discretion. *United States v. Jorn*, supra; *State v. Sedillo*, supra.

Defendant claims the trial court abused its discretion by failing to consider alternatives to a mistrial. See *State v. De Baca*, supra. Obviously it did consider alternatives. The trial court first instructed the jury to disregard the answer, but after the contempt hearing, the trial court concluded that "no amount of admonition . . . and no less drastic procedure would cure the error or eliminate the prejudice to the State's case . . . ."

Defendant asserts the trial court failed to exercise "sound discretion" in abandoning the "less drastic alternative" of an admonition to the jury. The trial court was of the view that an admonition to the jury could not eliminate the prejudice to the State's case. Compare *Albertson v. State*, 89 N.M. 499, 554 P.2d 661 (1976). The question of abuse of discretion necessarily turns on the trial court's view of prejudice. The trial court observed the witness and the impact of the witness's answer on the jury, we did not. Compare the situation in *State v. Aragon*, supra. Accordingly, we cannot hold that the trial court's view of prejudice to the State's ability to obtain a fair trial was an abuse of discretion.

The order declaring a mistrial is affirmed.

IT IS SO ORDERED.

HERNANDEZ and WALTERS, JJ., concur.

599 P.2d 395

STATE of New Mexico, Plaintiff-Appellee,

v.

Gilbert SAAVEDRA, Defendant-Appellant.

No. 3940.

Court of Appeals of New Mexico.

Aug. 7, 1979.

Roderick A. Dorr, Terrazas & Dorr, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Sammy J. Quintana, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

ANDREWS, Judge.

Appellant, Gilbert Saavedra (Saavedra) was charged with two counts of forgery by falsely making a check or in the alternative with forgery by issuing or transferring a forged check, and one count of conspiracy to commit forgery. Sections 30–16–10(A) and (B); 30–38–2, N.M.S.A.1978. Following a jury trial he was found guilty on all counts. Two issues are argued: (1) whether the trial court's answer to the jury's question was an unauthorized communication; and (2) whether the response given to the jury misstated the law and confused the jury.

At the trial the State proved that Lydia Chael lost her checkbook on October 26, 1977. The following day, a woman using a driver's license with Chael's name for identification presented a check on her account at a branch of the Albuquerque National Bank. This check, numbered 121 (Exhibit 1), was cashed. The same day, a woman later identified as Teresa Saavedra, defendant's sister, went to the main office of the Albuquerque National Bank and attempted to cash a second check, numbered 125 (Exhibit 3) on Chael's account, again using a driver's license with Chael's name for identification. An employee of the bank became suspicious of Teresa and called the police. Saavedra had been outside the bank while Teresa was inside attempting to cash the check. When she was arrested, Teresa had other checks, an identification card, a savings account card, savings deposit book and a checkbook, all with Chael's name on them.

Handwriting exemplars from Saavedra and Teresa were obtained. An expert on questioned documents testified that the two checks were probably written by Saavedra. The endorsements were written by Teresa and nothing on them was written by Chael, from whom exemplars were also obtained.

I. Saavedra argues that the district judge committed reversible error when he responded to a written question from the jury by sending a note back to the jury rather than calling the jury into the courtroom to answer the question. The judge, in open court, informed the parties of the note's contents and how he intended to answer. Defense counsel objected to the response on the grounds that the jury had already been instructed on the elements of the crime.

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. Orona*, 92 N.M. 450, 589 P.2d 1041 (1979); *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 a communication takes place a presumption of prejudice arises which the State has the burden to overcome. *State v. Orona, supra.* However, the question here is whether such a presumption arises when the trial court consults with counsel before sending its reply to the jury; the defendant is present; and there is no objection made to the procedure. We answer in the negative.

As conceded by Saavedra, the trial judge consulted with counsel and advised them of his intended response after receiving the jury's question. There was a "communication" here consisting of the note. *See State v. Orona, supra*; *State v. Brugger, supra.* The communication occurred in open court, with notice to, and in the presence of the parties. There was no unauthorized communication and therefore, no presumption of prejudice. *Compare, State v. Orona, supra.* The record also shows that although the defendant objected to the response, he did not object to the failure of the court to call the jury to the jury box. Inasmuch as the defendant did not object to this action at the time of trial, an objection at this late date is not proper. *State v. Herrera,* 82 N.M. 432, 483 P.2d 313 (Ct.App. 1971), *cert. denied* 404 U.S. 880, 92 S.Ct. 217, 30 L.Ed.2d 161; *Hines v. State,* 557 P.2d 917 (Okl.Cr.App.1976). In view of the foregoing, the district court did not commit reversible error by following the procedure used here. Accord, *Territory v. Lopez & Casias,* 3 N.M. 156, 2 P. 364 (1884).

II. Saavedra argues that the trial court's response to the jury's question was an incorrect statement of the law and injected intolerable confusion into the instructions.

Instruction No. 4 on Count II (forgery) states:

> For you to find the defendant guilty of forgery as charged in Count II, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The defendant *made up* check # 121, State's Exhibit 1, *with a false signature* on that check:
> 2. At the time, the defendant intended to injure, deceive or cheat Albuquerque National Bank of [sic] another;
> 3. This happened in New Mexico on or about the 27th day of October, 1977. (Emphasis added.)

The elements instruction on Count I is identical except for the check and exhibit numbers involved.

The question from the jury was:

> To clarify Count II: For the defendant to be found guilty. Does [sic] the signature *and* the payee have to be written by the defendant? (Emphasis in original.)

The judge's answer was, "No, read the instruction."

Saavedra's argument is that the elements instruction, as originally submitted to the jury, required a finding that he wrote the face of the two checks *and* the false signature of the drawer before a guilty verdict could be returned, but the supplemental instruction changed the elements so that the jury only had to find Saavedra wrote the face of the check *or* wrote the drawer's signature before they could reach a guilty verdict. Saavedra misreads the instruction. In requiring the jury to find that the defendant "made up" a check, "with a false signature on that check," the instructions did not require the jury to find that Saavedra wrote both the payee's name and the false signature. Rather, the instruction allowed the jury to find that the checks had false signatures, and that, knowing the signatures to be false, Saavedra "made up" the check. Use of the word "with" in the instruction does not mean that items are used in the conjunctive.

Section 30–16–10(A), defines the crime of forgery:

> Forgery consists of falsely making or altering any signature to, or any part of, any writing purporting to have any legal efficacy with intent to injure or defraud.

Under this provision, assuming the requisite knowledge and intent, one commits forgery when he makes up a check, whether he or someone else places a false signature on it. *See State v. Crouch,* 75 N.M. 533, 407 P.2d 671 (1965); *State v. Smith,* 32 N.M. 191, 252 P. 1003 (1927). Therefore, whether Saavedra wrote the false signature or someone else did, the jury had to find that the checks had a false signature and that Saavedra knew the signature was false. In this case, the jury also had to find that Saavedra "made up" the check.

In the foregoing posture, the jury sent its inquiry of whether Saavedra had to write both the payee's name and the false signature. The judge replied "No, read the instruction." This was perfectly proper—the jury could find Saavedra wrote both names in arriving at a guilty verdict, but was not required to do so under the original instructions.

In giving the supplemental instruction, the court merely restated what it had told the jury earlier. The answer given by the trial judge in no way coerced or misinformed the jury. There was no reversible error. *Compare State v. Kendall*, 90 N.M. 236, 561 P.2d 935 (Ct.App.1977); *State v. Cruz*, 86 N.M. 341, 524 P.2d 204 (Ct.App. 1974).

Finding no error, we affirm the judgment and sentence.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

599 P.2d 398

Stefani Celina ROBNETT, Appellant,

v.

NEW MEXICO DEPARTMENT OF HUMAN SERVICES INCOME SUPPORT DIVISION, Appellee.

No. 3914.

Court of Appeals of New Mexico.

Aug. 14, 1979.

Timothy Meehan, Northern New Mexico Legal Services, Inc., Taos, for appellant.

Gordon L. Bergman, Asst. Atty. Gen., N. M. Dept. of Human Services, Santa Fe, for appellee.

OPINION

WALTERS, Judge.

Mrs. Robnett applied for benefits under the Aid to Families with Dependent Children program (AFDC), for herself and three of her children by a former marriage. The New Mexico Department of Human

Services, Income Support Division (the Department), denied her application on the ground that she owned surplus real property. Appellant challenges the state regulation upon which denial was made as being in conflict with federal statutes and regulations, thus violating the Supremacy Clause; and further suggests that the Department's decision was arbitrary, capricious, and an abuse of discretion. § 27–3–4, N.M.S.A. 1978.

The Department has promulgated regulations authorized by the Public Assistance Act, § 27–1–3 D, N.M.S.A.1978, for the determination of need. Regulation 221.-831B(2) is the regulation attacked by Mrs. Robnett as constitutionally unsound.

At the time of the hearing appellant and her present husband lived in Costilla where they owned a one-bedroom home. They had purchased several acres of undeveloped land in Questa, New Mexico, with a purchase price of approximately $16,333. The parties made the low down payment of $486, owing the balance. It was their intention to build a home large enough for themselves and their combined families of six children. They had not yet commenced construction on the Questa land, and had not made any of the installment payments on the purchase contract. The property, with the exception of one lot commonly purchased with two other families, was in the name of appellant's husband, but since it was purchased after their marriage it qualifies as community property. Section 40–3–3, N.M.S.A.1978; *Moore v. Moore*, 71 N.M. 495, 379 P.2d 784 (1963). Accordingly, Mrs. Robnett's interest in the property was equal to one-half of the equity, or approximately $243. *See Reed v. Nevins*, 77 N.M. 587, 425 P.2d 813 (1967).

The hearing officer's decision, approved by the Review Committee and the Division Director, is somewhat confusing, but reads as follows:

> Since none of the conditions of ISD Manual Sec. 221.831B(2) were met, the County Office was correct in denying this AFDC application on the basis of ownership of surplus real property.
>
> When the family moves to Questa, as is the plan the home in Costilla will be surplus property.

The findings of fact, however, indicate that the *Questa* property was considered to be the surplus real property.

The Department's Regulation 221.831B(2) provides:

> 2. *Surplus Real Property*—All real property and rights in real property owned by or available to the budget group, other than the home [occupied by the budget group] . . . are classified as surplus real property. If the budget group has surplus real property, the group is ineligible for AFDC, except as provided below under paragraphs a, b, and c.
>
> a. If application for AFDC has been made on the basis of the temporary illness or incapacity of a parent, ownership of surplus real property does not result in ineligibility for assistance if:
>
> (1) The property has been a source of income and the use of the property has been interrupted primarily because of the parent's illness; and
>
> (2) The property will be necessary to return the parent to a self-supporting status; and
>
> (3) It is reasonable to expect the parent to be able to use this property to become self-supporting within a year from the date of the application.
>
> b. If the surplus real property is producing income consistent with its fair market value, the ownership of the surplus real property does not effect eligibility. . . .
>
> To determine if property is producing income consistent with its fair market value, the worker may contact local realtors, the local tax assessor, the Small Business Administration, other knowledgeable sources to determine the prevailing rate of return for similar real property in the area.
>
> c. If the surplus property is not producing income consistent with its fair market value and the conditions outlined

in (a) above are not met, eligibility on the condition of need will exist only if the client takes immediate steps to utilize the property in a manner that will produce benefits to meet his requirements and which benefit income would be consistent with the fair market value, or otherwise arrange for productive use of it to yield a return consistent with its fair market value and to make persistent and continued efforts toward its utilization. If the property cannot be utilized to produce income, then a bona fide effort must be made to sell this property.

Eligibility determined to exist in this circumstance will continue for a period of three months following the date of approval for assistance or for three months after a determination has been made that surplus real property exists. After expiration of this time period, a redetermination of eligibility on this factor must be made.

We do not reach appellant's claim of conflict between state and federal regulations, because our reading of the challenged regulation convinces us that the Department ignored its provisions.

The evidence is undisputed that if the applicants sold the property being purchased, they would net absolutely nothing from the sale; that in its current condition the land could not be leased or rented; that arrangements to clear a portion of the land in order to build a house had been delayed. This evidence shows that, at the time of the hearing, the property could not be utilized to produce income and a sale of the property would produce no income.

Moreover, subparagraph (c) requires the Department to grant benefits for a three-month period, after which time applicant's eligibility with respect to the surplus property factor is to be redetermined.

Under the regulation itself, and in view of the undisputed facts, the Department's decision to deny AFDC benefits has no support in the record. *Baca v. New Mexico Health and Social Services Dept.*, 83 N.M. 703, 496 P.2d 1099 (Ct.App.1972); § 27–3–4(F)(2), N.M.S.A.1978.

The denial of benefits is reversed and this cause is remanded for the allowance of Mrs. Robnett's application accordingly.

IT IS SO ORDERED.

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

599 P.2d 1045

STATE of New Mexico,
Plaintiff-Appellee,

v.

Frank F. TURKAL, Defendant-Appellant.

No. 12158.

Supreme Court of New Mexico.

Sept. 21, 1979.

Reginald J. Storment, Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Michael A. Kauffman, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SOSA, Chief Justice.

Defendant appeals his conviction, pursuant to a jury verdict, of three counts of first degree criminal sexual penetration, § 30–9–11A, N.M.S.A.1978, and a subsequent sentence of life imprisonment. The issues we address in this appeal are:

1) Did the trial court err in denying defendant's motion to suppress the items seized during the search of his home; and
2) Did the trial court err in *sua sponte* admitting into evidence the affidavit for the search warrant?

On February 9, 1978, Dan Lundy of the Bernalillo County Sheriff's Department prepared an affidavit for a search warrant based on information that he had received from a confidential informant and from Lt. Grisham, also of the Sheriff's Department. A warrant was issued to search defendant's home for marijuana in an unknown quantity and any nude photographs which might be found on the premises.

When the officers executed the warrant on February 9, they did not find any marijuana. They did find some nude photographs of at least two girls and other items in defendant's bedroom. The officers seized the photographs, cassette tapes, a tape recorder, polaroid cameras, and a marijuana pipe. Most of the photographs were of a young girl named Jennifer.

On the evening of February 9, the officers went to Jennifer's home and began an investigation of her relationship with defendant. On February 13, 1978, a criminal complaint was filed against defendant charging him with one count of first degree criminal sexual penetration of a child less than 13 years old, who was identified as Jennifer. The crime was alleged to have occurred on or about February 9, 1978. The complaint was subsequently amended to read that the act of criminal sexual penetration had occurred between February 15, 1975 and April 15, 1975. The date was amended because Jennifer was fifteen in 1978.

A bind-over order was filed on March 8, 1978, charging defendant with five counts of first degree criminal sexual penetration occurring between February 15, 1975 and July 26, 1975; three counts of distribution of controlled substances; and two counts of contributing to the delinquency of minors. Defendant moved to dismiss the information charging him with these crimes on the basis that he had not received a valid preliminary hearing. The motion was denied. Defendant also moved to suppress all the physical evidence seized from his residence under the authority of the search warrant. This motion was also denied.

Defendant's trial began on July 10, 1978. Lundy testified regarding the search of defendant's home and the investigation of Jennifer. During cross-examination, defendant had the affidavit used in support of the search warrant marked as defendant's Exhibit A. By an oversight, the affidavit, though not admitted, was passed to and viewed by some of the jurors. Defendant moved for a mistrial; this motion was denied. The State moved for admission of the affidavit into evidence. The court admitted the affidavit over defendant's objection.

The trial court directed a verdict of not guilty on two counts of criminal sexual penetration. The jury returned verdicts of guilty as to each of the three counts of criminal sexual penetration and verdicts of not guilty as to the drug counts. Defendant moved for a new trial. This motion was denied. Defendant appeals.

I. *Seizure of the Items*

In his first point, defendant argues that the trial court erred in denying his motion to suppress the items seized during the search of his home. In his motion to suppress, defendant argued that the affidavit

for the search warrant gave no probable cause on which to issue a warrant to search for any nude or partially nude photographs.

In *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723 (1964), the United States Supreme Court said:

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States*, 362 U.S. 257, [80 S.Ct. 725, 4 L.Ed.2d 697] 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, see *Rugendorf v. United States*, 376 U.S. 528, [84 S.Ct. 825, 11 L.Ed.2d 887,] *was "credible" or his information "reliable."* (Emphasis added and footnote omitted.)

See also Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); N.M.R.Crim.P. 17(f), N.M.S.A.1978.

The affidavit in this case contains three sources of information. The first source consists of a reliable confidential informant, who advised Lundy on February 9 that he had personally observed quantities of marijuana in excess of three pounds in defendant's Albuquerque home from January 26, 1978 to February 9, 1978. The informant also advised Lundy that defendant was furnishing marijuana and other drugs to numerous teenage children in defendant's neighborhood and that defendant had been doing so for quite some time. Lundy stated in the affidavit that he had used information provided by the confidential informant in the past on at least ten separate occasions and that it had proven to be true and correct on each occasion. The second source of information consists of one of the informant's friends, who told informant that he had observed marijuana in defendant's home on the morning of February 9. The third source, which is the one at issue here, consists of an unidentified "concerned juvenile citizen", who reported to Lt. Grisham that defendant was furnishing illegal drugs to several juveniles in the Albuquerque area and that defendant had been taking nude photographs of young girls and had, in fact, asked her to pose for him.

[redacted] Because of the knowledge personal to the juvenile informant, and by a reading of the affidavit as a whole, the juvenile's veracity is shown by the reliability of the information which she provided. The information supplied by the juvenile relating to defendant's furnishing drugs to teenagers was corroborated by the information supplied by the confidential informant. Under the facts of this case, we hold that the affidavit for the search warrant contained sufficient facts upon which the district court judge could determine that the juvenile's information as to the photographs was reliable. We defer to the court's determination as to the existence of probable cause to search defendant's home for nude photographs. *See State v. Bowers*, 87 N.M. 74, 529 P.2d 300 (Ct.App.1974).

In his motion to suppress, defendant also argued that the seizure of the items exceeded the scope of the search warrant. The State counters that the seizure was proper because the items were found in plain view during the course of a legal search.

[redacted] As previously stated, the items seized included photographs, tapes, a recorder, two polaroid cameras, and a marijuana pipe. Because we have determined that there was probable cause to search defendant's home for the photographs, we find that they were properly seized. We also find that the cameras and marijuana pipe were properly seized. However, this is not the case with the tapes and recorder.

During the execution of the search warrant, the officers discovered that a tape recorder and microphone were hooked up under defendant's bed. Most of the tapes were found in the drawers of a nightstand. Upon reading the titles written on the labels of the tapes, the officers decided to listen to them to see if the tapes contained criminal evidence.

In *State v. Paul*, 80 N.M. 521, 458 P.2d 596 (Ct.App.1969), *cert. denied*, 80 N.M. 746, 461 P.2d 228 (1969), *cert. denied*, 397 U.S. 1044, 90 S.Ct. 1354, 25 L.Ed.2d 654 (1970), defendant contended that the officers had no authority to seize certain items because they were not described in the search warrant. The Court of Appeals stated that *Marron v. United States*, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927), was controlling. 80 N.M. at 524, 458 P.2d at 599. In *Marron*, the United States Supreme Court said:

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

275 U.S. at 196, 48 S.Ct. at 76. *See also Stanford v. Texas*, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965), *rehearing denied*, 380 U.S. 926, 85 S.Ct. 879, 13 L.Ed.2d 813 (1965); *United States v. LaVallee*, 391 F.2d 123 (2nd Cir. 1968).

Although the case is not on point, we find the rationale employed by Justice Stewart in his concurring opinion in *Stanley v. Georgia*, 394 U.S. 557, 569, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), persuasive. In *Stanley*, an investigation of defendant's bookmaking activities led to the issuance of a warrant to search his home for evidence of such activities. The officers found very little evidence of bookmaking activity. However, they found reels of film, which they concluded were obscene matter in violation of Georgia law.

As in *Stanley*, what began as a perfectly lawful search in this case "became the occasion for an unwarranted and unconstitutional seizure" of tapes and a tape recorder. *Id.* at 570, 89 S.Ct. at 1250. In addition, the seizure of the tapes and recorder was not one as to which "agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence in plain view." (Footnote omitted.) *Id.* at 571, 89 S.Ct. at 1251. The contents of the tapes, like the contents of the film in *Stanley*, could not be determined by mere inspection.

The warrant here authorized the seizure of marijuana and nude photographs. The warrant gave the officers no authority to seize the tapes or recorder. Their authority did not extend beyond that conferred by the warrant. *Marron v. United States, supra; State v. Paul, supra.* In addition, we feel there was no basis for a warrantless seizure of the tapes and recorder. The record does not show that these items were seized on the grounds that the officers believed them to be illegally possessed property. *See State v. Bell*, 90 N.M. 160, 560 P.2d 951 (Ct.App.1977), *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977). The seizure of the tapes and recorder was based upon a suspicion of criminal conduct; it was not based upon knowledge of any previous criminal activity. *See State v. James*, 91 N.M. 690, 579 P.2d 1257 (Ct.App. 1978), *cert. denied*, 91 N.M. 751, 580 P.2d 972 (1978). "[T]he mere suspicion or expectation that an item may prove, in some unknown way, incriminating to a defendant is not sufficient justification for the seizure of the item. (Footnote omitted.)" 68 Am. Jur.2d *Searches and Seizures* § 85 (1973).

Because the tapes and recorder were seized in violation of the Fourth and Fourteenth Amendments, they were inadmissible in evidence at defendant's trial. We hold, therefore, that the district court erred in denying defendant's motion to suppress those items.

II. *Admission of the Affidavit*

The second issue we address is whether the district court erred in admitting Lundy's affidavit for the search warrant. The affidavit had been marked as defendant's Exhibit A. It had not been admitted into evidence. By some oversight, the affidavit was viewed by certain jurors. Defendant moved for a mistrial upon learning of this situation. The motion was denied. The court then admitted the affidavit into evidence. Defendant argues that the admission of the affidavit constitutes reversible

error because it presented prejudicial hearsay testimony against defendant.

We have compared the information contained in the affidavit with Lundy's testimony. The information contained in the affidavit was not fully brought out in Lundy's testimony. We are of the opinion that the affidavit was not handled properly. It may well be that the affidavit interjected such objectionable material that it prejudiced defendant's case. We cannot say that its admission was not prejudicial to defendant.

For the foregoing reasons, defendant's conviction is hereby reversed. The cause is remanded to the district court for a new trial to be held consistent with this opinion.

IT IS SO ORDERED.

EASLEY and PAYNE, JJ., concur.

599 P.2d 1049

Eldon MILLER d/b/a Miller & Miller, Plaintiff-Appellant,

v.

BUREAU OF REVENUE, Defendant-Appellee.

No. 3323.

Court of Appeals of New Mexico.

Jan. 11, 1979.

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

Jeff Bingaman, Atty. Gen., Richard M. Kopel, Sp. Asst. Atty. Gen., Santa Fe, for defendant-appellee.

OPINION

HERNANDEZ, Judge.

This is an appeal from the decision of the Commissioner of the Bureau of Revenue assessing gross receipts tax, penalty and interest on part of the income earned by appellant for the period from January 1, 1971, through December 31, 1976.

Most pertinent facts are set out in findings 6, 7, and 10, of the Commissioner's decision and order:

"6. Certain prime contractors entered into construction contracts with the New Mexico Highway Department to build highways in New Mexico. Those prime contractors contacted, and entered into oral agreements with, the taxpayer, as a result of which the taxpayer, and drivers it designated, using trucks owned by the taxpayer, hauled a variety of construction materials. The prime contractors' paid the taxpayer for these services.

7. The material hauled included hot asphalt, seal coat, and several kinds of base course material all of which are ultimately incorporated into the highways being constructed by the prime contractor. These materials generally are prepared and mixed at asphalt plants or mills where the material is loaded into the taxpayer's trucks. Sometimes, the material is loaded at pits or crushers. The plants, mills or crushers are operated by third parties, presumably, the prime contractors. The plants and mills generally are located as close to the highway construction as feasible. The taxpayer then hauls the material to the highway being constructed where the taxpayer dumps the load into lay-down machines (spreaders) or boxes. In the case of hot mix asphalt the truck is backed up to and locked into the spreader. The load of asphalt is emptied into the spreader as the spreader moves forward, spreading and compacting the mix on the highway being constructed. During this time, the truck is being pushed by the spreader while the truck driver steers the truck. In the case of base course, the trucks dump the load into boxes—apparently containers utilized by contractors when contractors spread the course material by bulldozers or scrapers on the highway. The trucks are also used in hauling riprap (rocks) and back-fill material.

10. All materials hauled are owned by third parties, generally the prime contractor; the taxpayer does not buy or sell the materials."

It is the gross receipts tax on this income that is in question.

The appellant claims that this income is exempt from the gross receipts tax by reason of Section 72–16A–14.7A, N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Supp.1975):

"Receipts from selling a construction service may be deducted from gross receipts if the sale is made to a person engaged in the construction business who delivers a nontaxable transaction certificate to the person performing the construction service."

The key words are "construction service", which are defined in the Gross Receipts and Compensating Tax Act §§ 72–16A–1 to 72–16A–19, N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Supp.1975) as follows:

"C. 'construction' means building, altering, repairing or demolishing in the ordinary course of business any:

(1) road, highway, bridge, parking area or related project; . . ." § 72–16A–3C, N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Supp.1975).

. . . . .

"K. 'service' means all activities engaged in for other persons for a consideration, which activities involve primarily the performance of a service as distinguished from selling property. . . .

'Service' includes construction activities and all tangible personal property that will become an ingredient or component part of construction project. . . ." § 72–16A–3K, N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Interim Supp.1976–77).

The Bureau of Revenue has issued several interpretive regulations of §§ 72–16A–14.7 and 72–16A–3C, supra. The first was issued in 1969 and provides in part:

G.R. REGULATION 3(C)–1—

CONSTRUCTION SERVICES AS DISTINGUISHED FROM OTHER SERVICES

"The term 'construction' is limited to the activities which are listed in § 72–

16A–3(C) [sic]. 'Construction' does not include services that are only incidentally related to a construction project such as: hauling to the construction site, maintenance work, landscape upkeep, or the repair of equipment or appliances.

Example 1: T, a trucking company, contracts with R, a road construction company, to haul the necessary sand and gravel from an excavation site to the roadbed. T asks if it can deduct the receipts of its contract with R under § 72–16A–14.7, p. 77. Hauling sand and gravel from an excavation site to the construction site is not construction within the meaning of § 72–16A–3(C) [sic]. Therefore, T cannot deduct its receipts from the contract."

The 1969 G.R. Regulations under § 72–16A–14.7 provide in part:

G.R. REGULATION 14.7–1—

SERVICES MUST BE PERFORMED DIRECTLY ON THE PROJECT OR IMMEDIATELY ADJACENT THERETO

"To be deductible under this section, the services must be performed directly on the project or immediately adjacent thereto. Indirect services, such as accounting costs, architectural plans, engineering services, drafting services, bid depositories, and plan rooms are not construction services coming within the definition of construction under § 72–16A–3(C) [sic], p. 2.

Example 1: K is a surveying company that contracts with C, a contractor, to survey the site, set the stakes for the building, and give C the elevation reading. K incorrectly maintains that it is selling a construction service to C and that therefore the receipts are deductible. Surveying and related services are not included as construction under the definition of construction under § 72–16A–3(C) [sic], p. 2. Therefore, they are not construction services as defined under § 72–16A–14.7."

The appellant alleges five points of error, the fourth of which is dispositive of this appeal, to-wit: "The decision of the Commissioner denying the exemption is contrary to the law of this state providing an exemption for construction services." The law applicable to the decision of this matter is the following:

"A regulation adopted by an administrative agency creating an exemption not contemplated by the act or included within the exemption specified therein is void." *State v. Ashby*, 73 N.M. 267, 271, 387 P.2d 588, 590 (1963).

The converse is also true. *Rainbo Baking Co. of El Paso v. Commissioner of Rev.*, 84 N.M. 303, 502 P.2d 406 (Ct.App.1972).

"Statutes are to be given effect as written and, where free from ambiguity, there is no room for construction." *State v. Elliot*, 89 N.M. 756, 767, 557 P.2d 1105, 1106 (1977).

"It is undoubtedly a rule of statutory interpretation that the construction given a statute by the administrative agency charged with the enforcement of it is a significant factor to be considered by the courts in ascertaining the meaning of such statute. [Citation omitted.] But where there is no ambiguity and the interpretation is clearly erroneous, such administrative interpretation does not give legal sanction to a long continued incorrect construction." *California Drive-In Restaurant Ass'n v. Clark*, 22 Cal.2d 287, 294, 140 P.2d 657, 661 (1943).

Applying these rules to the instant matter, it is our opinion that the language of § 72–16A–14.7A, supra, and § 72–16A–3C(1) and § 72–16A–3K is definite and unambiguous. It is also our opinion that this language does not support the interpretive regulations of the Bureau of Revenue, insofar as they relate to the type of activities conducted by the appellant. The Commissioner acknowledges in finding No. 6 that the prime contractors were engaged in building highways. He also acknowledges in that finding that appellant was performing a service. In finding No. 7, he acknowledges that the materials which the appellant hauled were "ultimately incorporated into the highways." Finding No. 10, points out the materials being hauled were not owned by the appellant or bought or sold by him. This fact pattern fits squarely within the conditions of § 72–16A–14.7A, supra.

The decision and order of the Commissioner is reversed and the Bureau's interpretive regulations G.R. Regulation 3(C)–1 and G.R. Regulation 14.7–1 are declared void, insofar as they apply to these facts.

IT IS SO ORDERED.

LOPEZ, J., concurs.

SUTIN, J., concurs in the result.

SUTIN, Judge (concurring in the result).

I concur in the result.

Taxpayer was engaged in using trucks owned by the taxpayer to haul a variety of construction materials for certain prime contractors who entered into construction contracts with the New Mexico Highway Department to build highways in New Mexico.

The Commissioner made extensive findings which accurately stated the facts. Based upon G.R. Regulation 3(C)–1—, his decision was correct. By petition for certiorari to the Supreme Court, his decision will be sustained and this opinion will not be published. Nevertheless, I desire to express my views to be preserved for future use. This case is one of first impression in New Mexico and deserves serious consideration.

The Commissioner held that taxpayer was subject to the gross receipts tax because "the taxpayer only hauled or transported personal property from one place to another. After delivering the personal property to a designated place, others, not the taxpayer, began or continued the function of building a highway." In other words, "this taxpayer did not 'build' anything."

Section 7–9–52(A), N.M.S.A.1978 reads in pertinent part:

> Receipts from selling a construction service may be deducted from gross receipts if the sale is made to a person engaged in the construction business . . . .

The sole issue on this appeal is whether taxpayer sold a "construction service" to a highway contractor engaged in building a highway. If taxpayers did sell this "construction service," it is exempt from payment of the gross receipts tax.

My dispute with the Commissioner revolves over the meaning of "construction service." His view is narrow—mine is broad. It is obvious that a Commissioner will narrowly interpret the statute if it will provide additional revenue for public purposes. My criticism of the office of a Commissioner has been stated many times. See *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). Taxes are the sinews of the State and taxpayers sustain the operation of the State and its political subdivisions. But the office of the Commissioner was not created for the purpose of unduly burdening the taxpayer by a narrow interpretation of the statute. He must hold a genuinely impartial hearing conducted with critical detachment. This is psychologically improbable if not impossible when the Commissioner has at once the responsibility of appraising the strength of the case and seek to make it as strong as possible in favor of the State.

The Commissioner sits as a judge in an adversary proceeding between the State and the taxpayer. The Commissioner must not be arrayed against the taxpayer. Yet it is his attorney that represents the State and it is the advice of his attorney that becomes the Decision of the Commissioner. If a decision of the Commissioner was ever favorable to the taxpayer, the State has never appealed the decision to this Court. This administrative process establishes the fact that the Commissioner and the State are one entity arrayed against the taxpayer.

The duty of the Commissioner and his attorney is to construe language of doubtful meaning in the Act in favor of the taxpayer and most strongly against the taxing authority. *Western Elec. Co. v. N. M. Bureau of Rev.*, 90 N.M. 164, 561 P.2d 26 (Ct.App.1976), Sutin, J., specially concurring; *Torridge Corporation v. Commissioner of Revenue*, 84 N.M. 610, 506 P.2d 354 (Ct.App.1972), Sutin, J., dissenting.

One of the purposes of the Act "is to provide revenue for public purposes by levying a tax on the privilege of engaging in *certain activities* within New Mexico . . . ." [Emphasis added.] Section 7–9–2. This purpose should not be accomplished with "semantic niggling." *Cardinal Fence Co., Inc. v. Commissioner Bur. of Rev.*, 84 N.M. 314, 502 P.2d 1004 (Ct.App. 1972), Sutin, J., dissenting. These "certain activities" constitute a business operation because an excise tax is imposed upon any person engaged in business in New Mexico. Section 7–9–4.

A contractor engaged in the business of building a highway is confronted with many "construction activities" upon all of which income the contractor is subject to the excise tax. To avoid a double tax, one who sells a "construction service" to the contractor may deduct all monies received from gross receipts. In the instant case, the Commissioner seeks to impose a double tax.

The words "construction service" mean "construction activities" engaged in for other persons for a consideration. Section 7–9–3(K). "Construction activities" are words of doubtful meaning and must be construed in favor of the taxpayer. A reasonable interpretation of the words leads to the conclusion that the taxpayer is exempt from taxation if he sells to a prime contractor a service that falls within the circumference of all of the "construction activities" of the contractor. I take this view to avoid the doctrine of double taxation.

Under Section 9(b) of the Atomic Energy Act of 1946, the "activities" of the Atomic Energy Commission were exempt from state taxation. The word "activities" was given such broad and comprehensive meaning that independent contractors who performed sub-contract construction work for the Commission were exempt from state sales and use taxes. *Reynolds Electrical & Engineering Co. v. Lujan*, 64 N.M. 43, 323 P.2d 890 (1958). For the broad definition of the term "activities," see *Carbide & Carbon Chemicals Corp. v. Carson*, 192 Tenn. 150, 239 S.W.2d 27 (1951); aff'd, *Carson v. Roane-Anderson Co.*, 342 U.S. 232, 72 S.Ct. 257, 96 L.Ed. 257 (1952), cited in *Reynolds*.

In the instant case, the prime contractor is comparable to the Atomic Energy Commission, and taxpayer, a subcontractor who sells his "construction activities" to the prime contractor, is comparable to those who did construction work for the Commission.

Section 7–9–3(C) defines "construction" as building a highway in the ordinary course of business. This definition relates to the work performed by the prime contractor. To complete satisfactory performance of the work, all labor, materials and equipment are essential. When a contractor bids for a highway job, its "construction activities" includes hauling by truck hot mix, base course, aggregate and other materials. Without this service, the highway cannot be built. This type of "activity" is a part of the construction process. It is of necessity a "construction activity."

The Commissioner contends that the taxpayer must "build" some part of the highway to constitute a "construction activity"; that all contract work performed prior to, during or after the completion of the highway that is not manual labor used in the actual construction of the road is not a "construction activity."

The Commissioner holds that a concrete pumping truck which lays down concrete in inaccessible locations such as a box culvert or the upper stories of a building, performs a "construction activity." If taxpayer had dumped the materials upon the roadway instead of by the side of it, would he have been entitled to the exemption? Where shall the line of demarcation be drawn?

To adopt the Commissioner's interpretation of the words "construction activities" unduly limits the meaning of the words. I interpret the Commissioner's view to mean that "construction activities" do not begin until the materials hauled to the job are actually used to build the highway. To me, this is a rather narrow view. The taxpayer sold a construction service to the prime contractor and he is entitled to the benefit of Section 7–9–52(A).

599 P.2d 1054

STATE of New Mexico, Plaintiff-Appellee,

v.

Rosemary POLLER, Defendant-Appellant.

No. 3726.

Court of Appeals of New Mexico.

Feb. 6, 1979.

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

Jeff Bingaman, Atty. Gen., Sammy J. G. Quintana, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of murder in the second degree contrary to § 30–2–1(B), N.M.S.A. 1978, defendant appeals. She asserts one ground for reversal which relates to the refusal of the trial court to suppress certain statements she made to Officer Marable. We affirm.

The sheriff's department received a call of a shooting and officers were dispatched to the area. Officer Gomez was the first on the scene. Defendant approached Gomez and informed him that the victim had stolen Five Hundred Dollars ($500.00) from her and that she had shot him. (First statement.) Gomez testified, "Mrs. Poller stated she did have a weapon and that it was underneath her coat." Gomez then took the gun from defendant. He placed her in the patrol car and "asked her what had happened." Defendant was not given her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Gomez also stated that once he had placed defendant in the patrol car she was not free to leave although she had not been placed under arrest. While sitting in the patrol car and in response to Gomez's question, defendant stated that she had shot the victim and that the victim had robbed her. (Second statement.)

Defendant was then placed in Officer Marable's vehicle and placed under arrest and for the first time she was advised of her *Miranda* rights. Defendant was asked if she wished to waive her right to be silent. She said she did not wish to talk. Marable did not ask any further questions. Defendant then asked Marable if the victim was dead and he replied that the victim was dead. Marable testified that defendant then started crying and stated that the reason she had shot him was that he had taken money from her. (This and subsequent statements are referred to as the third statements.) Marable also testified defendant talked most of the time that they were at the scene.

Defendant was then taken to the sheriff's office. Defendant was again read her *Miranda* rights from a written form. She signed the form, after reading it, in the presence of witnesses. Defendant did not sign the waiver of rights. Marable stated that defendant kept on talking during this time. Marable, at defendant's request, called an attorney for her. She spoke to the attorney. Defendant then stated she did not want to answer any questions. Marable did not attempt to interrogate her. During this time defendant was spontaneously making comments to Marable.

The trial court found that the first statement and the production of the firearm were not suppressible, but that the second statement made in Gomez's police vehicle was suppressible since she was not given her *Miranda* rights. The trial court then held that the statements made to Marable were "not the result of an exploitation of her prior statement to Officer Gomez."

One of defendant's assertions in the trial court was that defendant was mentally incompetent to make any voluntary statement. The trial court declined to rule on this aspect until further information was supplied by the Court Clinic. This issue was not preserved for appeal since the record does not disclose the court ruling on this issue. Defendant's other assertion in the trial court was that since the second statement was without the benefit of the *Miranda* warnings the State assumes a heavy burden to show that the third statements were not based upon the second statement.

The State must meet its burden of proving that the third statements were free from the taint of the second statement. See *State v. Austin*, 91 N.M. 586, 577 P.2d 894 (Ct.App. 1978); *State v. Greene*, 91 N.M. 207, 572 P.2d 935 (1977). To do this it must overcome the presumption that the third statements were a result of the second statement. See discussion in *State v. Austin*, supra, of *State v. Chaves*, 27 N.M. 504, 202 P. 694 (1921) and *State v. Dickson*, 82 N.M. 408, 482 P.2d 916 (Ct.App. 1971). We need not decide what quantum of proof was required to overcome the presumption of inadmissibility. We will assume the highest quantum. See *State v. Austin*, supra.

The purpose of the rule of presumptive inadmissibility is "[t]he natural concern . . . that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage." *Michigan v. Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974). Thus, the concern is that a suspect will assume that since she has already made incriminating statements, she may as well continue to talk. This situation normally arises out of instances where the first statement is the incriminating statement obtained without proper warnings or by inducements or threats. See *State v. Chaves*, supra; *State v. Austin*, supra, and *State v. Dickson*, supra.

However, such is not the case here. Defendant's first statement was voluntary and spontaneous. It was a confession of shooting the victim. The second statement, although not much more than a reiteration of the first statement, was nonetheless given in violation of *Miranda*. The third statements were made, not as a result of questioning, but spontaneously by the defendant.

The distinguishing factors in each of the cases which have been reversed is the existence of continued questioning by the authorities after the *Miranda* warning had been given and invoked by the defendant, and during a time period falling within an unbroken "stream of events." See *State v. Word*, 80 N.M. 377, 456 P.2d 210 (Ct.App. 1969). The stream was broken here by removal of the defendant to the second police car after her second statement, and then to the police station where she continued to volunteer information and comments without questioning. As stated in *Greene* ". . . [A]dmission into evidence of volunteered statements is not prohibited by the fifth or fourteenth amendments, where there are no facts to indicate that the statement is made in response to 'interrogation.' . . . Voluntary statements of any type are not barred by the fifth amendment, and their admissibility is not affected by *Miranda v. Arizona* . . . ."

By whatever quantum of proof, the third statements pass muster and were not tainted by the second statement. The third statements did not arise out of questioning. Under the circumstances of this case the third statements were not the exploitation of the second statement. Compare *State v. Dickson*, supra. The State overcame the heavy burden of presumptive inadmissibility. *State v. Greene*, supra.

We hold that the third statements, which were not the result of questioning by Marable, were spontaneous and voluntary. As such, they were properly admissible. To hold otherwise would force the police to gag any suspect who wished to spontaneously talk about the incident.

Affirmed.

IT IS SO ORDERED.

SUTIN, J., concurring in result.

WALTERS, J., concurs.

SUTIN, Judge (concurring in result).

I concur in the result.

Defendant's only contention on appeal as stated in the Docketing Statement is:

> . . . Defendant contends that the State failed to meet its burden sufficiently distinguishing the later statements from the earlier to purge them of the taint of the earlier, illegally taken statements.

The earlier illegally taken statements suppressed were:

> She stated that she did shoot the victim, and that the victim had robbed her of five hundred dollars. She changed the amount several times, the amount of money that was supposed to have been robbed from her.

Over objection, Marable testified:

> [S]omething about he had taken some money from her and she came down there to find him or to get her money back . . . some money had been taken from the house, and that the victim had gone to the address where the shooting occurred to pick up some beer for the party and had been gone for quite sometime, that he [victim] had gone down there or was already down there, that *he walked toward her and she fired at him.* [Emphasis added by defendant.] . . . Well, the first time . . . she made two or three different amounts, one time it was five hundred dollars and then I think the next time she mentioned it was four hundred dollars. . . . It was her car or her sister's car, that he had been driving it—she didn't give him the car to go to the above address on Riverside. She went to see if he was down there, or if she could locate the vehicle.

Defendant believes that the "details," inherently untrustworthy because of the condition under which they were adduced, supplied the basis for showing a wilful killing without sufficient provocation (second degree murder).

What defendant does not point out is the testimony of Marable that is tainted by the prior suppressed statements. Marable did not testify that defendant shot the victim. She only fired at him. He did not testify that the victim had robbed her. The only "tainted" testimony was the different amounts of money the victim had taken from her. I think the testimony is sufficiently distinguishable to purge it of the taint of the suppressed statements.

Nevertheless, defendant's contention on appeal applies to only one of a two-pronged test as to the admissibility of "tainted" testimony. A second test is that the later statement was not the exploitation of the earlier illegally obtained incriminating statements.

"To keep the pot a-boiling," I should like to point out that *State v. Dickson*, 82 N.M. 408, 482 P.2d 916 (Ct.App. 1971) and *State v. Austin*, 91 N.M. 586, 577 P.2d 894 (Ct. App. 1978), upon both of which defendant relies, do not establish a proper rule of law. These cases stand for the proposition that:

> *Even though a defendant has been given the required warning of his constitutional rights,* the later incriminating statement may not be used unless it is established that the later statement was

not the exploitation of the earlier illegally obtained incriminating statements, *and unless the later statement was obtained under circumstances sufficiently distinguishable to purge it from the taint of the earlier illegal statements.*

The *Dickson—Austin* rule was taken from *Commonwealth v. Banks*, 429 Pa. 53, 239 A.2d 416 (1969). In *Banks*, the rule was adopted "absent a required warning of constitutional rights." [239 A.2d at 419.] Under *Banks*, if the later statement is obtained *after* defendant has been given the *Miranda* warnings, the later statement may be used as evidence if the statement was freely and voluntarily given. If not voluntarily given, the incriminating statement may be inadmissible and insubmissible. *Coyote v. United States*, 380 F.2d 305 (10th Cir. 1967).

Upon arrest of defendant, Marable read the *Miranda* warnings to defendant. Thereafter, he never questioned her. Defendant voluntarily talked all of the time. She was taken to sheriff's headquarters. There Marable read to her the rights from the "Interrogation of Advice of Rights" form. Defendant also read it, understood it, signed it, and, for 30 or 40 minutes, kept talking spontaneously while in the office. She asked Marable to call an attorney. He did. Defendant talked to the attorney and then indicated that she did not want to answer questions. Thereafter, no attempt was made to interrogate her.

Defendant was advised of her constitutional rights to protect her against self-incrimination on two occasions and yet made voluntary statements that were admissible and submissible in evidence. Defendant's claim for a new trial was foreclosed.

Judge Hendley says:

> The State must meet its burden of proving that the third statements were free from the taint of the second statement. See *State v. Austin*, 91 N.M. 586, 577 P.2d 894 (Ct.App. 1978); *State v. Greene*, 91 N.M. 207, 572 P.2d 935 (1977).
>
> . . .

In *Austin*, Judge Wood said:

> The State had the burden of proving the second and third inculpatory statements were voluntary. . . .
>
> The State also had *the burden of persuading the trial court* that the inculpatory statements were voluntary. . . . [Emphasis added.] [91 N.M. at 587, 577 P.2d at 895.]

What is meant by "persuading the trial court"? Black's Law Dictionary, p. 1301 (4th Ed. 1968) says, "persuade" means:

> To induce one by argument, entreaty, or expostulation into a determination, decision, conclusion, belief, or the like . . .

The State did "persuade" the trial court that the inculpatory statements were voluntary. Yet, the trial court was reversed. To avoid any misunderstanding, I think Judge Wood intended to say:

> The State also had the burden of *persuasion by a preponderance of the evidence*, that the inculpatory statements were voluntary.

In *State v. Santillanes*, 91 N.M. 721, 580 P.2d 489 (Ct.App. 1978), where presumptions were involved and the burden of proof shifted from the defendant to the State, Judge Wood said:

> This shifted burden of proof is the burden of persuasion. . . . [91 N.M. at 724, 580 P.2d at 492.]

The meaning of the phrase is not explained. The "burden of persuasion" never shifts at any stage of the proceedings. It is the burden of going forward with the evidence that shifts back and forth as the trial progresses. *Ambrose v. Wheatley*, 321 F.Supp. 1220 (D. Del. 1971). See also, *Commonwealth v. Walker*, 370 Mass. 548, 350 N.E.2d 678 (1976); *In re Swan's Estate*, 4 Utah 2d 277, 293 P.2d 682 (1956). The "burden or persuasion" is commonly referred to as the "burden of proof by a preponderance of the evidence." It is the preponderance of the evidence that must make the *trier of the fact* believe the facts asserted by a party. *People v. Valverde*, 246 Cal.App.2d 318, 54 Cal.Rptr. 528 (1967). In *Austin*, the trier of the fact was the trial court because the appeal was interlocutory. On whether the inculpatory statements

were voluntary, the trial court had to be convinced by the State's evidence that the existing facts were in favor of the State who had this burden. See, *Fretz v. Anderson*, 5 Utah 2d 290, 300 P.2d 642 (1956). To me, *Austin* stands for this proposition:

> The State had the burden of proving that the second and third inculpatory statements were voluntary by a preponderance of the evidence.

The trial court so found and this was assumed to be correct. Upon what grounds, then, did Judge Wood reverse the trial court?

(1) The trial court said:

> . . . The defendant had the burden of going forward with evidence rebutting the *prima facie* showing, which burden defendant did not carry.

Judge Wood said: "This finding is incorrect." I disagree. If the prima facie case of the State stands unrebutted, then the inculpatory statements of defendant were voluntary as a matter of law. When the trial court found that defendant's statements were voluntary, the conviction should have been sustained.

(2) The trial court also said:

> . . . Any taint, inducement or involuntariness which may have been involved in the defendant's statements to Jay J. Armes was renewed.

Judge Wood said: "This finding is incorrect." I disagree.

Judge Wood said:

> The fact that defendant was advised of his constitutional rights and understood them, and the fact that defendant viewed the third confession as voluntary, does not show the third statement was not the exploitation of the first, illegally obtained statement. . . .

This quotation is supported by Judge Wood's opinion in *State v. Dickson, supra.* This is not a correct statement of the law. In the event the Supreme Court should agree with the *Dickson—Austin* rule, it is essential to explain what the State's burden is to avoid an "exploitation" of a prior illegally obtained statement. I think it means an injust or improper use of a prior illegally obtained statement. This explanation was set forth in *Bunting v. Commonwealth*, 208 Va. 309, 157 S.E.2d 204 (1967) cited in *Dickson.* The court said:

> The influences which induced the original confession made by defendant to detective Allen are presumed to have continued when the subsequent confession was made to detective Fitzsimons in the absence of evidence to the contrary. . . . The narrative of the evidence does not show that defendant was advised that any statement made to Fitzsimons must be made freely and voluntarily on his part, *without any promise of reward*, and that what he said could and probably would be used against him at his trial. [A *Miranda* warning.] *Nor can it even be inferred from the circumstances surrounding the confession made to Fitzsimons that defendant's mind was free of the earlier influences which induced the involuntary written confession.* [Emphasis added.] [157 S.E.2d at 207.]

These requirements exceed the *Miranda* warnings. In addition to the *Miranda* warnings, the State must prove that the police officer did not promise or reward defendant, and that defendant's mind was free of earlier influences.

In the instant case, these requirements were not met. Under the *Dickson—Austin* rule, if properly raised, defendant is entitled to a new trial. The third statements were an exploitation of the second illegally obtained statement, even though voluntarily made.

Judge Hendley states that "The trial court then held that the statements made to Marable were 'not the result of an exploitation of her prior statement to Officer Gomez.' " This was not an issue in the case. Nevertheless, the trial court did not state in its Order the facts found and the conclusions reached for its denial of defendant's motion to suppress statements made by defendant to Marable. This was done by letter to both counsel. In my opinion, inasmuch as this procedure appears to be a common practice, the letter and the Order

can be read together as one instrument. However, the trial court did not make such findings that supported the conclusion reached. Based upon this fact, if properly raised, defendant was entitled to a new trial.

The State's response is that the admission of Marable's testimony resides within the sound exercise of discretion by the trial court and there was not abuse of discretion. This point is of some importance. However, the State escaped from the *Dickson—Austin rule* by silence. This convinces me the State agrees that the *Dickson—Austin rule* applies and sustains defendant's contention on appeal. Under this rule, the admission of "tainted" testimony would be an abuse of discretion because it would deny the defendant a fair trial. The trial court would act beyond the bounds of reason unless an effective reason was given for admitting the evidence—such as, this testimony is not "tainted."

599 P.2d 1059

STREBECK PROPERTIES, INC., Appellant,

v.

NEW MEXICO BUREAU OF REVENUE, Appellee.

No. 3611.

Court of Appeals of New Mexico.

March 20, 1979.

James F. Hart, Clovis, for appellant.

Jeff Bingaman, Atty. Gen., Daniel H. Friedman, Sp. Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WALTERS, Judge.

Appellant (Strebeck) conducts a 24-hour coin-operated laundry business in Clovis. The washers and dryers were purchased in another state and installed by Strebeck at its Clovis location. The business is operated as many laundromats are: the premises are not usually attended by any Strebeck employees; customers bring clothes to be washed and dried, select a machine or machines to be used, deposit the necessary coins required to make the machine(s) operate, and remove the clothes when the washing or drying operation is complete. No

personal services are performed for customers by Strebeck. Strebeck pays the New Mexico Gross Receipts Tax on the proceeds received from the machines.

Upon these facts, not disputed on appeal or in the record, and after an audit for the period of April, 1974 through June 30, 1977, the New Mexico Bureau of Revenue (Bureau), assessed a compensating tax under § 72–16A–7, N.M.S.A. (1953) [now § 7–9–7, N.M.S.A. (1978)]. Strebeck filed a protest arguing that since its equipment was leased, it was entitled to the deduction provided in § 72–16A–15.1, N.M.S.A. (1953) [now § 7–9–78, N.M.S.A.1978)]. The protest was denied by the Bureau's Hearing Examiner and Strebeck timely appealed.

The Decision and Order of the Bureau included the following paragraphs:

4. As stated by taxpayer, the issue in the case is the application of § 72–16A–15.1, N.M.S.A. (1953) [now § 7–9–78, N.M.S.A.1978], which provides:

   The value of tangible personal property, other than furniture or appliances furnished as part of a leased or rented dwelling house or apartment by the landlord or lessor, and other than mobile homes as defined in § 64–1–8, N.M.S.A.1953, may be deducted in computing the compensating tax due if the person using the tangible personal property:

   A. is engaged in a business which derives a substantial portion of its receipts from leasing or selling tangible personal property of the type leased; and

   B. does not use the tangible personal property in any manner other than holding it for lease or sale, or leasing or selling it either by itself or in combination with other tangible personal property in the ordinary course of business.

5. The taxpayer contends it "leases" its coin-operated machines to its customers and relies on the definition of leasing as defined in § 72–16A–3(J) (which language is repeated in instructions which accompany blank CRS–1 reports).

6. At the hearing, it was contended that the taxpayer makes no "use" of the imported machines; the only "use" of the machines is by customers of the taxpayer. Under the definition of "use" in § 72–16A–3(L), it is concluded that this taxpayer used the machines.

7. Is this taxpayer entitled to the deduction authorized in § 72–16A–15.1, which provides for a deduction from compensating tax, if the taxpayer is engaged in leasing the imported property to its customers? "Leasing" is defined in § 72–16A–3(J):

   "Leasing" means any arrangement whereby, for a consideration, property is employed for or by any person other than the owner of the property;

   A Bureau Regulation (G.R. Regulation 3(J):1) points out in the following example, that a license to use is not a lease:

   Example 1: W Company leases ten coin-operated washing machines to the Parkdale Apartments. W claims that since Parkdale's tenants will in turn lease the machines for their own use, the receipts it receives from the transaction may be deducted under § 72–16A–14.5, p. 85, which allows a deduction for property leased for subsequent leasing. W may not deduct these receipts because Parkland's tenants are not leasing the washing machines. See G.R. Regulation 14.5:2, p. 85.

The parties agree that the sole issue to be resolved on appeal is whether Strebeck leased the use of its machines to its customers, qualifying it for the statutory deduction. The Bureau maintains that the laundromat operation constituted a license to the users, and imposition of the tax was correct.

The Bureau recognized that Strebeck claimed its deduction under § 72–16A–15.1 (see quoted Paragraph 4 above). It applied a Bureau regulation (see quoted Paragraph

7 above), which refers to the "leasing" definition of § 72–16A–3(J) [now § 7–9–3(J), N.M.S.A. (1978)], and cited the example thereunder illustrating a claimed deduction under § 72–16A–14.5, N.M.S.A. (1953) [now § 7–9–50, N.M.S.A. (1978)], which provides a deduction from *gross receipts* tax for receipts on tangible property *leased for subsequent leasing*. Neither the tax referred to in that section, nor the manner of acquisition of the tangible property, nor the illustration relied on by the Bureau has any application to the facts of this case.

Example 1 shown in Paragraph 7 of the Bureau's decision does not reach the "license-lease" distinction claimed by the Bureau. It does refer to G.R. Regulation 14.5:2 which, again, is a regulation applicable to a *gross receipts tax* deduction under § 72–16A–14.5 for receipts from leasing property that is to be subsequently leased by the first lessee. That regulation is entitled "Lease vs. License to Use," and the examples cited thereunder, even though concerned with gross receipts tax, may be instructive on the question of license or lease:

G.R. REGULATION 14.5:2—LEASE vs. LICENSE TO USE—

> *Receipts of* a person who is a *lessor* of tangible personal property *from leasing* tangible personal property *to a lessee who grants a license to use the leased items* of tangible personal property *to a third party* may not be deducted from gross receipts pursuant to this section. However, the deduction will be allowed if the lessor has accepted a non-taxable transaction certificate *from the buyer* in good faith that the property would be used in a non-taxable manner. [Emphasis supplied.]
>
> If the lessee delivering the nontaxable transaction certificate does not use the property in a nontaxable manner, the Compensating Tax is due.
>
> Example 1: Television Leasing, Inc., leases television sets to X Motel to place in the rooms of their guests. X Motel delivers a nontaxable transaction certificate to Television Leasing, Inc., pursuant to this section. X Motel may not properly deliver a nontaxable transaction certificate pursuant to this section because it is not subsequently leasing the television sets to its guest in the ordinary course of business; rather, it is granting its guests a license to use the television sets.
>
> Example 2: X Bowling Equipment Company leases bowling equipment to a local bowling alley which in turn grants its customers a license to use that equipment. The local bowling alley may not deliver nontaxable transaction certificate to X Bowling Equipment Company pursuant to this section because the lease of the equipment is not for subsequent lease. See G.R. REGULATION 3(J):1, p. 22.
>
> Example 3: X is in the business of selling and leasing golf carts. Y, a country club, leases a golf cart from X and permits golfers to use it for a consideration. X's receipts from leasing the golf cart may not be deducted from gross receipts pursuant to Section 72–16A–14.5, because Y is not subsequently leasing the golf cart to golfers, but is merely granting a license to use the golf cart.

G.R. Regulation 14.5:1 was not referred to by the Bureau in its decision but it, too, may shed some light on the Bureau's interpretations of such a transaction as it considers a lease. It reads:

G.R. REGULATION 14.5:1—GENERAL EXAMPLES—

> The following examples [sic] illustrate the application of Section 72–16A–14.5 in various situations:
>
> Example 1: The H Tool Company manufactures fishing tools for use in the oil field. H leases these tools to J Rental Company which in turn rents the tools to the P Drilling Company. If the J Rental Company delivers a nontaxable transaction certificate to H, H may deduct the amount of its rental from its gross receipts.

Unlike the country club in Example 3 of G.R. Regulation 14.5:2 (dealing with gross receipts tax deductions), Strebeck customers do not conduct a larger business to which laundromat equipment is merely incidental; nor are they like the motel owners who lease television sets simply to provide an additional service to customers for the benefit of the principal business of renting rooms; nor do they fall into the same category as bowling alley operators who occasionally rent shoes and bowling balls and other bowling incidentals for the convenience of some of the customers of the alleys. All of those illustrations are concerned with operators of larger businesses providing services to their customers which are incidental to the principal businesses conducted. For purposes of being excused from payment of gross receipts tax, the supplier of such equipment to the business owner or operator is not considered to be leasing for re-lease.

The greater problem, however, is that (although Regulation 14.5:2 refers indiscriminately to "lessee" and "buyer") all of the illustrations are concerned with a lessor's liability for *gross receipts tax* on the lease price received from one who, in turn uses the merchandise in a leasing business and delivers to the first lessor a nontaxable transaction certificate. Those illustrations are not concerned with a *purchaser-lessor's* obligations to pay a *compensating tax* if the seller-supplier is an out-of-state merchant, and the purchaser uses the merchandise in a New Mexico leasing business. We do not find the Bureau's regulations helpful because they are directed toward a dissimilar section of the Act. Our inquiry is whether Strebeck is entitled to the deduction from compensating tax liability for the "value of tangible personal property . . . [used by a person who]: A. is engaged in a business which derives a substantial portion of its receipts from leasing . . . tangible personal property of the type leased; and B. does not use the tangible personal property in any manner other than holding it for lease . . . in the ordinary course of business." § 7–9–78, N.M.S.A. (1978).

The Bureau relied on the definition of "leasing" as set forth in its G.R. Regulation 3(J):1 to deny that appellant was leasing the washing and drying machines (see Paragraph 7 of the Bureau's decision quoted above), and concluded that Strebeck "used" the equipment as defined in § 72–16A–3(L) [now § 7–9–3(L), N.M.S.A. (1978)].

Example 1 of G.R. Regulation 3(J):1 is not in point. It is concerned with W Company's gross receipts tax liability and thus illustrates the provisions of § 72–16A–14.5 [now § 7–9–50], "Deduction; gross receipts tax; lease for subsequent lease," not with § 72–16A–15.1 [now § 7–9–78]: "Deductions; compensating tax; use of tangible personal property for leasing." Secondly, the claim of Parkland's "subsequent lease" of washing machines to its tenants falls because it is not in the "ordinary course" of Parkland's business, but is merely incidental to its principal and "ordinary" business of renting apartments. Finally, in justification of the last sentence of Example 1, and from the standpoint of *W's* liability for *gross receipts tax*, Parkland's tenants indeed are *not* leasing from W Company. This example is not of assistance in resolving the *compensating tax liability* of one in the shoes of Strebeck, an owner who purchases equipment out of state for the sole purpose of making its use available directly to its own New Mexico customers, not to the users of the entity to whom it first leases the property.

The second example of G.R. Regulation 3(J):1 was not cited nor quoted by the Bureau. It reads:

> *Example 2*: C, a Texas contractor, enters into a contract for a road construction job in New Mexico. When he enters New Mexico to begin construction, he brings with him ten pieces of heavy equipment. But for the short time that he will require this equipment and giving thought to his future needs, C purchases three of the pieces and rents the other seven from the Heavy Equipment Leasing Corporation in Dallas, Texas. C consults the Bureau of Revenue as to the Compensating Tax liability. C must pay Compensating tax on the value of the three pieces he owns, but there is no

liability for Compensating Tax of the rental equipment. The rental received by H.E.L.C. is subject to the Gross Receipts Tax. It is not a receipt from the sale of construction services and is therefore not subject to the deduction permitted by Section 72–16A–14.7, p. 88.

The Bureau summarily concludes that the Texas contractor in the example is not liable for compensating tax on the seven pieces of equipment rented from a Dallas leasing company and used in construction of a New Mexico road. No statutory authority is cited but since the contractor is not re-leasing the equipment to another in New Mexico, it is clear that § 7–9–78 " . . . use of tangible personal property for leasing" (the section with which this case is concerned), does not provide the basis for that portion of the Bureau's interpretation.

Paragraph 6 of the Bureau's order and decision concludes that Strebeck "used the machines according to the definition of "use" found in § 72–16A–3(L) [now § 7–9–3(L), N.M.S.A. (1978)]:

> L. "use" or "using" includes use, consumption or storage other than storage for subsequent sale in the ordinary course of business or for use solely outside this state.

That conclusion ignores the statutory definition of "use" as specifically expanded in the portion of the Act pertinent to Strebeck's protest. Subsection B of § 72–16A–15.1 [now § 7–9–78], grants the deduction if the one using the property for leasing "does not *use* [or consume or store] the tangible personal property *in any manner other than holding it for lease* or sale . . . ." (Our emphasis.)

The statute under which Strebeck sought its deduction, § 72–16A–15.1 [now § 7–9–78], is also interpreted by Bureau Regulation. For some reason, the Director did not refer to it in his decision and order. In its entirety, that regulation specifies:

G.R. REGULATION 15.1:2—GENERAL EXAMPLES—

> The following examples illustrate the application of Section 72–16A–15.1 in various situations:
>
> *Example 1:* E, a New Mexico corporation, is solely engaged in the business of leasing electric typewriters to a business establishment in New Mexico. E purchases a typewriter in Texas to hold for lease in the ordinary course of its business. It does not use the typewriter in any other manner. E may deduct the value of the typewriter in computing its Compensating Tax due. Compare G.R. REGULATION 3(L):1, Example 1, p. 24.
>
> *Example 2*: E, a Colorado company, buys stoves from A, a Colorado company. E initially uses the stoves in its business in Colorado but later converts their use solely to leasing. E then brings the stoves into New Mexico for purposes of leasing. E asks if the firm is liable for the payment of the Compensating Tax. E is not liable for the Compensating Tax if the stoves are leased to restaurants. If E brings the stoves into New Mexico to be furnished as part of a leased dwelling house of which E is the lessor, E is liable for the Compensating Tax.

The use of the property described in the last sentence of Example 2 is that which the statute expressly excludes from deduction. In contrast, the other uses of tangible properties shown by Examples 1 and 2 meet the precise conditions set forth in the statute to permit deduction.

Unless we are to accept what the Bureau's illustrations seem to indicate, i. e., that leasing situations which normally are entered into formally and in writing—lease of oil field equipment, lease of typewriters, lease of restaurant equipment—are the only kinds of transactions that will be considered leases rather than licenses, we are faced with trying to differentiate the use of Strebeck's laundromat equipment solely by others from the use of E's typewriters by business establishments in Example 1, and the restaurants' use of the Colorado company's stoves in Example 2 of G.R. Regulation 15.1:2.

The issue thus indeed boils down to the Bureau's judgment that "leasing" as

defined in the statute is sufficiently ambiguous to require interpretation by regulatory illustration to distinguish a lease from a mere license. *S.S. Kresge Co. v. Bureau of Revenue*, 87 N.M. 259, 531 P.2d 1232 (Ct. App.1975), relied on by the Bureau, defined "license" to mean "permission to act," but the court emphasized that the parties to the instrument there had declared in writing that the agreement was not intended to create, nor to be construed as creating, a lease. In *New Mexico Sheriffs and Police Ass'n v. Bureau of Revenue*, 85 N.M. 565, 514 P.2d 616 (Ct.App.1973), also cited by the Bureau, this court held that a contract granting another the exclusive right to publish, distribute and sell, and solicit advertising for the Association's official magazine, under which the Association would receive a 16% royalty from advertising receipts only, created a "license" and proceeds from the license would be subject to gross receipts tax; and it did not provide to the Association the deduction from gross receipts tax available to those receiving income from publishing newspapers or magazines. The question of "lease v. license" did not arise, and the case is not helpful on the issue now to be decided.

In *Transamerica Leasing Corp. v. Bureau of Revenue*, 80 N.M. 48, 51, 450 P.2d 934, 937 (Ct.App.1969), where the tax statutes concerned did not define "lease," Judge Wood wrote that "[g]enerally speaking, a lease is an agreement under which the owner gives up the possession and use of his property for a valuable consideration and for a definite term," at the end of which term "the owner has the absolute right to retake, control and use the property." The agreement in that case, although termed a lease, provided that the "lessee" would own the property at the end of the term of lease payments upon a final payment of $1.00. The document there was determined to be a security instrument rather than a lease, and the transaction a purchase from the manufacturer by the "lessee," financed by the "lessor."

There are no elements of eventual ownership in the users of Strebeck's equipment which might destroy the categorization of the instant arrangement as a "lease." The reported cases most frequently discuss the lease-license question in connection with real estate, typical of which are *Cutter Flying Service, Inc. v. Property Tax Dep't*, 91 N.M. 215, 572 P.2d 943 (Ct.App.1977), and *Lee v. North Dakota Park Service*, 262 N.W.2d 467 (N.D.1977).

A few cases have considered and classified the type of arrangement between the owner of coin-operated machines and a property owner who permits them to be installed in his building in consideration of a part of the gross income from the machines, to be a license, e. g., *American Coin-Meter of Colorado Springs, Inc. v. Poole*, 31 Colo.App. 316, 503 P.2d 626 (1972); *Wash-O-Matic Laundry Co. v. 621 Lefferts Ave. Corp.*, 191 Misc. 884, 82 N.Y.S.2d 572 (1948). One such case, *Bathrick Enterprises, Inc. v. Murphy*, 27 A.D.2d 215, 277 N.Y.S.2d 869 (1967), did not decide what the arrangement was, but did declare what it was not. There, the Appellate Division ruled against the Tax Commissioner and held that receipts from coin-operated music machines were not taxable to the owner of the machines under the theory that Bathrick had granted a "license to use" tangible personal property.

In all of the above cited cases, however, the arrangements were unlike the case presently before us, since they dealt with the owner's placement of his machines in business establishments of others. *State Tax Commission v. Peck*, 106 Ariz. 394, 476 P.2d 849 (1970), is more directly on point. Peck owned a laundromat in which were installed coin-operated washers and dryers. A co-appellee, Sollberger, owned a business equipped with automatic car-washing machinery. Both owners furnished utilities, including heat and water, for operating their machines, but in both businesses the customers operated the equipment and performed whatever manual activity was necessary to use the facilities. Arizona's statute imposed a transaction privilege tax on businesses engaged in renting or leasing personal property. The taxpayers in *Peck* took a position exactly opposite that taken

by the taxpayer here, urging that they performed personal services and thus were exempt from the Arizona tax. Justice Udall's analysis is particularly pertinent to the precise question to be answered here. At 476 P.2d 850–851, he wrote:

> The major dispute between the parties here concerns the meaning of the terms "leasing" or "renting" as used in [the statute]. The legislature has not defined these terms as they are used in this section, and it does not appear from the context that a special meaning was intended. We must therefore be guided by the ordinary meaning of the words. [Citing cases]
>
> Webster's Third International Dictionary defines the verb "to rent" as "(1) to take and hold under an agreement to pay rent," or "(2) to obtain the possession and use of a place or article for rent." There is no question that when customers use the equipment on the premises of the plaintiffs herein, such customers have an exclusive use of the equipment for a fixed period of time and for payment of a fixed amount of money. It is also true that the customers themselves exclusively control all manual operations necessary to run the machines. In our view such exclusive use and control comes within the meaning of the term "renting" as used in the statute.
>
> It is plaintiff's principal contention here that because the equipment is at all times located upon the premises of the plaintiffs, and because the plaintiffs as owners supply the utilities necessary to operate the machines, that the customers do not obtain a requisite degree of control or "possession" of the equipment. We do not believe that the terms "leasing" or "renting" as used in the statute require that the property so leased or rented be physically capable of being transported from one place to another by the customer. Nor do we believe that the mere attachment of a label such as "license", borrowed from other areas of law, can be dispositive of the tax question before us.

Under the definition of "leasing" found in our statute, and following the reasoning of *State Tax Commission v. Peck,* supra, the Bureau was in error in determining that Strebeck "used" and did not "lease" property, to deny the deduction. If the regulation adopted by the Bureau creates an exception from exempt transactions which was not contemplated by the legislative act even though such administrative interpretations are entitled to great weight in ascertaining the meaning of the statute, the courts may not give legal sanction to the agency's incorrect construction of unambiguous statutory language. *Miller v. Bureau of Revenue,* 93 N.M. 252, 599 P.2d 1049 (Ct.App.1979). The statutory definition of "leasing" needs no interpretation by Bureau regulations.

The property of Strebeck is used for a consideration by persons other than the owner, and the transactions, therefore, are "leasings" as defined in § 7–9–3(J). It follows that Strebeck was entitled to the deduction allowed by § 72–16A–15.1 [now § 7–9–78].

The decision and order of the Director is reversed; the taxpayer's claimed deduction is to be allowed.

IT IS SO ORDERED.

WOOD, C. J., concurs.

ANDREWS, J., dissents.

ANDREWS, Judge (dissenting).

I dissent.

The sole issue on appeal is whether the taxpayer is entitled to a deduction in computing the compensating tax owed pursuant to § 7–9–78, N.M.S.A.1978 Comp. (§ 72–16A–15.1, N.M.S.A.1953 Comp.). This section provides in material part:

> The value of tangible personal property, . . . may be deducted in computing the compensating tax due if the person using the tangible personal property:
>
> A. is engaged in a business which derives a substantial portion of its receipts from *leasing,* . . . tangible personal property of the type leased; and

B. does not use the tangible personal property in any manner other than holding it for *lease* . . . or *leasing* . . it either by itself or in combination with other tangible personal property in the ordinary course of business. (Emphasis added.)

If the taxpayer's customers "lease" the washers and dryers, the taxpayer is entitled to the deduction. If the taxpayer's customers "use" the washing machines but the "use" does not constitute a "lease" within the meaning of the Compensating Tax Act, the taxpayer is not entitled to a deduction.

The term "leasing" is defined in the Compensating Tax Act, § 7–9–3(J), N.M.S.A. 1978 (§ 72–16A–3(J), N.M.S.A.1953), as follows:

. . . "leasing" means any arrangement whereby, for a consideration, property is employed for or by any person other than the owner of the property;

In my opinion, regardless of the criteria established in this definition, the definition can only be applied if the transaction in question is shown to be an "arrangement." While this term appears to be quite broad, it is subject to interpretation; and, where it affects a tax deduction, should be reasonably, but narrowly construed. *McKee, General Contractor, Inc. v. Bureau of Revenue*, 63 N.M. 185, 315 P.2d 832 (1957); *EVCO v. Jones*, 81 N.M. 724, 472 P.2d 987 (Ct.App. 1970); cert. denied 81 N.M. 772, 473 P.2d 911 (1970); vacated 402 U.S. 969, 91 S.Ct. 1655, 29 L.Ed.2d 134, on remand 83 N.M. 110, 488 P.2d 1214 (Ct.App.1971); cert. denied 83 N.M. 105, 488 P.2d 1209 (1971).

An "arrangement" is "a mutual agreement or understanding," Websters Third New International Dictionary (1976). Thus, in order to establish the existence of an "arrangement" between the taxpayer and customers using the washers and dryers, there must be a mutual agreement or understanding between the two. In this situation, taxpayer has no contact with the customers and does not even have knowledge of their identity. There is no evidence of a "mutual agreement" or "understanding." Absent such an arrangement between identifiable persons, "leasing," within the meaning of the Act, does not occur. Rather, the activity described herein is a "service" as defined in § 7–9–3(K), N.M.S.A.1978 (§ 72–16A–3(K), N.M.S.A. 1953 Comp.). The deduction therefore does not apply. *See Boise Bowling Center v. State*, 93 Idaho 367, 461 P.2d 262 (1969) for a helpful discussion of the nature of businesses which provide "a unique combination of goods and services."

In *Francom v. Utah State Tax Commission*, 11 Utah 2d 164, 356 P.2d 285 (1960), interpreting a sales tax law imposing a tax upon charges for "laundry service," the Court characterized this type of coin-operated laundry business as providing a "laundry service." The business was like that of taxpayer in that customers performed all the manual labor in the washing and drying of their articles, and no attendant was on duty at the premises. In spite of these facts, the Court said:

Regardless of the fact that the actual manual operation or labor is performed by the customer, we are of the opinion that the plaintiffs are performing a "laundry service" within the meaning of the statute . . . . The mere fact that the plaintiffs have no attendant at the establishment does not mean that the plaintiffs are not performing a "service". By making available to the public the machines necessary to the washing and drying of articles, they are performing a "laundry service". 356 P.2d 285 at 286.

In his testimony at the hearing, Mr. Strebeck, president of taxpayer corporation, characterized his business as a "service" when he stated that "[w]e feel that that's providing a service for the people that cannot afford a washer and dryer at home. . . ." Tape 312. Likewise, I would find that the taxpayer's business is that of providing a "service" and therefore taxable under the Compensating Tax Act.

The decision and order of the Director should be affirmed.

599 P.2d 1067

STATE of New Mexico,
Plaintiff-Appellant,

v.

Joe Nestor CHAVEZ,
Defendant-Appellee.

No. 3877.

Court of Appeals of New Mexico.

June 7, 1979.

Rehearing Denied June 20, 1979.

Jeff Bingaman, Atty. Gen., Robert G. Sloan, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

William C. Marchiondo, Marchiondo & Berry, P. A., Warren O. F. Harris, P. A., Albuquerque, for defendant-appellee.

OPINION

WOOD, Chief Judge.

This appeal involves the filing of a criminal information after the grand jury had refused to indict. The trial court dismissed the information; the State appeals. We (1) identify the appellate issue; (2) discuss the authority of the district attorney; and (3) further proceedings before the trial court.

Identification of the Appellate Issue

The grand jury investigated the graveling of certain roads in Bernalillo County and defendant's conduct in connection with the gravel matter. The grand

jury's final report states that it considered 501 cases, issued 492 true bills, and 9 no bills. The trial court found that a no bill had been returned in connection with defendant's conduct. The State suggests that it is uncertain whether the grand jury refused to indict or simply took no action. It being undisputed that the grand jury investigated defendant's conduct, the grand jury report stating that it issued either a true bill or a no bill in each case it considered, the trial court's finding that a no bill was returned as to defendant is supported by substantial evidence.

Although the grand jury refused to indict defendant, the district attorney filed a criminal information charging defendant with making, or permitting, a false public voucher in violation of § 30–23–3, N.M.S.A. 1978. This charge was based upon defendant's conduct in connection with the gravel matter, the same matter investigated by the grand jury.

Defendant moved to dismiss the information. The motion asserted a violation of due process on the basis of a "systematic selection of prosecution . . . ." After hearing evidence on the motion to dismiss, the motion hearing was continued so that evidence presented at the preliminary hearing could also be considered in connection with the motion to dismiss. The combined hearing was possible because the trial court conducted the preliminary hearing. See N.M.Const., art. VI, § 21. The trial court was concerned with the propriety of a criminal charge by information after the grand jury had returned a no bill. Consistent with this concern, the trial court required the district attorney to show whether, at the preliminary hearing, he relied on evidence which was unavailable when the matter was presented to the grand jury.

Although the trial court's requirement was phrased in terms of "compelling" or "new" evidence, we give no consideration to these adjectives. The trial court found as a fact:

> The District Attorney presented substantially no evidence at the Preliminary Hearing which was not previously presented to the Grand Jury; or which was not in possession of the District Attorney at the time in question.

This finding is not challenged; it is a fact in this appeal.

The trial court also found that defendant had not proved a discriminatory prosecution based on race, religion, country of origin, or attempted exercise of constitutional rights. Because none of these grounds were proved, the trial court concluded that defendant was "not entitled to relief from his claim of discriminatory or selective prosecution . . . ."

The trial court's ruling concerning a discriminatory or selective prosecution is not an issue in this appeal. Evidence introduced in connection with the asserted discriminatory prosecution does, however, help to explain the issue on appeal. The evidence is that the district attorney, from January 1, 1977 through the middle of July, 1978, had obtained 1479 indictments. During this same period of time, the district attorney presented 29 matters to the grand jury which resulted in either a no bill or no report by the grand jury. Of these 29 matters, two were resubmitted to the grand jury and indictments resulted. In one of the 29 matters, the district attorney filed an information—that is this case. The information was filed against defendant after the grand jury had heard the testimony of some 40–to–50 witnesses concerning defendant's conduct and had refused to indict.

Inasmuch as the evidence at the preliminary hearing was substantially the same as the evidence presented to the grand jury, the trial court concluded that it had no jurisdiction to decide whether probable cause existed to bind over defendant for trial on the charges in the information. The trial court's thinking, in jurisdictional terms, is indicated by other conclusions to the effect that it lacked authority to review conclusions reached by the grand jury. "Jurisdiction to decide" is misleading. A district judge, conducting a preliminary hearing, has authority to decide the issue of probable cause. Rule of Crim.Proc. 20. In conducting the preliminary hearing in this

case, the trial court did not review the action of the grand jury; rather, the trial court was to make its own, independent determination of probable cause on the evidence presented at the preliminary hearing.

The issue is not whether the trial court had jurisdiction, or authority, to decide the question of probable cause. The issue is whether the district attorney had authority to institute a criminal charge by information when the charge is based on substantially the same evidence considered by a grand jury which returned a no bill.

Authority of the District Attorney

A provision in a former grand jury statute, § 41–5–27, N.M.S.A.1953 (1st Repl. Vol. 6) stated:

> The dismissal of the charge [by the grand jury] does not however prevent its being again submitted to a grand jury as often as the court may direct.

The former grand jury statute, including § 41–5–27, supra, was repealed by Laws 1969, ch. 276. This 1969 law also enacted a new grand jury statute, § 31–6–1, et seq., N.M.S.A.1978. The new grand jury statute has no provision comparable to § 41–5–27, supra.

The trial court ruled that the repeal of § 41–5–27, supra, and the failure of the Legislature to reenact a similar statute "removed from the Courts, the District Attorney and the Grand Jury the authority to resubmit this case or any other case to the Grand Jury for reconsideration, absent new evidence or other compelling factor to resubmit the matter to the Grand Jury." Defendant asserts that by the repeal, "the Legislature was trying to do away with the fact that a prosecutor or a Trial Court could discriminate against [a] particular defendant or accused and continue to try to institute criminal proceedings against that individual." While not expressly stated, the view of the trial court and the defendant was that the repeal of § 41–5–27, supra, which referred only to resubmission to the grand jury, prohibited the district attorney from proceeding by information, after a no bill by the grand jury, unless authorized to do so by the trial court.

The 1969 legislation shows a legislative intent to change the law. See *Stang v. Hertz Corporation*, 81 N.M. 69, 463 P.2d 45 (Ct.App.1970), aff'd, 81 N.M. 348, 467 P.2d 14 (1970). Inasmuch as § 41–5–27, supra, was repealed and no comparable provision was included in the new grand jury statute, the legislative intent was to remove from our statutory law the matters covered by § 41–5–27, supra. Compare *Rodgers v. City of Loving*, 91 N.M. 306, 573 P.2d 240 (Ct. App.1977). What was removed depends on the meaning of § 41–5–27, supra.

Different interpretations have been given to statutes similar to § 41–5–27, supra. *People v. Pack*, 179 Misc. 316, 39 N.Y.S.2d 302 (1942) states that the "spirit" of such a law prohibits resubmission of a charge, either to a grand jury or "any" court, unless a court has authorized resubmission. *Rea v. State*, 3 Okla.Cr. 269, 105 P. 381 (1909) holds that such a statute applies only to resubmissions to a grand jury, and "has no application to offenses prosecuted by information * * *."

The "spirit" of § 41–5–27, supra, could not have applied to criminal charges instituted by information. Section 41–5–27, supra, was part of a law pertaining to grand juries enacted in 1853–54. Prior to the amendment of N.M.Const., art II, § 14, effective January 1, 1925, felony prosecutions were instituted by indictment or by information upon a waiver of indictment in open court. N.M.Const., art. XX, § 20; *State v. Chacon*, 62 N.M. 291, 309 P.2d 230 (1957). Inasmuch as a felony prosecution, by information, without regard to waiver of indictment did not exist when § 41–5–27, supra, was enacted, § 41–5–27, supra, cannot be construed to apply to such prosecutions. Thus, the repeal of § 41–5–27, supra, had no bearing on felony prosecutions by information.

Section 41–5–27, supra, did provide a limitation upon the resubmission of a matter to a grand jury; resubmission was limited to those authorized by the court. The repeal of § 41–5–27, supra, removed this limitation from our statutory law; specifically "the

effect of a repeal . . . [was] to obliterate the statute and to destroy its effective operation in futuro . . . ." 1A Sands, Sutherland Statutory Construction, § 23.33 (4th ed. 1972).

The legislative intent in repealing § 41–5–27, supra, goes no further than an intent to destroy the future operation of that statute; the legislative intent, as shown by the repeal, was not an intent to change permissible resubmission practices that existed apart from § 41–5–27, supra.

What were the permissible practices existing after the repeal of § 41–5–27, supra? The briefs suggest that the common law determined the question of resubmission of a charge after a no bill has been returned, but disagree as to what the common law held. The use of the common law, in connection with a prosecutor's authority to institute a felony charge, must be with caution because the issue under the common law frequently was the form or the timing involved in the matter, rather than the substance of the matter. 4 Wharton's Criminal Law and Procedure, § 1734 (1957). Inferences from *State v. Vincent*, 36 La.Ann. 770, 43 La.Rptr. 481 (1884) and *Richards v. State*, 22 Neb. 145, 34 N.W. 346 (1887) are that under the common law a matter could be resubmitted to successive grand juries, but could not be resubmitted to the same grand jury. See *People v. Benson*, 208 Misc. 138, 143 N.Y.S.2d 563 (1955). We do not consider the common law procedure further. *State v. Reese*, 78 N.M. 241, 430 P.2d 399 (1967) refused to hold that the district attorney "has any common-law powers. The constitution and statutes clearly prescribe and delimit his authority."

Section 36–1–18, N.M.S.A.1978, which was enacted by Laws 1909, ch. 22, § 2 (prior to New Mexico becoming a state) requires the district attorney to prosecute all criminal cases in the district. N.M.Const., art. VI, § 24 provides that the district attorney is the "law officer" of the district. N.M. Const., art. II, § 14 authorizes the institution of a felony prosecution by "information filed by a district attorney * * *." Section 31–6–7, N.M.S.A.1978, which was enacted by Laws 1969, ch. 276, § 7, provides the district attorney "shall attend the grand jury, examine witnesses, prepare indictments, reports and other undertakings of the grand jury."

None of the above-cited constitutional and statutory provisions contain any express limitation upon the power of the district attorney either to resubmit a matter to a grand jury or to proceed by information after a grand jury has returned a no bill.

Richards v. State, supra, held that absent "new evidence," "[t]he law has not made it the duty of a district attorney to file an information in a case where a grand jury has refused to find a bill." *State v. Vincent*, supra, held the district attorney could proceed by information after the grand jury returned a no bill. *State v. Vincent*, supra, proceeded on the basis that if the grand jury refuses to indict, it is the same as if the matter had never been before a grand jury. Recognizing a conflict in the decisions, the Annotation, 120 A.L.R. 713 (1939) states: "[I]t appears that in the majority of instances the courts have taken the view that the right to file an information is not affected by the failure or refusal of the grand jury, upon investigation, to find an indictment."

We do not agree with the explanation in *State v. Vincent*, supra, that if the grand jury refuses to indict, it is the same as if the matter had never been before a grand jury. Such a view disregards the facts which provide the basis for the appellate issue. A better reason, in our opinion, is that the decision to prosecute has been placed with the district attorney by our constitutional and statutory provisions. The district attorney is the official prosecutor. If a trial court may decide whether a prosecution may be initiated after a grand jury has refused to indict, the trial court is in the position to control those criminal prosecutions. Such authority in the trial court is incompatible with the district attorney's role as the official prosecutor, and such authority in the trial court should not be found to exist absent specific statutory authority. *United States v. Thompson*, 251 U.S. 407, 40 S.Ct. 289, 64 L.Ed. 333 (1920); see Joyce on Indictments, § 131 (2d ed. 1924).

We hold that after the repeal of § 41–5–27, supra, in 1969, the grand jury no bill did not prevent the district attorney from either resubmitting the matter to the grand jury or charging defendant by information. This result is reached because of the absence of limitation upon the district attorney's authority as prosecutor. This result is consistent with *State v. Peavler*, 88 N.M. 125, 537 P.2d 1387 (1975) where it is stated:

> [A] subsequent indictment is not barred even if the magistrate determines in a preliminary hearing that there is no probable cause to bind over for trial in the district court.

Defendant asserts there was a limitation upon the district attorney's authority to file the information. He relies on Laws 1979, ch. 337, which relates to grand juries. Section 11 of the law states:

> After a grand jury acts on the merits of evidence presented to it and returns a no-bill, the same matter shall not be presented again to that jury or another grand jury on the same evidence.

We doubt that this law has any effect on the power of a district attorney to proceed by information because, by its terms, this law refers only to grand jury matters. Compare *Rea v. State*, supra. However, it is unnecessary to decide the reach of this law. Laws 1979, ch. 337 had not been enacted when the trial court, by written decision filed October 31, 1978, refused to decide probable cause. A prohibition against resubmission of a matter to a grand jury is substantive law. Such a prohibition is not to be given retroactive effect absent a clear legislative intent to apply the prohibition retroactively. *State v. Padilla*, 78 N.M. 702, 437 P.2d 163 (Ct.App.1968); see *Gray v. Armijo*, 70 N.M. 245, 372 P.2d 821 (1962). Laws 1979, ch. 337, does not show a legislative intent to give that law retroactive effect.

Further Proceedings Before the Trial Court

In its decision, the trial court stated "that, absent the jurisdictional issue, the Court could find the evidence persuasively sufficient to find probable cause in favor of the Information." The State requests that the case "be remanded with instructions to bind the Defendant over for trial . . ." The words "could find" are conditional; they are not a finding of either probable cause or no probable cause under Rule of Crim.Proc. 20(c). Upon remand, the trial court is to make an unconditional finding of the presence or absence of probable cause.

The result herein that the district attorney, absent a constitutional violation, has the authority to proceed by information after a grand jury no bill, will offend those who believe there should be restraints on the district attorney's power to initiate felony prosecutions. The existence or nonexistence of such restraints is a policy matter. Absent a constitutional violation, such policy is for the Legislature to decide. We do not hold there can be no restraints; our holding is that there were no restraints applicable to this case.

The dismissal of the information is reversed. The cause is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

599 P.2d 1071

In the Matter of the ESTATE OF Garland L. SHADDEN, Deceased.

Joyce M. SHADDEN, Personal Representative, Appellant,

v.

G. L. SHADDEN, Appellee.

No. 3564.

Court of Appeals of New Mexico.

June 19, 1979.

Rehearing Denied June 28, 1979.

Wayne A. Jordon, Durrett, Conway, O'Reilly & Jordon, P.C., Alamogordo, for appellant.

Ralph D. Shamas, Hunt & Shamas, Roswell, for appellee.

OPINION

WALTERS, Judge.

Garland L. Shadden died leaving a will which bequeathed certain items of his separate property to his son, appellee herein, including "a promissory note payable to me from the community in the amount of $9,000.00 which represents money I received from some of my personal property." The note, Exhibit 1 in the hearing below, read:

$9,000.00 Alamogordo, N.M., December 1, 1976 No. _____

Garland L. Shadden and Joyce M. Shadden after date, for value received jointly and severally promise to pay to the order of GARLAND L. SHADDEN the sum of NINE THOUSAND AND NO/100 DOLLARS

lawful money of the United States with interest at the rate of six (6) per cent per annum from default until paid.

The makers and endorsers of this note severally waive protest, demand and notice of protest and non-payment and agree to all extensions, partial payments before or after maturity and agree that they will pay ten per cent attorney's fees on the amount due, in case the same shall not be paid upon maturity, and is placed in the hands of an attorney for collection.

Payable at Alamogordo, New Mexico s/ Garland L. Shadden

Due December 1, 1977

The will further provided that, with the exception of family bibles, an oil royalty, and inherited real property, appellee would receive all the rest and remainder of decedent's separate property, and that appellant, his widow, would receive a life estate in the oil royalty and the inherited realty (with a gift over to decedent's sister), and all of decedent's interest in real and personal community property. If Mrs. Shadden preceased the testator, the will directed that "the *community* property . . . acquired during the term of our marriage" be distributed "as follows: A. The first $9,000.00 from the estate assets, I give, devise and bequeath to [X], as Trustee," and 50% of the balance (after a $1.00 devise to two other beneficiaries) "to [X], as Trustee for the use and benefit" of appellee, with discretion in the trustee to pay any reasonable sum to or for the appellee's benefit; and any balance remaining after the death of appellee was to be distributed to named grandchildren. The will also declared: "My wife and I have made written lists of items which we consider to be our respective sole and separate properties."

Appellee G. L. Shadden filed a claim against the estate for payment of the $9,000 promissory note which, as can be seen, had been signed only by Garland. The claim was disallowed by appellant Joyce Shadden, as personal representative of the estate. Following a formal hearing on the denial of the claim, the trial court entered judgment for $9,000 in favor of appellee against the estate, and the personal representative appealed. She raises issues of insufficiency of the evidence to support most of the court's findings; reception of inadmissible evidence; and the ineffectiveness and unenforceability of the note to transmit any interest to claimant thereunder by the will.

Fourteen of the court's twenty-three findings, which relate to the execution and terms of the will, the conduct of the widow with respect to benefits received under the will, the testator's intentions and the widow's knowledge of his intentions, etc., are asserted to be unsupported because the will was not introduced into evidence and no interpretations of its provisions or the testator's intent could have been reached by the court. The record received on appeal contradicts the basis of this claim. It contains all of the pleadings in the probate matter, including Joyce's petition for admission of the will to probate, a copy of the will bearing the filing stamp of the district court clerk, and an order admitting it to probate and appointing Joyce as the personal representative. The transcript of proceedings reveals further that at the outset of the hearing, the trial judge carefully reviewed the court file before him and recited for the record the various pleadings and proceedings had in the probate matter up to the date of the hearing. It was not necessary for appellee to move the will into evidence—it was before the court in the court record, and the court was bound to take judicial notice of the documents entered in the cause pending before it. *In re Landers' Estate*, 34 N.M. 431, 283 P. 49 (1929). Additionally, Mrs. Shadden, the appellant-widow, testified concerning her knowledge of decedent's intent, as did the attorney who drew the will and the promissory note in dispute, and from their testimony the court was justified in making its findings that decedent had sold separate property in El Paso owned by him prior to

his marriage to Joyce Shadden; that he had used the $9,000 from the sale for the purchase of the home of the parties in Otero County; that he considered the $9,000 to be a debt chargeable against his estate; that he intended the note as a device to assure payment of $9,000 in cash to his son rather than that the son and Mrs. Shadden share title to the home; and that the note evidenced Garland's intention that his son be given the preference of a creditor against his estate to the extent of $9,000.

Many of the court's findings were based upon the extrinsic evidence furnished by Mrs. Shadden and the attorney, but that evidence was properly received for, as we read in 4 Page on Wills, §§ 32.1, 32.2, 32.4, and 32.5:

> The meaning and application of the terms of the will cannot be understood until the property and beneficiaries have been identified, which can be done only by extrinsic evidence; and, in many instances, until the court understands testator's situation with reference to his property, the natural objects of his bounty, and his contemplated beneficiaries. Evidence of this sort explains the meaning of the will and, not infrequently, this meaning is varied to the extent that the will evidently means something different, when read in the light of admissible extrinsic evidence, from the meaning which it appeared to have without such evidence. It is said that such evidence is received, not to defeat, but to aid in determining the testator's intent when that intent is uncertain from a reading of the will itself, and to explain or resolve doubts, not to create them. It has been held that the rule against admission of extrinsic evidence is not violated by the reception of extrinsic evidence which tends to show the intention of the testator as expressed in the will, although the evidence in such cases is probably unnecessary.
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> . . . . .
>
> . . . [A]dmissibility of parol evidence . . . is generally raised where the will either upon its face, or *by reason of imperfect description of the subject-matter of the gift* or the object of testator's bounty, is ambiguous *or* uncertain. It is often stated, as a general principle, that evidence of extrinsic circumstances is admissible to aid in interpreting a will which is ambiguous. This rule is so general as to be of little value since questions as to what constitutes such an ambiguity as to require consideration of extrinsic evidence in order to ascertain the testator's intent are almost as numerous as the variations which can be conceived for testamentary dispositions. . . . [I]n many cases the ambiguity does not appear until extrinsic evidence is received, some courts holding that it is only in such cases that extrinsic evidence can be considered in the construction of the will.
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> . . . . .
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> While in some cases considerable stress is put on the fact that evidence is admissible because of the ambiguity of the will, this is because it is only in such cases that extrinsic evidence needs to be considered in construing the will. In any case, *whether the will appears ambiguous or not, the court is entitled to hear such extrinsic evidence of the surrounding circumstances as will put it in the place of testator.* Until this is done, the court cannot know whether the will is ambiguous or not.
>
> . . . . .
>
> While a few cases arise upon the admissibility of evidence where the will is free from ambiguity, extrinsic evidence is, nevertheless, not only admissible, but necessary in all cases for the purpose of identifying the beneficiaries *and the property* disposed of by will. This arises from the evident fact that no amount of clear, detailed description in a will can show whether there are any extrinsic objects or persons which correspond to such description. This fact underlies the rules concerning the admission of evidence to explain any written instrument, and is made necessary from the very nature of the case.
>
> . . . . .

> The question of the admissibility of extrinsic evidence is very frequently invoked where the description of either the property to be disposed of by will, or the beneficiary to whom the property is to be disposed of [sic], is ambiguous. . . . Where the description in the will of the property disposed of does not apply completely to any property which testator owned, but does apply in part to property owned by testator, or where it is so general or incomplete that it cannot be determined without reference to external facts exactly what portion of the property owned by the testator is included; . . extrinsic evidence is admissible to show the surrounding facts and circumstances in order to aid the court in determining what property testator meant to dispose of by the language which he has used. (All emphasis ours.)

We would acknowledge that some of the findings made, even though fully supported by the evidence, are supplementary findings rather than findings of ultimate facts, but they do no harm to appellant in our determination of this appeal as they do not present any conflict with facts gleaned from the will itself, from which we are required to determine the intent of the testator with respect to his bequests. *In re Will of McDowell*, 81 N.M. 562, 469 P.2d 711 (1970).

The exhibits introduced, to which appellant objects, were the promissory note, a handwritten draft from the attorney's file relating to the $9,000 bequest, and several handwritten lists of property entitled "Garland's separate property," "Gifts from my sons," "Inherited from my mother Mrs. S. F. Crenshaw," "Separate property of Joyce," "Community property of G. L. Shadden and Joyce Shadden," and some other lists without headings. Mr. and Mrs. Shadden's attorney testified that these lists were to be embodied in affidavits that had not been completed at the time of Mr. Shadden's death. However, the exhibits themselves were admissible as documents contemplated by § 45–2–513, N.M.S.A. 1978, and, in any event, they did not create a conflict with the dispositive provisions of the will. Appellant was not prejudiced by any of the findings attacked or by admission of the exhibits.

Appellant next argues that the promissory note was not decedent's separate property and it was not from the community; that the bequest created a specific legacy, and only delivery of the specific item bequeathed could satisfy the bequest. We admit to some inability to understand precisely the totality of this argument, but we assume appellant is urging that since the note was not signed by Mrs. Shadden, the promise to pay did not become Garland L. Shadden's separate property; that because the note did not fully comport with its description in the will (that is, it was not executed "from the community" because not signed by one of the members of the community), it was not the "specific item" bequeathed by the will to appellee.

The court's foremost duty in this matter is "to ascertain the desire of the testator, as he has expressed it, and to carry it to fulfillment," unless prohibited by public policy or general rules of law. *Rhodes v. Yater*, 27 N.M. 489, 491, 202 P. 698, 699 (1921). Justice Moise's opinion in *Gregg v. Gardner*, 73 N.M. 347, 388 P.2d 68 (1963), approved language describing the testator's intent as "the polestar" which must prevail, and noted that the attempt to arrive at the intention of the testator "is invariably the first and paramount inquiry." 73 N.M. at 356–57, 388 P.2d at 75.

Garland L. Shadden's testamentary provision referring to the promissory note creates some difficulty only because the note was not signed by Mrs. Shadden. Had it been, there could be no disagreement that it was separate property which Garland L. Shadden had the power to bequeath to his son. Neither public policy nor general rules of law prohibit a father from making a testamentary gift to his child. The trial court found that Mr. Shadden intended the note to be a preferential charge against his estate to the extent of $9,000, and we must review that most significant finding

by resolving all reasonable inferences in support of the lower court, disregarding evidence and inferences to the contrary. *Moore v. Bean*, 82 N.M. 189, 477 P.2d 823 (1970). What is indicated by the extrinsic evidence, the promissory note, and the will itself with regard to testator's intent? We think that together they are susceptible of the inference that Garland L. Shadden contributed "money that I received from some of my personal property"—his separate property—to the community, and that he considered the contribution a debt "payable to me from the community." This was evidence of transmutation of separate funds to an asset of the community, *cf. Chavez v. Chavez*, 56 N.M. 393, 244 P.2d 781 (1952), for which he would receive in return a promissory note evidencing the debt of the community. Mrs. Shadden did not deny the use of separate funds toward the purchase of their home, nor did she argue that her husband had not intended his son to have $9,000 from the community. She did not admit in any of her testimony that she too considered it a community obligation. Her failure or refusal to sign the note is rather pointed evidence that she did not agree that a community debt had been created. She, instead, points to the language of her husband's will which provides for a $9,000 bequest to appellee from community property in the event she predeceased her husband to urge that payment of the note was not intended until after her death. The disputed bequest cannot be so read.

The effect of Garland's signature on the note could do no more than commit his separate property and his share of the community personal property to repayment of the obligation stated on the note, because he was without power to encumber the community real property for its repayment without Mrs. Shadden's joinder. § 40–3–13, N.M.S.A. 1978. His signature was, however, effective to create a community obligation payable from the community's personal property. Section 40–3–14, N.M.S.A. 1978. And even though he was both maker and payee of the note, his devise of the note by will was a sufficient "endorsement" of it to meet appellant's challenge to its negotiability and effectiveness, since we are here dealing with passage of title by will and not by rules of commercial law. Compare, 11 Am.Jur.2d 154–55, Bills and Notes, § 118. The note, without endorsement, was no less transferrable by will than an unendorsed security certificate bequeathed by will.

Thus, at the time of his death Garland L. Shadden held an asset as well as an obligation, a promissory note for $9,000 payable to himself from himself and as manager of the entire community personal property. Section 40–3–14, N.M.S.A. 1978. When he died, his separate and community personal estate became substituted as the obligor, and his beneficiary became the obligee.

The trial court found that G. L. Shadden had a preferential charge of $9,000 *against the estate*. Section 45–2–804 of the Probate Code (N.M.S.A. 1978) providing for payment of community debts upon the death of either spouse presents a clear conflict, in this case, with the provisions of § 40–3–13 which we have referred to above, in that it makes "the entire community property . . . subject to the payment of community debts." We have found no cases in this or other jurisdictions which have considered this perplexing inconsistency. We must, therefore, according to the rules of statutory construction, ascertain the manifest purpose sought to be accomplished by the legislature as expressed in both statutes without doing violence to either, insofar as possible. *Martinez v. Research Park, Inc.*, 75 N.M. 672, 410 P.2d 200 (1965); *State v. Blevins*, 40 N.M. 367, 60 P.2d 208 (1936).

The note reflects a community debt. Under § 45–2–804, the entire community may be subjected to its payment. But at the time of making the note, decedent was prohibited from encumbering community real property to pay the debt unless his wife also joined in the encumbrance. Does the death of the spouse who created the debt payable to himself enable one who has become the creditor by inheritance to step into a circumstance of repayment more favorable

than was enjoyed by the person from whom he inherited? We do not believe that was the purpose inducing enactment of § 45–2–804, N.M.S.A. 1978, particularly in view of the constraints of § 40–3–13.

Section 40–3–13 in the 1978 compilation requiring joinder of both spouses in real estate transactions is identical with § 57–4A–7, enacted by the 1973 legislature as a part of the Community Property Act of 1973. Section 57–4A–7 merely continued the provisions of § 57–4–3, N.M.S.A. 1953, which was originally enacted as § 1, ch. 84 of the Laws of 1915. Even prior to 1915 both spouses had to join in transactions disposing of or encumbering the family homestead. Section 16, ch. 37, Laws of 1907. Since at least 1901 (§ 6, ch. 62, Laws of 1901), it has been the legislative policy of this state to prohibit one spouse from alienating the community's real property without the other spouse's consent during the life of the marriage community, and to declare, since 1915, any such unilateral attempts "void and of no effect."

On the other hand, it is clear that the purpose of § 45–2–804 B, subjecting the entire community to payment of community debts, was intended to protect third parties who had dealt in good faith with the community during its existence against dissipation of the estate by the survivor before outstanding debts were taken care of.

The situation before us is not totally unlike the problem which arose in *Jenkins v. Huntsinger*, 46 N.M. 168, 125 P.2d 327 (1942), and those in *McGrail v. Fields*, 53 N.M. 158, 203 P.2d 1000 (1949), and *Marquez v. Marquez*, 85 N.M. 470, 513 P.2d 713 (1973), wherein community property in each case was purportedly conveyed by the husband alone and the predecessor statutes to § 40–3–13, N.M.S.A. 1978, were interpreted. Justice Mabry's 1942 opinion, re-affirmed in the later decisions, dealt at great length with and analyzed numerous decisions of other jurisdictions concerning the effect of attempted alienations of community real property by the husband only. *Jenkins, supra*, established unequivocally that the statutory language had but one interpretation, i. e., that any such document was "of no effect for any purpose, and therefore, a nullity," and noted at 178–79, of 46 N.M. at 333–334 of 125 P.2d:

> Obviously, when the legislature had come now to a recognition of what had been so often asserted by many, that the interest of the wife being more than a "mere expectancy" and having a real present interest in the property of the community, she should have an equal voice in the matter of its alienation; and public policy would dictate some such safeguards to any *attempt* to alienate without her joinder.
>
> Ample reason can be readily found in support of a rule that would, under the theory upon which our community property law is administered, thus surely and effectively safeguard the wife's interest. She, an equal shareholder, and yet, with no voice in management of the property, should not be subjected to the hazards of alienation by the husband alone, where consent, waiver, or other like defenses to her claim might ordinarily be successfully asserted. The act, in other words, makes of the effort by the husband alone an "abortive attempt" and the "merest nullity".

If we apply the reasoning of these cited New Mexico cases, as well as the holdings in the earlier cases of *El Paso Cattle Loan Co. v. Stephens & Gardner*, 30 N.M. 154, 228 P. 1076 (1924); *Terry v. Humphreys*, 27 N.M. 564, 203 P. 539 (1922); and *Miera v. Miera*, 25 N.M. 299, 181 P. 583 (1919), we can reach no other result than to determine that the note could encumber no part of the community real estate for its repayment, for the simple reason that decedent had no power to do so in his lifetime. At the time of signing the note, the credit extended by the payee could only have been against the maker's separate property and the community's personal property.

The circumstances of this case are not the same as they would be if a stranger to the community had taken decedent's note. He might well expect the entire community to answer for the debt if his bor-

rower died before payment, because the law grants him that expectation. But when a member of the community takes a note from himself as a member of the community, he is charged with the knowledge that any document purporting to pledge the credit of the community can only refer to the community's personal property. If we were to resolve this matter in any other way, we would be required to eviscerate the very essence of § 40–3–13, N.M.S.A. 1978. To give it the effect we herein propose, we preserve the intent of § 45–2–804 B in all circumstances except those rare situations similar to the instant case, and we keep safe the protection to the unconsenting spouse inuring in the mandatory joinder which has been required since New Mexico's territorial days. *See* Southerland Statutory Construction, Vol. 1A, § 28:12; Vol. 3, § 68:05 (4th Ed. 1974).

Since decedent could not have enforced payment of the note against the entire community estate, appellee, now standing in his shoes, cannot do so either. Thus, the trial court erred in failing to limit appellee's claim as one against the separate and community personal property of the estate.

Section 45–3–902 of the Probate Code sets the order in which the shares of distributees shall abate in order that debts, expenses and costs of administration may be paid. The first property to be applied to such payments is that which is not disposed of by will. In the instant case, Garland L. Shadden, by Paragraphs Second, Third and Fourth of his will, disposed of all of his property. The second type of property to be charged is real or personal property contained in residuary devises. Paragraph Third is the only residuary provision of the will, and in it "all of the rest, residue and remainder of my separate property and separate estate, both real and personal," was devised by decedent to G. L. Shadden, the appellee.

The trial court made no findings relating to the identification or value of the items of separate and community property. Thus it will be necessary to determine whether there are sufficient assets in the residuary devise to satisfy the appellee's claim of $9,000, even though this means that his claim must first be settled from assets he also was bequeathed by his father. If the residuary separate estate is insufficient, then the trial court must apportion the balance of the $9,000 charge against the last category to abate, each of the specific legacies provided in the will. The appellant-widow was specifically devised *all* of the community property and a life estate in the oil royalty and in the realty inherited by Garland L. Shadden from his mother; and the appellee-son was specifically bequeathed other items of decedent's separate property. They are the only specific legatees named in the will. In the event of any deficiency in payment of the $9,000 charge against the estate from the assets of the residuary bequest, the specific legacies are to be charged equally in meeting the balance due to appellee on his preferential charge, except that no part of the community real property may be assessed to pay any balance due. Sections 40–3–13, 45–3–902 B, N.M.S.A. 1978.

We, therefore, remand this matter to the trial court with directions to determine the identity and values of the real and personal property described in the residuary Paragraph Third of decedent's will, and to apply those values against the $9,000 note. If the properties there included do not equal the $9,000 amount, the trial court shall then determine the identity and values of decedent's interest in all of the community personal property, and the value of the specific devises to both appellee and appellant, and equally apportion against each such legacy the amount necessary to pay any balance due to appellee.

IT IS SO ORDERED.

LOPEZ, J., concurs.

SUTIN, J., concurs in result.

SUTIN, Judge (concurring in result).

I concur in the result.

Joyce Shadden appeals an adverse interlocutory order concerning the following provision in the Will of Garland L. Shadden, deceased:

> To G. L. Shadden, I give and bequeath the following which is my separate property . . . a promissory note payable to me from the community in the amount of $9,000.00 which represents money I received from some of my personal property.

G. L. Shadden is the son of decedent. The trial court awarded G. L. Shadden judgment against the estate of Garland L. Shadden in the amount of $9,000.00 with interest.

I concur in the affirmance of the judgment but for none of the reasons stated in Judge Walters' Opinion. The reason for this concurrence arises out of the blood relationship of father and son based upon the intention of the father as expressed in the will. Joyce Shadden, wife of decedent, was a stepmother of G. L. Shadden.

"The intention of a testator as expressed in his will controls the legal effect of his dispositions." Section 45–2–603, N.M.S.A. 1978. In *Gregg v. Gardner*, 73 N.M. 347, 388 P.2d 68 (1963), Justice Moise introduced into this forum the principles of law that govern the interpretation of a will in order to arrive at the true intention of the testator. These rules are simple and clear but most difficult in application. They are supplemented by detailed explanation of guidelines to follow in ascertaining the meaning of words and phrases. *See, Delaney v. First National Bank in Albuquerque*, 73 N.M. 192, 386 P.2d 711 (1963); *Lamphear v. Alch*, 58 N.M. 796, 277 P.2d 299 (1954); *Brown v. Brown*, 53 N.M. 379, 208 P.2d 1081 (1949). The long essay quoted as authority in the Walters' Opinion is but an exhortatory restatement of the pertinent rules adopted in New Mexico.

A reiteration of these rules is a useless appendage when a court seeks to determine a testator's intent. A testator's intention is discerned by carefully reading the contents of the Will. When a determination is made, then each judge states those precise rules which support his conscientious belief. Clearness and ambiguity are the polestars upon which his belief is hitched and his determination made. Ofttimes, he turns to concepts of public policy, fair play and tail-twisting language to support his good faith efforts.

Casting aside the intricate rules of law, decedent gave his son a $9,000.00 promissory note made out to himself and payable from the community property of the estate. This was his intention. For Joyce Shadden to search an escape by the invention of technical crevices that may appear finds disfavor in a court of law.

To contend that the Will was not admitted to probate, nor introduced into evidence is facetious. Joyce Shadden's attorney requested findings that "The Will . . . has been admitted to probate"; that the Will made the specific bequest stated supra and that "The foregoing devise [sic] is not ambiguous." The other contentions made lack any merit.

Without knowledge of the assets and liabilities of the estate, this appeal should be affirmed, not remanded with instructions to the district court. Payment of the $9,000.00 obligation of the estate must be resolved by the district court.

599 P.2d 1080

Luis J. ESTRADA, as Administrator and Personal Representative of the Estate of Johnny Estrada, deceased, and as father and next friend of David Estrada, a minor, Plaintiff-Appellant,

v.

Daniel CUARON, Defendant-Appellee.

No. 3578.

Court of Appeals of New Mexico.

June 19, 1979.

Rehearing Denied July 9, 1979.

James P. Reichert, David R. Gallagher, Gallagher, Casados & Martin, Albuquerque, for plaintiff-appellant.

James T. Roach, Klecan & Roach, Albuquerque, for defendant-appellee.

OPINION

WALTERS, Judge.

Plaintiff appeals an adverse jury verdict and judgment arising out of an automobile-pedestrian accident that occurred August 5, 1976 at approximately 10:20 p. m. near the southeast corner of the intersection of Coors Boulevard and Barcelona Road in Albuquerque, New Mexico. Defendant was driving north on Coors Boulevard. Decedent and his brother were crossing Coors Boulevard afoot from west to east and were about twelve inches from the east curb line when the accident occurred.

The trial court refused to admit evidence of speed of defendant's vehicle by two witnesses: (1) that of a state police officer who clocked defendant's speed at 69 miles per hour 7/10 of a mile south of the point of the accident and (2) a lay witness, 16 years of age, standing 10 feet east of Coors, who observed defendant's car about 75 yards south of the point of the accident, a split second before defendant's car struck the boys. Plaintiff correctly contends that exclusion of this evidence was reversible error. Both witnesses should have been permitted to testify.

The eye witness, a 16 year-old boy with two years' driving experience, accompanied decedent and his brother to the south side

of Barcelona at the Coors intersection. He crossed Coors Boulevard first, stood about 10 feet east of Coors and watched the brothers cross. When they arrived at the middle of the two northbound lanes of Coors Boulevard, he saw defendant's car approaching from the south at about 75 yards. He looked back at the boys, with the approaching car also within his sight, and saw the car strike them. It took two or three seconds from the time he first saw the car to the time of the accident.

The witness was examined in the absence of the jury. He testified that he drove his own car to work everyday, and was experienced in observing the speed of other cars. He said that defendant's vehicle was going at a high rate of speed, probably 65 or 70 miles an hour. The court held that the witness was not competent to evaluate the speed.

A sufficient foundation had been laid for the witness's testimony. *State v. Richerson,* 87 N.M. 437, 442, 535 P.2d 644 (Ct.App.1975); *Pavlos v. Albuquerque Nat'l Bank,* 82 N.M. 759, 487 P.2d 187 (Ct.App. 1971), and cases and authorities collected in *Pavlos.* Personal observation is the key factor in allowing lay opinion evidence. *Pavlos, supra,* at 761, 487 P.2d 187. This witness was clearly competent to observe defendant's vehicle and to estimate its speed. The value of his opinion was for the jury to assess.

Plaintiff tendered the testimony of the state police officer who related that he clocked defendant driving at 69 m.p.h. seven-tenths of a mile from the accident. He pulled off to the side for fifteen seconds "at the most" to allow two cars to pass so he could make a u-turn and pursue defendant, having defendant's taillights in view at all times. He saw defendant brake "for an instant" at the intersection of Rio Bravo, .2 mile before Barcelona where the accident occurred; the car continued north and the brake lights came on again "for short time, and off," and then on once again when defendant pulled onto the shoulder north of Barcelona. The officer told the court that the second time he saw the brake lights flash "must have been at the time of the accident." He was unable to say how much the car slowed down after the defendant braked "for an instant" before defendant reached the point of the accident and made the second "on and off" application of his brakes. Defendant testified he was driving fifty-five miles per hour before he reached Rio Bravo.

There is no question that the officer's testimony was relevant as tending to make the existence of defendant's excessive speed more or less probable than it would be without the evidence. N.M.R.Evid. 401, N.M.S.A.1978. It was not made inadmissible by reason of danger of unfair prejudice, confusion of issues or misleading the jury, undue delay, waste of time, or because it was cumulative evidence. Rule 403. He clocked defendant at 69 m.p.h. a half-mile south of Rio Bravo. Defendant said he "slowed down" to "about fifty miles an hour" between Rio Bravo and Barcelona. Even assuming a 50-mph speed for the entire .7 mile from the radar contact to the point of the accident, the officer's observation occurred less than a minute before the accident (.7 mile (3696 feet) ÷ 70.0 feet/second (at 50 m.p.h.) = 52.8 seconds); thus the evidence of speed was not so remote as to be misleading or confusing, cf., *Pavlos v. Albuquerque Nat'l Bank, supra* (evidence relating to driving conditions as far as 72 miles from scene of accident). Additionally, it was relevant to the credibility of defendant's statement that he had not exceeded the speed limit that night. Rule 607.

The purpose of a trial of factual issues is to arrive at the truth, insofar as possible. *State ex rel. Hwy. Dept. v. Kistler-Collister Co. Inc.,* 88 N.M. 221, 539 P.2d 611 (1975). The jury had before it only the testimony of defendant regarding speed, the testimony of both the officer and the eye-witness having been excluded. Thus the defendant's testimony at trial was uncontradicted. If the excluded evidence had been admitted, the jury was not bound to believe either of the witnesses, nor that the radar-recorded speed continued to the point of accident;

but even though the testimony of these witnesses was not conclusive, it was relevant to the issue of defendant's speed and should have been submitted to the jury. " 'It is wise to remember that the trend in American jurisprudence is toward the greater admissibility of evidence. We must not "close any reasonable avenues to the truth in the investigation of question of fact. In doubtful cases the doubt should be resolved in favor of its admissibility." ' " *Weiland v. Vigil,* 90 N.M. 148, 153, 560 P.2d 939, 944 (Ct.App.1977), Sutin, J., quoting from his dissent in *Pavlos v. Albuquerque Nat'l Bank, supra.*

The radar evidence corroborated the lay witness's opinion that defendant was traveling between 65 and 70 m.p.h. at the point of impact. *Dawson v. Olson,* 97 Idaho 274, 543 P.2d 499 (1975). By the same token, the police officer's testimony confirmed the testimony of the layman; and the jury should have been allowed to weigh their conflicting evidence with that of defendant's. *Jones v. Anderson,* 81 N.M. 423, 467 P.2d 995 (1970).

The trial court was in error in excluding the tendered evidence by plaintiff's two witnesses.

The case is reversed and remanded for a new trial.

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

SUTIN, J., concurs in part and dissents in part.

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

I concur and dissent.

Judges Hernandez and Walters withdrew my opinion in this case which had been filed on May 23, 1979. To avoid any misunderstanding, I do herewith set forth the pertinent parts of my opinion.

We reverse as follows:

(1) The Court is in accord on Point B of the opinion, that the trial court erred in denying admission of the testimony of the lay witness.

(2) Judges Hernandez and Walters, in special opinions also reverse on denial of the admission in evidence of the police officer's testimony. Judge Sutin dissents.

Point A in this opinion which follows represents Judge Sutin's dissent.

A. *The trial court did not abuse its discretion in denying admission of officer's testimony.*

The police officer was travelling south on Coors Boulevard. At approximately 7/10 of a mile south of the Barcelona intersection, the officer, by radar, clocked the speed of defendant's approaching vehicle at 69 miles an hour. At that moment, defendant's vehicle was 205 yards south of the police car or about 9/10 of a mile from the Barcelona intersection. The accuracy of the radar evidence was not challenged. *See,* Annot., *Proof, by radar . . . of violation of speed regulations,* 47 A.L.R.3d 822 (1973). The officer stopped on the shoulder of the road to allow two cars behind him to pass. After 15 or 20 seconds, a U-turn was made and the officer proceeded north. He saw the taillights of the vehicle. At the Bravo intersection, he saw the brake lights go on and then off. How much the vehicle slowed down, he could not say. Neither could he estimate the rate of speed as the vehicle approached the point of the accident.

At first blush, the trial court held the testimony relevant under Rule 401 of the Rules of Evidence. After extensive argument and further questioning of the police officer, a change of position occurred. The trial court held the clocked speed irrelevant because it could not be tied to the cause of the accident. The court concluded:

I am not prepared to let my jury speculate.

Rule 401 defines "relevant evidence" as follows:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence.

The determination of relevancy rests largely within the discretion of the trial court. *Wright v. Brem,* 81 N.M. 410, 467 P.2d 736 (Ct.App.1970). Judicial discretion is also the controlling factor in the admissibility of vehicular speed fixed at some point distant from the accident. On appeal, respect for this discretionary process is eminent and conspicuous. It represents the personal judgment of the court based in all conscience on an honest attempt to resolve the perplexing problem involved in the reception of evidence. It involves a choice, an exercise of the will, of a determination made between competing circumstances. In making the determination, the court must evidence the exercise of will, not perversity thereof, the exercise of judgment, not the defiance thereof, the exercise of reason, not passion or bias. On appeal, I look to see if the result is palpably and grossly violative of fact and logic. Unless the reasons given are so untenable or unreasonable in such fashion as to amount to a denial of justice, the decision of the trial court must be affirmed. *Pankey v. Hot Springs Nat. Bank,* 42 N.M. 674, 680–81, 84 P.2d 649, 653 (1938) says:

> Any attempt to define the phrase "judicial discretion" is generally regarded as a difficult and dangerous undertaking. But we venture that such a discretion as the law sanctions is not arbitrary, vague, or fanciful, nor is it to be controlled by humor or caprice, but is to be governed by principle and regular procedure for the accomplishment of the ends of right and justice.

The ruling of the trial court is presumed valid and the burden is on plaintiff to show in which manner the trial court abused its discretion. We will not substitute our discretion for that of the trial court. *Coastal Plains Oil Company v. Douglas,* 69 N.M. 68, 364 P.2d 131 (1961). Plaintiff's burden is heavy in view of our long-standing rule that the action of the trial court, absent a patent abuse or manifest error in the exercise of discretion, will not be overturned. *Hanberry v. Fitzgerald,* 72 N.M. 383, 384 P.2d 256 (1963). This burden has not been met. In so concluding, I lay aside any personal feelings of disagreement that we might have. If the trial court had ruled the testimony of the police officer admissible, I would have affirmed the determination made.

In *Giroux v. Gagne,* 108 N.H. 394, 236 A.2d 695, 698 (1967), Justice Grimes said:

> A review of the many cases involving merely evidence of speed at various distances from a scene of an accident would not be helpful. For a collection of cases, see Annot. 46 A.L.R.2d 9. . . .

In the 22 years following the Annotation published in 1956, a review of the many cases on the subject follow in the tenor of the preceding Annotation. *See* A.L.R.2d, Later Case Service for 40–48 cases. Each case is decided upon the facts and circumstances surrounding the event. Judicial discretion is and is not relied upon by appellate courts. Admission of evidence of speed at various distances is and is not remote. Denial of admission of evidence of speed at various distances is and is not reversible error. It may be said with some degree of certainty that each appellate court affirms or reverses in the climate of what it believes to be fair or just. No hard and fast rule can be laid down on the subject.

Ofttimes, the most important factor is (1) the degree of probability that speed continued until the accident occurred; (2) whether a casual connection existed between the speed and the accident; (3) whether evidence of speed stands alone or fits into a pattern with other evidence to show continued speed; (4) what period of time elapsed between the witness's observation of speed and his arrival at the scene of the accident; (5) whether prejudicial error exists; and (6) whether the trial court exercised judicial discretion or abused it.

In New Mexico, judicial discretion has been the most important factor. *State v. Richerson,* 87 N.M. 437, 535 P.2d 644 (Ct. App.1975); *Garrett v. Howden,* 73 N.M. 307, 387 P.2d 874 (1963).

In *Richerson*, a witness, 200 feet from an intersection, testified that defendant was driving at 70 miles per hour. Within the discretion of the court, the evidence was admissible. In *Garrett*, the trial court did not abuse its discretion in excluding evidence that after the accident an unidentified bystander had said that within a mile and a half of the scene of the accident, defendant-driver had passed her "doing better than 100." In both cases, reference was made to the A.L.R. Annotation, *supra.*

For analogous cases in which judicial discretion was the controlling factor upholding the trial court who either admitted or denied evidence of speed, *see, Comins v. Scrivener*, 214 F.2d 810 (10th Cir. 1954), 46 A.L.R.2d 1 (1956), in which Justice Bratton decided a New Mexico case; *Gleson v. Thompson*, 154 N.W.2d 780 (N.D.1967); *Emery v. Frateschi*, 161 Me. 281, 211 A.2d 578 (1965); *Hill v. Sadler*, 186 So.2d 52 (Fla.App.1966); *Swindall v. Speigner*, 283 Ala. 84, 214 So.2d 436 (1968); *Bennett v. Bass*, 248 Md. 260, 235 A.2d 715 (1967); *Shoopman v. Long*, 252 Or. 341, 449 P.2d 439 (1969); *Baxter v. Rounsaville*, 193 So.2d 735 (Miss.1967); *Maxie v. Doe*, 215 Va. 409, 211 S.E.2d 246 (1975).

In the instant case, the trial court, in making its determination, exercised judgment and reason. I cannot say that the result was so palpably and grossly violative of fact and logic, nor so untenable or unreasonable as to amount to a denial of justice. There was no abuse of discretion.

B. *The testimony of the lay witness was admissible. The weight and credit to be accorded it is for the jury.*

The lay witness, 16 years of age, accompanied decedent and his brother to the south side of Barcelona at the Coors intersection. He crossed Coors Boulevard first, stood about 10 feet east of Coors and watched the brothers cross. When they arrived at the middle of the two northbound lanes of Coors Boulevard, he saw defendant's car approaching from the south at about 75 yards. He looked at the boys, looked back at the car at the moment the car struck them. It took two or three seconds from the time he saw the car to the time of the accident. The trial court sustained defendant's objection to the witness's estimate of speed. The witness was examined in the absence of the jury. He glanced at the car for just about a second, a split second or so, and stated that defendant's vehicle was going at a high rate of speed, probably 65 or 70 miles an hour. The court held that the witness was not competent to evaluate the speed. We disagree.

Gibbs v. Gianaris, 137 Ga.App. 18, 223 S.E.2d 4 (1975) involved a motorcycle-automobile accident in which the jury found for defendant-automobile driver. Plaintiffs urged that it was error to allow two teenagers to give their estimate regarding speed of plaintiff's motorcycle prior to the collision because no sufficient opportunity existed to observe the vehicle and both were not competent to estimate speed due to age and lack of experience.

One witness, 14 years old, saw the plaintiff for "just a brief second" and estimated his speed at "approximately 50 to 55 miles per hour." The witness admitted he had never driven an automobile prior to that time but stated he had owned a motorcycle. The length of time he observed the motorcycle was "just a second" and he conceded that his estimate was a "guess." The other witness, aged 15, who had ridden in and driven cars, estimated the speed "between 50 and 60." He stated he observed the motorcycle "between a split second and a second."

Omitting the citation of cases, the court said:

> A non-expert witness may give an opinion concerning speed where he relates the facts on which such opinion is based. Where the witnesses' qualifications are weak, the testimony is admissible, although the weight and credit to be accorded it is for the jury.
>
> * * * * * *
>
> [T]estimony was allowed by a witness who had only gotten a "glimpse" of the vehicle, the court holding: "The period of observation upon which the testimony of a witness as to speed is based is a factor

for the jury to consider in weighing the testimony of the witness and does not affect its admissibility."

From these cases we conclude that the testimony of the witnesses was admissible, leaving for the jury to determine whether their period of observation was sufficient and whether they had the requisite experience. [223 S.E.2d at 5].

Opinion testimony as to speeds, time, and distance is admissible even though it may be very unreliable. *Harris v. Collins*, 145 Ga.App. 827, 245 S.E.2d 13 (1978); *Fuels, Inc. v. Rutland*, 123 Ga.App. 23, 179 S.E.2d 290 (1970).

For cases which support the *Gibbs* rule, *see Hicks v. Bacon*, 26 Mich.App. 487, 182 N.W.2d 620 (1970); *Cederburg v. Carter*, 448 P.2d 608 (Wyo.1968); *Raines v. Boltes*, 258 Md. 325, 265 A.2d 741 (1970); *Godwin v. Jerkins*, 282 Ala. 11, 208 So.2d 210 (1968); *Davis v. Imes*, 13 N.C.App. 521, 186 S.E.2d 641 (1972); *Murchison v. Powell*, 269 N.C. 656, 153 S.E.2d 352 (1967); *Emanuel v. Clewis*, 272 N.C. 505, 158 S.E.2d 587 (1968); *Potts v. Brown*, 452 P.2d 975 (Wyo.1969). *Contra: Carpino v. Kuehnle*, 54 F.R.D. 28 (D.Pa.1971), aff'd, 3 Cir., 474 F.2d 1339; *City of Milwaukee v. Berry*, 44 Wis.2d 321, 171 N.W.2d 305 (1969).

The trial court erred in denying admission of the estimate of speed of the lay witness.

599 P.2d 1086

STATE of New Mexico, Plaintiff-Appellee,

v.

Dennis B. VIALPANDO, Defendant-Appellant.

No. 3763.

Court of Appeals of New Mexico.

June 28, 1979.

Eileen R. Mandel, Lauer & Mandel, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Michael A. Kauffman, Ralph W. Muxlow, II, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WALTERS, Judge.

Defendant was convicted of aggravated burglary, robbery, aggravated battery, and criminal sexual penetration in the second degree. He raises eight issues on appeal. We discuss them in order:

1. *Denial of Pre-trial Motion to Suppress Line-up Identification*

Defendant maintains that the line-up of six similarly-dressed persons, four months after the incidents charged, was impermissibly suggestive and conducive to misidentification. Five of the participants were within one or two inches of 65–66 inches tall, and the other was noticeably taller; two had facial hair; all were in their early twenties or late teens. The victim, a Catholic nun, made two separate observations of all the men in the line-up, heard them speak, and she then asked to look at two of them, one of whom was defendant, the third time. She identified defendant among the six, and again after seeing only two the third time. He was the shortest of the group and wore a mustache. She recognized him because of his "mean expression . . . black mustache . . . vicious eyes," and his voice sounded the same as she remembered, the "voice that sounded like the man" who had spoken to her at the time of the assault. She was positive in her identification.

The assertions of suggestiveness and attendant misidentification are said to rest upon (1) the fact of the discrepancy in height, defendant being the shortest person in the line-up; (2) the fact that defendant and only one other person had facial hair and the assailant had been described as having a moustache; (3) the lapse of time from the date of the incident to the date of the line-up; (4) the fact that the Sister believed the assailant would be in the line-up; and (5) the fact that it was the only identification that the Sister ever made of the defendant as her assailant. The trial court, in denying the motion to suppress, commented that defendant and two others appeared to be the same height. The victim observed that some of the men in the line-up had very obviously just shaved their mustaches, and she felt that inclusion of one mustached participant might have been an attempt to trick or confuse her. She identified defendant, however, because of his height, his voice, a "kind of Spanish-English accent," the black mustache, the "mean, vengeful" expression, and his "vicious" eyes. There was no uncertainty in her selection of defendant from the group. These specific details of identification dispose of all but the fourth factor enumerated above. However, the victim was not at any time during her identification of defendant told that anyone in the line-up was suspect, nor were any suggestions whatever made to her that she should identify defendant or anyone else. Cf., *State v. Torres*, 81 N.M. 521, 469 P.2d 166 (Ct.App. 1970). Although she felt that the line-up participants probably were "being held" for some reason and that one of them might be the person who attacked her, she was not assisted in or swayed from her positive identification of defendant. It is for the trier of fact to determine the weight and sufficiency of the evidence, including all reasonable inferences. *State v. Keyonnie*, 91 N.M. 146, 571 P.2d 413 (1977). Considering the totality of the circumstances surrounding the line-up, it was neither impermissibly suggestive nor conducive to misidentification. *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *State v. Lara*, 92 N.M. 274, 587 P.2d 52 (Ct.App. 1978).

2. *Denial of Second Motion to Suppress Line-up Identification*

During the trial, defense counsel again moved to suppress the line-up identification, contending two frailties in its validity: (1) there was an indication that defendant's

mental capacity was below normal and (2) he was not represented by counsel at the line-up. He does not argue the first contention in this appeal.

There was no in-court identification in this case, the victim being an 80 year-old woman with a terminal illness who was out of the state at the time of trial. In her video-taped deposition, which was admitted as evidence, she described her assailant and how she identified defendant at the time of the line-up. No claim is made that the person referred to in the victim's deposition was not the same person tried in this case. But since this was an out-of-court identification, defendant urges that the absence of counsel at the line-up identification violated his Sixth Amendment right to counsel.

In denying the second motion to suppress, the trial court did not expressly rule that it was untimely, but we take notice of Rule 18(c), N.M.R.Crim.P., requiring that a motion to suppress be filed within twenty days after entry of a plea unless waived by the court for good cause. The first motion to suppress was timely filed, but it made no claim of unconstitutional deprivation of counsel. The second motion, during trial, was made almost nine months later. The motion properly made could have been denied on the basis of untimeliness alone, no waiver of the time requirement appearing in the record.

Nevertheless, we discuss the requirement of counsel at line-up procedures under the facts of this case, assuming the motion was denied on the merits rather than as a violation of procedural rules. Vialpando was in custody awaiting sentence on charges to which he had pled guilty at the time of the line-up, and he was represented by an attorney on the other unrelated matters. He had not been charged with any of the crimes of which he was convicted in this case, but at the time of the line-up he was a prime suspect.

United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) is the beacon case regarding the requirement of legal representative for line-up participants, and it was concerned with a line-up, of which the accused was a member, occurring after his indictment. It was there held that because conducting a line-up without notice to and in the absence of defendant's counsel denies the accused his Sixth and Fourteenth Amendment rights to counsel at a "critical stage" of the prosecution, in-court identification by witnesses who attended the line-up must be excluded. The Court was asked in *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), to extend the exclusionary rule of *Wade* to those line-ups conducted *before* indictment or filing of charges. It declined to do so, holding that when the

> government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified [,i]t is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guaranties of the Sixth Amendment are applicable.

We cannot agree with appellant's assertion that "several pre-*Kirby* New Mexico cases have indicated that a suspect is entitled to counsel in pre-indictment line-ups." The cases cited to us, *State v. Samora*, 83 N.M. 222, 490 P.2d 480 (Ct.App.1971), and *State v. Carrothers*, 79 N.M. 347, 443 P.2d 517 (Ct.App.1968), dealt, respectively, with an inadvertent out-of-court identification of defendant *after* arrest for the charge on which he was tried, and with the admissibility of an in-court identification questionably free of any taint of suggestions made during an out-of-court identification *after* defendant had been charged *and* an attorney appointed to represent him.

We note other cases decided by this court, e. g., *State v. Clark*, 80 N.M. 91, 451 P.2d 995 (Ct.App.1969) and *State v. McCarty*, 82 N.M. 515, 484 P.2d 357 (Ct.App.1971), concerning out-of-court identification without counsel present, but in both of those cases the concern was with the effect of possible taint of in-court identification by reason of

the pre-trial confrontations in the absence of attorneys for the defendants. In neither case was it the mere fact that counsel was not present, nor merely that both defendants had been arrested at the times the out-of-court identifications were made, that occupied the court's attention. The question of the *independence* of the in-trial identifications, free of any influence from the out-of-court identifications, was the sole concern on the issue of trial identification in both *Clark* and *McCarty*.

We do not have an in-court identification here. Thus, our inquiry goes strictly to the fairness of the pre-indictment line-up at a time when defendant was not represented by an attorney for these crimes. Although defendant argues that he was not asked if he wished representation at the line-up, we are not referred to any evidence in support of that argument. Perhaps, if defendant's counsel on the charge for which he was awaiting sentence had been called, he would have attended the line-up; perhaps not. It is clear that he was not defendant's attorney on these charges; defendant had not been charged.

In the exercise of judgment on the side of caution rather than precise legality, and with the benefit of hindsight attending the inevitability of an appeal on every possible ground, district attorneys might, in the future, carefully arrange for notification to all possible counsel before conducting line-ups or out-of-court identification sessions. However, the failure to do so in this case is not unconstitutional because defendant was neither charged nor represented by counsel in this matter at the time the line-up was held.

Returning, then, to the question of the fairness of the line-up, this has already been answered in our discussion of appellant's first point. The trial court determined, in "the totality of the circumstances" and from the clear and unequivocal deposition testimony of the victim, that the line-up was "fundamentally fair and not impermissibly suggestive." This is the test stated in *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), and adhered to in *State v. McCarty, supra.* The trial court did not err in refusing to grant defendant's second motion to suppress.

3. *Use of the Victim's Videotaped Deposition*

The issue here raised is whether the State carried its burden under Rule of Evidence 804(a)(4) and (b)(1) to show the unavailability of its principal witness. Rule 804 defines unavailability of a witness to include situations wherein the declarant "is unable to be present or to testify at the hearing because of . . . then existing physical . . . illness or infirmity," and permits the use of deposition testimony in such situations of unavailability if the deposition was "taken . . . in the course of the same or another proceeding, [and] if the party against whom the testimony is . . . offered . . . had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination."

Rule 29(n) of N.M.R.Crim.P. specifically provides for the use of depositions in criminal proceedings, as follows:

> At the trial, or at any hearing, any part or all of a deposition, 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.

Defendant argues that the sworn letter of the victim's doctor that he had advised his patient, who was under his care and treatment for arteriosclerotic heart disease, osteoarthritis, phlebitis, and chronic lymphocytic leukemia, that she was not well enough to travel from Michigan to New Mexico for any further trial proceedings; a letter from the victim herself to the same effect and that the long trip, at her advanced age, would be dangerous to her health; a letter from another doctor also advising against travelling to the trial; and the prosecutor's statements that he had talked with the victim two days earlier regarding her condition and about a subpoena that had been sent to her (not in accordance with the Uniform Act to Secure Attendance of Witnesses from Without State in Criminal Proceedings, §§ 31–8–1 through 31–8–6, N.M.S.A.1978), were insufficient to satisfy Rule 804 so as to call Rule 29(n) into operation.

It is true that a few New Mexico cases have required strict compliance with all reasonable means to procure attendance by process, including use of the Uniform Act, before a witness may be declared unavailable under *Rule 804(a)(5),* or his deposition admitted under *Rule 29(n)(4). State v. Waits,* 92 N.M. 275, 587 P.2d 53 (Ct.App. 1978); *Madrid v. Scholes,* 89 N.M. 15, 546 P.2d 863 (Ct.App.1976); *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). But we are here dealing with unavailability by reason of subsection (a)(4) of Rule 804, and use of deposition testimony under (n)(2) of Rule 29. It is clear from a common-sense reading that all of the subsections of both rules are disjunctive; if *any* of the reasons exist for excusing attendance or receiving deposition testimony, the court may apply the rules and proceed with the trial in accordance with the provisions of those rules. In none of the cases above cited was any reason given for non-attendance of the witness other than that he was out-of-state, or that a New Mexico subpoena was ineffective to procure attendance of an out-of-state witness. There was no suggestion that any of the other situations of unavailability—death, illness, lack of memory, refusal to testify, exemption by order of the court—or reasons for use of deposition testimony—death, illness, impeachment—were present. Those cases dealt only with the fact that the witnesses purportedly were out of the jurisdiction and due diligence had not been exercised to procure attendance at trial by means of process or other lawful means.

We do not have that situation here. Two days after the indictment against defendant was filed in district court, an order for the Sister's deposition was entered based upon the State's written representations that she was 79 years old at that time, terminally ill, and possibly unable to attend the trial. She was cross-examined regarding her health at the deposition, eight months before trial, and related that she was retired, and although she felt well, that she had a heart condition, had been hospitalized with blood clots, and was suffering with leukemia. At the time of trial she was eighty years old. According to her doctor's "medical judgment," she was not well enough to travel or participate in the trial.

Despite the State's enumeration of three grounds for admission of the deposition, unavailability on any ground is sufficient. The principal witness was not unavailable because her attendance had not been diligently pursued through process; she was unavailable because she was ill and infirm. Rule 804(a)(4); Rule 29(n)(2). None of the cases from other jurisdictions to which defendant refers us contained facts of debility even remotely approaching the situation in this case.

It was not error for the trial judge, who considered the writings "clothed with the indicia of reliability" Rule 804(b)(6), and who took "the totality of the circumstances of this case into consideration," including the witness's "advanced age and the condition of her health," to admit her deposition at trial.

4. *Denial of Motion for Mistrial*

During the course of the trial a correctional officer was called to testify regarding

his observation of a Dominican cross around the neck of defendant subsequent to the crimes charged against him. The Sister's Dominican cross was missing after she was attacked on May 23, 1977. The assistant district attorney asked a leading question, objection to which was sustained, and another was asked. The defense again objected, and the following ensued:

THE COURT: Mr. Campos, you have asked the same question to which the Court sustained the objection. Mr. Ortega, have you ever seen Dennis Vialpando?

A. Yes, sir.

THE COURT: When?

A. The first time was when he was in the State Penitentiary approximately in 1975. He was paroled from there.

THE COURT: Have you seen him at any time since May 23, 1977.

A. Yes, sir at Santa Fe County Jail.

THE COURT: And when was that?

A. That was approximately May 28.

THE COURT: What, if anything, did he have in his possession—

MR. LAUER: May we approach the bench? (Discussion off the record)

Counsel moved for a mistrial outside the presence of the jury, urging that the inference of defendant's prior criminal record arising from the witness's testimony was impermissibly prejudicial to defendant. The court examined defendant's record and discovered that he had been held at the penitentiary in July 1975 for safekeeping, and then said:

THE COURT: I'm going to deny the motion for mistrial. I am willing to give the jury any kind of an admonition that you might desire. I'm willing to advise the jury to completely disregard any references made by this witness to Mr. Vialpando at any time prior to May 23, 1975 [sic]. I'm willing to go further and to advise the jury that Mr. Vialpando was not, in fact, an inmate at the penitentiary in 1975. What would you desire in the way of—I'm willing to refrain from giving any admonition if you desire I not give an admonition. The choice is yours . . .

We recognize the prevailing rule prohibiting introduction of evidence indicating a defendant's prior criminal record, unless presented to rebut character evidence offered by the accused. *State v. Rowell*, 77 N.M. 124, 419 P.2d 966 (1966); N.M.R.Evid. 404(b), N.M.S.A.1978. In *Rowell* and the cases cited to us, however, the prejudicial evidence either was deliberately induced through questioning by the prosecutor who intended that the objectionable response be made by the witness, or was a questionably prejudicial answer to an inquiry from the defense. We note here that the witness's response was totally unexpected by the court and the attorneys; that although an objection was not made immediately, counsel did move for a mistrial and this could be deemed a timely objection. *State v. Baca*, 89 N.M. 204, 549 P.2d 282 (1976).

Nevertheless, the court offered "any kind of admonition" the defense wished and even though the offer was refused, because the objectionable portion of the response was totally unsolicited, unexpected, and was susceptible to cure by any or all of the admonitions proposed by the court, we cannot say that the court did not weigh the danger of unfair prejudice against the probative value of the remainder of the witness's identification evidence, and reach a correct ruling. We are particularly inclined to this view because of the language of our Supreme Court in *Baca, supra*, where, in considering a similarly surprising remark by a State's witness, it declared a distinction between "those comments which can be directly attributed to the prosecutor and those comments incorporated within the testimony of a witness" in determining whether a mistrial or reversal of a conviction must result. It declined to hold a witness's unsolicited, improper comment in that case a mandatory ground for mistrial.

We further hesitate to find error in the trial court's denial of a mistrial because of two additional considerations: First, New

Mexico has frequently held that a prompt admonition from the court to the jury to disregard and not consider inadmissible evidence sufficiently cures any prejudicial effect which otherwise might result. *State v. Pace*, 80 N.M. 364, 456 P.2d 197 (1969); *State v. Ferguson*, 77 N.M. 441, 423 P.2d 872 (1967); and this court has ruled that an offer to admonish, even though declined, is sufficient to support denial of a motion for mistrial. *State v. Carlton*, 83 N.M. 644, 495 P.2d 1091 (Ct.App.1972). Upon these precedents, the circumstances of this case, and the reason for no admonition being given, we cannot rule that a mistrial was mandated. The trial court would be placed in the intolerable position of never being able to cure unwanted and spontaneous errors in testimony if we held that defendant could control the trial's progress by refusing to permit a possibly-curative admonition and yet rely on its absence to assert error.

Secondly, we have recently addressed the issue of deliberately calling a prior criminal record to the attention of the jury, contrary to Rule 404(b), N.M.R.Evid., *State v. Gutierrez,* State Bar of New Mexico Bar Bull. and Adv.Ops., Vol. 18, p. 229 (April 12, 1979), and we there said that receipt of inadmissible evidence is not reversible error when other evidence of defendant's guilt is so persuasive that under no reasonable probability could the improper evidence have induced the jury's verdict. The converse of that principle is the necessity of finding that there was no reasonable probability of a guilty verdict without the inadmissible evidence. The other evidence in this case meets the *Gutierrez* test. Defendant was positively identified by the victim of his crimes; he was seen on two occasions wearing the type of rare and unusual religious cross stolen from the victim at the time the crimes were committed; the victim's unequivocal identification of defendant as her assailant was corroborated by three witnesses who were present at the time the identification took place. We think the other evidence of defendant's guilt was amply strong and convincing to overcome any prejudice he may have suffered from the unsolicited testimony of the officer.

Therefore, considering all of the factors relevant to determining this point on appeal, especially mindful of the lack of any improper motive preceding the witness's unprompted utterance and the trial court's offer to repair any harm done, and the compelling evidence of defendant's guilt, we hold the denial of the motion for mistrial free from error in this case.

5. *Admission of Police Officer's Prior Written Statement*

Defense counsel used two prior written statements of the police officer who testified at trial that he saw defendant in possession of a Dominican cross on two separate occasions. The witness was cross-examined on the statements to illustrate discrepancies in his remembrance of the dates of those observations at the times of giving the statement and testifying at trial; and to stress that he had been shown two crosses by the officer to whom he gave the prior statements.

Rule 801(d)(1)(B) removes the hearsay objectionability from witness's prior consistent "statement" if it is offered "to rebut an express or implied charge against him of recent fabrication *or* improper influence *or* motive." If the prior statement is also inconsistent with the witness's trial testimony, that too is a non-hearsay "written assertion." Rule 801(d)(1)(A).

The defense agrees it used the statements, defendant's Exhibits B and C, for purposes of impeachment. Counsel argued to the trial court that the statements were inadmissible because they were hearsay. On appeal, we are asked to declare the court's admission of the entire statements, offered by the State after the witness was cross-examined on them, reversible error because the consistent portions were not excised before they were offered and received as evidence.

The hearsay objection below was insufficient. The rule expressly excepts a document of this sort from the definition of

hearsay. In addition, the witness was questioned, with respect to Exhibit B, regarding the date contained in the first of the statement's two paragraphs, and his attention was then directed to the totality of the second paragraph. The witness was next asked to read Exhibit C and respond regarding the date he had first seen defendant wearing the cross. He was then asked to read the second page of the Exhibit, and he testified with respect to the crosses he had been shown at the time the statement was recorded. It was necessary that he read the entire first and second pages to answer the questions put to him by defense counsel. If the statements reinforced the witness's testimony at trial, that was the risk appellant took in attempting to use them for impeachment or to imply that the witness's testimony was not worthy of belief by reason of "inconsistent[ency] . . . recent fabrication . . . improper influence or motive." Rule 801(d)(1).

Our Rule 801 is identical to the federal rule. We take notice of the federal Advisory Committee's note discussing this rule, and particularly subdivision (d)(1)(B) relating to prior consistent statements, where it is said:

> Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

The commentary quoted is a natural concomitant of Evidence Rule 106.

We look further to cases which have discussed admission of prior consistent written statements. It is apparent that they consider the "statement" referred to in Rule 801 as a whole document rather than sentences or portions thereof. See *State v. Lovato,* 91 N.M. 712, 580 P.2d 138 (Ct.App. 1978); *State v. Bell,* 90 N.M. 134, 560 P.2d 925 (1977); *State v. Foster,* 87 N.M. 155, 530 P.2d 949 (Ct.App.1974). Indeed, in *Sundberg v. Hurley,* 89 N.M. 511, 554 P.2d 673 (Ct.App.1976), this court approved the ruling below which denied opposing counsel the right to question a witness regarding a prior written statement, or admit any portion of it into evidence, unless the entire statement were offered.

In any event, both because the witness was referred to the entirety of both documents in defendant's attempt to impeach, and because no proper objection was made to admission of the exhibits, we will not disturb the trial court's ruling regarding admissibility.

6. *Granting the State's Motion to Amend Indictment*

Before the jury was instructed, the State moved to amend Count IV of the indictment, which had charged upon its return by the grand jury that defendant had caused the victim

> to engage in sexual intercourse, and did so by use of force and coercion which resulted in personal injury to Sister Malachi Laithwaite; and did so in the commission of other felonies, to wit: AGGRAVATED BURGLARY, AGGRAVATED BATTERY AND ROBBERY * * *.

to read:

> . . . *or* did so in the commission of . . . AGGRAVATED BURGLARY, AGGRAVATED BATTERY, *OR* ROBBERY.

Defendant claims error in the court's allowance, although he acknowledges that the last "or" was an amendment allowed by the court two weeks before trial.

Rules 7(a), R.Crim.P., permits amendment of an indictment "at any time prior to verdict" to correct any defect, error, omission or repugnancy if thereby no additional or different offense be charged, and if defendant's substantial rights are not prejudiced. Rule 7(c) allows amendment of any variance to conform to the evidence "at any time." The State requested the amendment to conform to the evidence and so that the charge likewise would conform to

the criminal statute, § 30–9–11, N.M.S.A. 1978, under which defendant was charged. Defendant objected below only on the ground of timeliness, not on the basis of "fundamental fairness" argued here.

Defendant, prior to trial, sought and was granted disclosure of all exculpatory information; names, addresses and statements of expected State witnesses; and all of defendant's statements, grand jury testimony, prior mental, physical or criminal records, papers or books, intended to be used at trial. Mental and polygraph examinations of defendant were allowed; depositions were taken; pretrial motions were heard. There was no surprise to defendant as a result of changing the conjunctive to the disjunctive in the indictment, and he was on notice from the beginning that he must defend against each element originally alleged. Compare *State v. Wilburn,* 90 N.M. 436, 564 P.2d 1000 (Ct.App.1977); *see State v. Dunlap,* 90 N.M. 732, 568 P.2d 258 (Ct. App.1977). Defendant has not "affirmatively shown that the defendant was in fact prejudiced . . . in his defense upon the merits." *State v. Lucero,* 79 N.M. 131, 133, 440 P.2d 806, 808 (Ct.App.1968).

Moreover, there was substantial evidence of sexual intercourse caused by force and coercion used upon the Sister, resulting in injuries sufficient to require her hospitalization for approximately ten days immediately afterward; there was also substantial evidence to support the guilty verdicts on Counts I, II, and III. Defendant can point to no real prejudice to the defendant arising from the amendment. He relies solely on the abstruse proposition that *if* the State had been unable to prove both of the elements originally charged by reason of its use of "and"—that is, intercourse by force and coercion and resulting in personal injury to the victim, *and* commission of another felony—defendant could not have been convicted on Count IV. But it would appear from the truncated record brought up on appeal that the defense, which consisted wholly of cross-examination of the State's witnesses, was directed against all of the crimes and elements charged in all counts; and there is no substantial evidence whatever that all of the crimes charged, and all of the elements of each crime, were not proved. Consequently, whether the indictment was amended or not, defendant suffered no detriment. The verdicts and the evidence support the conviction of the crime charged in Count IV on all elements alleged.

Because the objection below was insufficient to preserve any error pressed on appeal, and because, in any event, defendant was not prejudiced, we find no abuse in the trial court's allowance of the amendment.

7. *Refusal to Permit the Jury to Review the Victim's Deposition*

The Sister's videotaped deposition was received as evidence at trial. During their deliberations the jury asked to have the deposition; and we assume (as did appellant) that the jury was referring to the typewritten transcription of the victim's videotaped testimony. The court denied the request, stating into the record that "[a]ll of the exhibits that have been admitted into evidence have been sent into the jury room for the jury." Error is asserted in the judge's ruling, defendant contending that Rule 42(c), N.M.R.Crim.P., mandates submission to the jury of any exhibit received in evidence upon the jury's request to review the exhibit during its deliberation.

Nothing in the record indicates that the typed transcription was admitted as an exhibit; thus, defendant mistakenly relies on Rule 42(c). An appellant must provide a sufficient record to review matters asserted on appeal. *State v. Vallejos,* 86 N.M. 39, 519 P.2d 135 (Ct.App.1974). Rule 43(a) provides for the juror's having portions of any witness's testimony, read to them in the court's discretion, after they begin their deliberations, but apparently the jury did not pursue that course and the record doesn't disclose that it was suggested to the court by counsel. *State v. Fried,* 92 N.M. 202, 585 P.2d 647 (Ct.App.1978), cited as authority by appellant, does not apply because there was no doubt in that case that the tape requested by the jury to be heard had been

received as an exhibit and, further, only those portions of the tape relating to the matter requested to be reheard by the jury were played. The facts there and here are not similar.

This point is without merit, and there was no error in the court's refusal to allow the typewritten version of Sister's testimony into the jury room.

8. *Refusal to Request Pre-sentence Report*

The trial court declined, despite defense counsel's request, to order a pre-sentence report on defendant before imposing sentence. Appellant acknowledges that Rule 56(a), N.M.R.Crim.P., authorizing the court to obtain such a report, rests within the sound discretion of the court. He insists, however, that discretion was abused because (1) the Model Penal Code, the National Council on Crime and Delinquency, and the ABA recommend that the court order a presentence report any time a felony conviction obtains or incarceration for more than one year is possible; (2) defense counsel expressly requested the report and urged the question of defendant's mental condition as a reason for its necessity; (3) it was unfair to defendant to expect his counsel to proceed immediately after "a lengthy trial" to present to the court an argument or evidence concerning sentencing, and to deny defendant the hearing before sentencing that he automatically is afforded when a presentence report is ordered, and (4) the presentence report received by the court upon an earlier conviction of defendant for property crimes is insufficient reason to deny the request for presentence report after conviction of crimes against one's person "where a substantial period of incarceration (14 months) had elapsed between commission of the offenses in this case and the time of convictions therefore [and a] presentence report would have informed the court as to the effect, if any, of this imprisonment upon defendant."

As a general rule, and for first offenders, the recommendations of the organizations cited in defendant's reason (1) above are sound, but they are, nevertheless, merely recommendations. We are governed by Rule 56, N.M.R.Crim.P., N.M.S.A.1978.

Reason (3) argued by defendant is patently vacuous. The trial court disposed of Reasons (2) and (4) by openly and distinctly expressing his reasons for refusing to order the presentence report:

> THE COURT: I see no reason for any delay in making final disposition in this case. I have become aware of the facts of the case, the circumstances surrounding the offenses, throughout a seven-day trial. I am aware of Mr. Vialpando's background, I being the Judge that sentenced him to the penitentiary before I had a presentence report relating to Mr. Vialpando.
>
> . . . . .
>
> There is contained in the record proper in this case a rather lengthy report by Dr. Joel Hochman, a psychiatrist, and also by Dr. Trost, a psychologist. The question of the defendant's capacity to stand trial was gone into. It was resolved by the Court in advance of the trial. No issue as to his legal responsibility, his mental capacity to be legally responsible was raised in this case and the Court was aware at the time of sentencing upon the charge that he is now serving time on, about prior facets of his mental condition and if some other psychiatrist may have a different opinion, I see no reason for any delay in making final disposition in this case, based upon the statements made by you.
>
> . . . . .
>
> I feel that I am in just as good a position today to make final disposition as I will be at any time in the future.

Obtaining a presentence report is not a matter of right. *State v. Follis,* 81 N.M. 690, 692, 472 P.2d 655 (Ct.App.1970). Since ordering presentence report is not mandatory, it is axiomatic that the trial judge is endowed with the authority to impose sentence immediately after trial, absent an abuse of discretion in so doing. *State v.*

Mireles, 84 N.M. 146, 150, 500 P.2d 431 (Ct.App.1972).

As the discussion above reveals, there was no abuse of discretion—indeed, the trial court recited cogent, compelling reasons for declining to seek a presentence investigation before entering sentence against the defendant.

Finding no error in the matters presented in this appeal, the guilty verdicts and sentence imposed are affirmed.

IT IS SO ORDERED.

HERNANDEZ and ANDREWS, JJ., concur.

599 P.2d 1098

BASKIN-ROBBINS ICE CREAM COMPANY, Plaintiff-Appellant,

v.

REVENUE DIVISION, DEPARTMENT OF TAXATION AND REVENUE of the State of New Mexico, Defendant-Appellee.

No. 3683.

Court of Appeals of New Mexico.

Aug. 9, 1979.

Sandra Jo Craig, Schlenker, Craig & Lebeck, Albuquerque, for plaintiff-appellant.

Jeff Bingaman, Atty. Gen., Sarah Bennett, Sp. Asst. Atty. Gen., Santa Fe, for defendant-appellee.

OPINION

SUTIN, Judge.

Taxpayer appeals a Decision and Order of the Director, Revenue Division, which imposed payment of gross receipts taxes based upon income derived from an Area Franchise Agreement entered into with Creamland Dairies, Inc., a New Mexico based corporation engaged in the manufacture and processing of dairy products in New Mexico. We affirm.

In his Decision and Order, the Director states that the issue is whether Taxpayer is subject to the New Mexico gross receipts tax on royalties received by Taxpayer based on Creamland's sales of Taxpayer's brand of ice cream products in New Mexico.

The Decision and Order is lengthy and detailed and is supported by judicial authority. It relates to two subjects: (1) that Taxpayer is engaged in business in New Mexico by leasing its property in New Mexico, and (2) that Taxpayer is not engaged in interstate commerce.

In arriving at its Decision, the Director found that Taxpayer is a Delaware Corporation with headquarters in California. It owns distinctive trademarks, trade names, emblems, merchandizing designs and services, recipes and formulas. It has no employees nor any offices located in New Mexico. It does not own or lease any real property nor does it manufacture or sell any products in New Mexico.

Under the 1966 franchise agreement executed in California, taxpayer furnished its assorted items to Creamland to use in the manufacture and sale of ice cream products to "Baskin-Robbins 31 Ice Cream" retail stores in New Mexico, stores that are established by Creamland through a "B–R Retailers Franchise Agreement." This Agreement continued to the time of trial.

Taxpayer's trademarks are "31" and "Baskin-Robbins 31 Ice Cream." (The parties agreed that the secret recipe book and the trademarks were the basis of the agreement; that these were properties used by Creamland to manufacture Baskin-Robbins Ice Cream according to the recipes). Taxpayer's most valuable assets are its trade name, trademark and related intangibles. These properties are used in New Mexico. The secret formulas and techniques are utilized in New Mexico. Taxpayer's method of business exploits the New Mexico market for Taxpayer's benefit.

Creamland pays Taxpayer a royalty in California based upon the ice cream products sold by Creamland to its New Mexico retail stores.

The remainder of the "findings" will be discussed under the two subjects mentioned above.

A. *Taxpayer is engaged in business by leasing its property to Creamland in New Mexico.*

The Director further found that Taxpayer had "property located in New Mexico; the formula or recipe book and more importantly, *a bundle of intangible rights* being employed in New Mexico"; that the grant of rights to Creamland of some part of Taxpayer's property rights in its trademarks and secret formula "is the *leasing of property* which is employed in New Mexico regularly and systematically for business purposes"; that the legislature intended to impose a tax on receipts from *leasing* such property employed in New Mexico because of the definition of "property" in § 7–9–3(I), N.M.S.A. 1978, and Taxpayer is "engaging in business" in New Mexico.

The Director held that Creamland was engaged in business because its gross receipts were derived from leasing property in New Mexico.

To determine the validity of the Director's ruling we must seek the answer in the definitional aspects of the Gross Receipts Tax Act.

Section 7–9–3(E) reads:

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

"The definition of 'business' as stated in the statute does not say 'any *act* engaged in for gain,' but rather 'any *activity*.' Webster's New International Dictionary lists, as synonyms of *activity,* the words *occupation* and *business.* Accordingly, no definitive distinction can be drawn between the definition of *business* as used in the statute, and that of its common and accepted meaning." [Emphasis theirs.] *Novak v. Redwing,* 89 Ga.App. 755, 81 S.E.2d 222, 224 (1954). *See, State v. Spink Hutterian Brethren,* 77 S.D. 215, 90 N.W.2d 365, 379 (1958). ("The words 'occupation' and 'business' are synonyms of 'activity.' ")

We find that Taxpayer was "engaging in business" as defined by Section 7–9–3(E). It was doing what it was organized and authorized to do. *Besser Company v. Bureau of Revenue,* 74 N.M. 377, 394 P.2d 141 (1964).

The remaining issue is whether taxpayer was "leasing property employed in New Mexico" as stated in the definition of "gross receipts." Section 7–9–3(F).

Section 7–9–3(J) reads:

> "leasing" means *any arrangement* whereby, for a consideration, *property* is employed for or by any person other than the owner of the property. [Emphasis added.]

Section 7–9–3(I) reads:

> "property" means . . . *licenses, franchises* . . . *trademarks* . . . [Emphasis added.]

Taxpayer was "engaging in business" and owned "property" in New Mexico used by Creamland—the franchise and trademarks. Is the Area Franchise Agreement "any arrangement" within the definition of "leasing"? The term "any arrangement" is broad and expansive.

H & R Block, Inc. v. Lovelace, 208 Kan. 538, 493 P.2d 205, 211–12 (1972) defines a franchise as follows:

> . . . In its simplest terms a franchise is a license from the owner of a trademark or trade name permitting another to sell a product or service under that name or mark. More broadly stated, the franchise has evolved into an elaborate agreement under which the franchisee undertakes to conduct a business or sell a product or service in accordance with methods and procedures prescribed by the franchisor and the franchisor undertakes to assist the franchisee through advertising, promotion and other advisory services. The franchise may encompass an exclusive right to sell the product in a specified territory (see 15 Business Organizations, Glickman, Franchising, § 2.01).

By translating the definition of "leasing" into the facts of this case, "leasing" means an Area Franchise Agreement (any arrangement) whereby for payment of royalties (a consideration) a franchise and trademark (property) are employed by Creamland (any person) other than Taxpayer (owner) of the franchise and trademarks (property).

When definitions of "engaging in business," "leasing" and "property" are applied to Taxpayer, Taxpayer cannot escape the fact that it is leasing property in New Mexico for which it receives royalties. The royalties are "gross receipts," the money received by Taxpayer from leasing property employed in New Mexico. Section 7–9–3(F).

In so construing the statute, we follow the rule announced by Justice Moise in *Besser Company, supra,* that a taxpayer "should be given a fair, unbiased and reasonable construction, without favor either to the taxpayer or the state, to the end that the legislative intent is effectuated and the public interests to be subserved thereby furthered." [74 N.M. at 381, 394 P.2d at 145.]

Taxpayer is "engaging in business" by "leasing" property employed in New Mexico. "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." Section 7–9–4(A).

Taxpayer is subject to the Gross Receipts Tax Act.

B. *Taxpayer is not engaged in interstate commerce.*

The Director determined that "The fact that the franchise and royalty payments were received in California or that the franchise was executed by the taxpayer in California does not per se, establish that the taxpayer's receipts were from interstate commerce"; that to the extent that the Taxpayer's property is used solely in New Mexico, the taxpayer's activity is localized in New Mexico; that this is not the classic case involving the transportation of property or service from one state to another; that if ever the Taxpayer's activities involved interstate commerce, that commerce ceased when Creamland started performance in New Mexico pursuant to the franchise agreement.

"It is Taxpayer's position that its activities (vis a vis the Agreement) are clearly interstate commerce. To the extent the activities which the Director relies on to support this Assessment are *intra* state, they are activities of Creamland . . . *not* those of Taxpayer. *It is Taxpayer's activities which must be examined to sustain the Assessment of Gross Receipts Tax.*" [Emphasis added.] [Br. p. 16.] "Clearly," says Taxpayer, "the agreement and the Lanham Act requires services from Taxpayer, many of which are performed in California." We disagree.

What are Taxpayer's "activities" or "services" that place it in the stream of commerce? (1) New flavors are developed in California; (2) forms for leases and agreements supplied by Taxpayer are developed in California; (3) trademarks are the symbol of the good will of Taxpayer's business and its continued value depends upon the continuing use of the trademarks in its business with its continuing effort to regulate the use of the trademarks. When we bundle up these "activities" or "services," we find no relationship to the concept of interstate commerce. The only contact Taxpayer has with New Mexico is its Area Franchise Agreement.

When Taxpayer's recipes, recipe book and trademarks come to rest in New Mexico, their use becomes localized and have left the stream of interstate commerce. *Besser Company, supra.* The franchise agreement is not within the protection of the Commerce Clause unless its performance is within its protection. *Besser Company, supra.* Taxpayer does not perform the agreement. It is completely performed in New Mexico by Creamland, so that the performance of the contract is not within the protection of the Commerce Clause.

The Lanham Act (Trademarks) is 15 U.S.C. § 1051, et seq. In § 1127, which

contains "Definition of terms; construction; intent," we find the following:

> For the purposes of this Act a mark shall be deemed to be used in commerce (a) on goods when it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto *and the goods are sold or transported in commerce* and (b) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State or in this and a foreign country *and the person rendering the services is engaged in commerce in connection therewith.* [Emphasis added.]

Taxpayer neither sells nor transports goods that are marked nor is it engaged in commerce in connection with the use or display of the mark in the sale or advertising of services. The use or display of the trademarks were franchised to Creamland and used by Creamland in New Mexico in the sale and advertising of its products. None of the "activities" of the franchise agreement are serviced by mail, telephone, correspondence or by any employees of taxpayer. We find no intercourse or traffic between California and New Mexico. Mere contracts are not commerce at all, neither intrastate nor interstate. *Western Live Stock v. Bureau of Revenue,* 41 N.M. 141, 65 P.2d 863 (1937), aff'd 303 U.S. 240, 58 S.Ct. 546, 82 L.Ed. 823, 115 A.L.R. 944 (1938).

Taxpayer does claim that the Director cannot tax services performed outside the State. *Advance Schools, Inc. v. Bureau of Revenue,* 89 N.M. 79, 547 P.2d 562 (1976). We agree. ASI was an Illinois based correspondence school that sold courses of education to New Mexico students. "After the contract was accepted, the whole program was serviced entirely by mail, telephone, and correspondence between ASI instructors in Illinois and the student in New Mexico. The educational kit and materials were all mailed to the student in New Mexico from the State of Illinois." *Advance Schools, Inc. v. Bureau of Revenue,* 89 N.M. 133, 137, 548 P.2d 95, 99, (1975), Sutin, J., dissenting. The Supreme Court said:

> . . . *Virtually all the services accompanying the sale of educational materials by ASI were performed in Illinois.* The Commissioner's decision and order, therefore, are not supported by substantial evidence. [89 N.M. at 82, 547 P.2d at 565.] [Emphasis added.]

The relationship between Taxpayer and Creamland does not approach that which existed between *Advanced Schools* and its students. In *Advanced Schools,* the contract was serviced and performed in Illinois. In the instant case, the contract was serviced and performed in New Mexico by Creamland. In *Advanced Schools,* New Mexico taxed it for services performed in Illinois. In the instant case, New Mexico does not tax Taxpayer for providing recipes and forms of leases prepared in California.

Taxpayer has not disclosed any "activities," and we have found none that place taxpayer within the perimeter of what we deem interstate commerce to mean—intercourse or traffic of some nature between the states. It is only such transactions as directly affect interstate commerce and impose a direct burden thereon that fall within the interdiction of the Commerce Clause of the Federal Constitution. *Western Live Stock, supra.*

Taxpayer relies primarily on a formula that it gleaned from *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). This case presented the question whether the application of a Mississippi tax on "the privilege of doing business" within the State of the activity in interstate commerce of a motor carrier in transporting an out-of-state manufacturer's automobiles between points in the State violated the Commerce Clause. A unanimous court said "no."

Complete Auto Transit is not applicable. The Commerce Clause plays no part in the instant case.

It is important to note that *Complete Auto Transit* overruled *Spector Motor Service v. O'Connor,* 340 U.S. 602, 71 S.Ct. 508,

95 L.Ed. 573 (1951), a case cited in *Spillers v. Commissioner of Revenue,* 82 N.M. 41, 475 P.2d 41 (Ct.App.1970); *Evco v. Jones,* 81 N.M. 724, 472 P.2d 987 (Ct.App.1970); *Bell Telephone Laboratories v. Bureau of Revenue,* 78 N.M. 78, 428 P.2d 617 (1966).

Taxpayer is not engaged in interstate commerce. The tax here imposed is conditioned on Creamland's local business of manufacturing and selling ice cream products in New Mexico. It is not a tax imposed on the importation of property or the rendering of services outside the State; neither is it a tax measured by income derived from manufacturing and selling ice cream products in any other state; nor is the tax different from that assessed and paid by local taxpayers in manufacturing and selling ice cream products for others.

Affirmed.

IT IS SO ORDERED.

HENDLEY, J., concurs.

HERNANDEZ, J., concurs in result.

600 P.2d 253

STATE of New Mexico, Plaintiff-Appellee,

v.

Harry LINAM, Defendant-Appellant.

No. 11816.

Supreme Court of New Mexico.

Jan. 11, 1979.

Rehearing Denied Feb. 12, 1979.

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

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

OPINION

EASLEY, Justice.

After the defendant was convicted on two counts of forgery, the State filed a supplemental information charging him as an habitual offender. A jury found him to be the same person who was convicted of the forgeries and of three previous felonies. He was sentenced to life imprisonment and appeals.

Three issues are raised:

1. Whether the admission into evidence of photographic and fingerprint identification records from the State Penitentiary was in violation on the Hearsay Rule, N.M. R.Evid. 802, N.M.S.A. 1978 (Formerly § 20–4–802, N.M.S.A. 1953 (Supp. 1975)), and of the defendant's constitutional right to confront witnesses against him;

2. Whether the habitual offender statute should be construed to require proof that each felony was committed after conviction for the next preceding felony; and

3. Whether, under that statute, evidence indicating only the dates of the prior convictions, and not the dates the offenses were committed, is sufficient to enhance the sentence.

Certified copies of each judgment and sentence in the three prior convictions were admitted. The indictment, verdict, and judgment and sentence for the principal offenses were admitted. Photographs and

fingerprint I.D. cards from the State Penitentiary records were admitted to prove that the defendant was the same person involved in the three prior convictions.

The prosecutor who tried the principal case testified that the defendant was the same person who was convicted in that trial. The records supervisor at the penitentiary testified in the instant case that he personally took the photographs and fingerprints of the defendant when he was committed in 1973, and that the defendant was the same person then committed. He also testified that the photographs and fingerprints relating to the commitments in 1962 and 1968 were from the files at the penitentiary and that such records were regularly made and kept in the file whenever a person was committed, although he had no personal knowledge regarding the making of these particular records.

A fingerprint expert testified that he had taken the defendant's fingerprints on the day of this trial and that those fingerprints were made by the same person whose prints appear on the fingerprint I.D. cards from the 1962, 1968 and 1973 commitments.

Admissibility of Penitentiary Identification Records

The public records exception to the hearsay rule allows admission of "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (B) matters observed pursuant to a 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 . . . ." N.M.R.Evid. 803(8), N.M.S.A. 1978 (Formerly § 20–4–803(8) N.M.S.A. 1953 (Inter, Supp. 1976)). Defendant contends that penitentiary staff are 'law enforcement personnel'; therefore penitentiary identification records made by them are not admissible under that exception.

The cases cited in support of this proposition are distinguishable. Two of them dealt with whether a corrections employee was a law enforcement officer within the meaning of statutes relating to employee benefits. *Schalk v. Department of Admin., Pub. Emp. Retire. Sys.*, 42 Cal.App.3d 624, 117 Cal.Rptr. 92 (1974); *Kimball v. County of Santa Clara*, 24 Cal.App.3d 780, 101 Cal. Rptr. 353 (1972). The other case cited, *State v. Grant*, 102 N.J.Super. 164, 245 A.2d 528 (1968), held that a county penitentiary corrections officer whose duties were to supervise prisoners and to maintain security was a law enforcement officer within the meaning of the statute proscribing assault and battery upon a law enforcement officer.

In the present case, the records in question were made and kept by the records supervisor at the penitentiary. There is no indication that his duties as custodian of the records include law enforcement as the term is used in the *Grant* case.

Both the New Mexico and the Federal Rules of Evidence contain the identical provision. F.R.Evid. 803(8)(B). Congressional intent in adopting that rule will serve to indicate its purpose. Representative Dennis proposed the amendment which added the language, "excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel." His stated reason was:

> [I]n a criminal case, only, we should not be able to put in the police report to prove your case without calling the policeman. I think in a criminal case you ought to call the policeman on the beat and give the defendant the chance to cross-examine him, rather than just reading the report into evidence. That is the purpose of this amendment.

120 Cong.Rec. 2387 (1974).

Thus, the exclusion is aimed at reports of law enforcement personnel engaged in investigative and prosecutorial activities where the officer himself should testify. There is no reason to equate the job of record supervisor with the term "law enforcement personnel", as it is used in the rule, merely because the record supervisor is employed at the penitentiary.

It appears that the photographic and fingerprint identification records, properly authenticated by their custodian, were admissible under the Public Records Exception to the hearsay rule, *State v. Gallegos*, 91 N.M. 107, 570 P.2d 938 (Ct. App. 1977); and their admission did not violate the defendant's right to confront witnesses against him. *State v. Johnson*, 194 Wash. 438, 78 P.2d 561 (1938); *State v. Bolen*, 142 Wash. 653, 254 P. 445 (1927); and *Waxler v. State*, 67 Wyo. 396, 224 P.2d 514 (1950).

Construction of the Habitual Offender Statute

For a sentence to be enhanced 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)), there must have been a prior conviction preceding the commission of the offense for which the enhanced sentence is sought. *State v. Ellis*, 88 N.M. 90, 537 P.2d 698 (Ct. App. 1975). *See French v. Cox*, 74 N.M. 593, 396 P.2d 423 (1964) for a similar interpretation of the previous Habitual Offender Statute, § 41–16–1, N.M.S.A. 1953 (Repealed by Laws 1963, Ch. 303, § 30–1); and *State v. Garcia*, 91 N.M. 664, 579 P.2d 790 (1978) for a similar interpretation of § 31–18–4, N.M. S.A. 1978 (Formerly § 40A–29–3.1, N.M. S.A. 1953 (Supp. 1975)) which provides for enhanced sentences for use of a firearm in the commission of a felony.

It is a question of first impression in this Court whether, in a proceeding to enhance sentence for a third or fourth felony, *each* felony must have been committed after conviction for the preceding felony. The overwhelming majority of jurisdictions have adopted such a construction as the logical and reasonable extension of the habitual offender laws. Annot. 24 A.L.R.2d 1247, §§ 6, 9 and 12. The historical reason is that the intent of such statutes is to provide an increased penalty in order to deter commission of a subsequent offense, and that an increase in penalty would not deter one who had not yet been convicted and punished for an earlier offense. It is the opportunity to reform under threat of more severe penalty which serves to deter. See *Joyner v. State*, 158 Fla. 806, 30 So.2d 304 (1947); *Karz v. State*, 279 So.2d 383 (Fla. App. 1973) and *Cobb v. Commonwealth*, 267 Ky. 176, 101 S.W.2d 418 (Ct. App. 1936).

A rather small minority of jurisdictions has adopted the view that the prior offenses, if based on unrelated charges, need not have been committed after conviction for a preceding offense. *People v. Braswell*, 103 Cal.App. 399, 284 P. 709 (1930); *State v. Williams*, 226 La. 862, 77 So.2d 515 (1955); *People v. Gorney*, 203 Misc. 512, 103 N.Y.S.2d 75 (1951); *Bumbaugh v. State*, 36 Ohio App. 375, 173 N.E. 267 (1930).

There is a New Mexico case that contains dictum indicating favor for the minority rule. *State v. Sanchez*, 87 N.M. 256, 531 P.2d 1229 (Ct. App. 1975). The Court of Appeals there held that the trial court did not err in instructing that, for enhancement of sentence, the jury may consider three previous convictions entered on the same day as one conviction, since the record did not indicate whether or not they were unrelated offenses. The court went on to state that "where multiple convictions are obtained for crimes unrelated to one another, no prohibition has been found to prevent counting each conviction separately in habitual offender proceedings. I.e., *Cox v. State*, 255 Ark. 204, 499 S.W.2d 630 (1973)." *Id.* at 258, 531 P.2d at 1231.

We now clarify New Mexico's stance on this issue by adopting the majority view. We hold it 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. Thus the use of the words "upon conviction of such second felony" or "third felony" as used in the statute must be held to mean felonies committed subsequent to the dates of the convictions relied on to effect an increase of the penalty. Otherwise the reform object of the legislation to provide a deterrent from future crimes would not be realized.

Sequence of Convictions and Crimes

The sole remaining issue is whether each of Linam's prior offenses except the first were shown to have been committed after a preceding conviction.

The evidence proves that the defendant was convicted on two counts on May 21, 1962 and sentenced to one to three years and one to ten years concurrently; convicted on April 17, 1968 and sentenced to one to five years; convicted on March 2, 1973 and sentenced to two to ten years; and convicted for a fourth time on two counts in September 1976. There is no direct proof that each of the offenses was committed subsequent to the date of the next preceding conviction relied on to effect an increase of the penalty in each instance.

The State argues that the periods between the dates of conviction are longer in each case than the sentence imposed and that it may be implied that commission occurred in each case, but for the first, after the conviction for the preceding crime. *Perry v. Mayo*, 72 So.2d 382 (Fla. 1954). This argument is not persuasive. It calls for speculation. There is a reasonable hypothesis that the real facts may not support the conclusion advanced. We hold that there is no substantial evidence to support the decision that Linam's convictions and commissions of the crimes involved conform to the necessary pattern as here announced.

We reverse. Because an habitual proceeding involves only sentencing, not trial of an "offense", and therefore jeopardy does not attach, *see Gryger v. Burke*, 334 U.S. 728, 68 S.Ct. 1256, 92 L.E. 1683 (1948); *Davis v. Bennett*, 400 F.2d 279 (8th Cir. 1968); and, *Pearson v. State*, 521 S.W.2d 225 (Tenn. 1975), we remand for a new trial.

IT IS SO ORDERED.

McMANUS, Senior Justice, and FEDERICI, J., concur.

600 P.2d 256

TRANS UNION LEASING CORPORATION, Plaintiff-Appellee and Cross-Appellant,

v.

Paul HAMILTON and his wife, Bettie Hamilton, Defendants-Appellants and Cross-Appellees.

No. 12127.

Supreme Court of New Mexico.

July 26, 1979.

Rehearing Denied Sept. 11, 1979.

Donald Brown, Alvin F. Jones, Roswell, for appellants.

Heidel, Samberson, Gallini & Williams, C. Gene Samberson, R. W. Gallini, Lovington, for appellee.

OPINION

FEDERICI, Justice.

Appellee Trans Union Leasing Corporation (Trans Union) brought this action against appellants Paul and Bettie Hamilton for breach of an equipment lease contract and to foreclose on a real estate mortgage which Trans Union held as security for the Hamiltons' performance of the contract. The trial court directed a $57,000 verdict for Trans Union following Trans Union's presentation of its case and ordered foreclosure of Trans Union's mortgage on the Hamiltons' farm. The Hamiltons' counterclaim against Trans Union was dismissed. The Hamiltons appeal.

The Hamiltons are farmers in Lea County, New Mexico. Trans Union is an Illinois corporation which is in the business of financing equipment leases. In 1975 Mr. Hamilton contacted A.V.I., Inc. (AVI), a business in Muleshoe, Texas, regarding the purchase of an overhead sprinkling system for irrigating his crops. Mr. Biggerstaff, a salesman for AVI, presented several systems, including various prices and financial arrangements, to Mr. Hamilton, for his consideration. Hamilton ultimately chose to lease a system and in late October 1975, he gave Biggerstaff a $1,000 check, made out to AVI, as a good faith deposit. At the same time, Hamilton submitted a financial statement which was to be considered by Trans Union, the lessor.

On November 8, 1975, Hamilton wrote another check to AVI in the amount of $5,423.67 as the first payment on the lease. At this time Hamilton signed the lease contract with Trans Union which was prepared by Biggerstaff. Hamilton took the lease agreement home with him to obtain his wife's signature and then mailed the lease back to AVI, which in turn forwarded it to Trans Union.

On November 21, 1975, Trans Union notified AVI that it would approve the lease to the Hamiltons for the sprinkler system and all necessary pipeline and other equipment if the Hamiltons executed a mortgage on their farm to Trans Union; or, at the Hamiltons' option, they could lease only the sprinkling system from Trans Union without mortgaging their farm. The Hamiltons chose to lease the entire package. They executed a mortgage on their property the same day the sprinkler system was being delivered and installed.

The Hamiltons defaulted on their payment due January 15, 1977. Trans Union filed suit to collect the balance due under the contract and to foreclose on the mortgage.

At trial, out of the presence of the jury, the Hamiltons tendered their evidence relating to the negotiations between Hamilton and Biggerstaff of AVI. This evidence was offered in support of the Hamiltons' defenses and counterclaim against Trans Union. The trial court ruled that if the Hamiltons wished to present this evidence they should have joined AVI as a party. AVI was not joined as a party. The court stated that, as a matter of law, AVI was not an agent of Trans Union, therefore the evidence was inadmissible. Thereafter the court directed the jury to enter a verdict for Trans Union and ordered the mortgage foreclosed.

The only issue we consider is whether the trial court erred in determining that, as a matter of law, AVI and Biggerstaff were not agents of Trans Union. In arriving at this conclusion, the court would not permit the Hamiltons to introduce evidence to

prove agency or to prove negotiations between Hamilton and AVI unless the Hamiltons joined AVI as a party.

The Hamiltons contend that the trial court's rulings were improper. The Hamiltons' defenses and counterclaim were based on their negotiations with AVI's employee. The trial court's ruling prevented the Hamiltons from proving their claims.

Trans Union argues that the trial court's exclusion of evidence pertaining to the negotiations between AVI and Hamilton was proper. On several occasions the trial judge instructed the Hamiltons' counsel that if they wished to introduce evidence relating to AVI they should join AVI as a party to the lawsuit.

The question of agency must be determined from all of the facts and circumstances in each case, along with the conduct and communications of the parties. *Lanier v. Securities Acceptance Corporation,* 74 N.M. 755, 398 P.2d 980 (1965); *Budagher v. Loe,* 70 N.M. 32, 369 P.2d 485 (1962); *Western Elec. Co. v. N.M. Bureau of Rev.,* 90 N.M. 164, 561 P.2d 26 (Ct.App. 1976); *State v. DeBaca,* 82 N.M. 727, 487 P.2d 155 (Ct.App.1971). In this case the facts pertaining to the existence or nonexistence of an agency relationship are conflicting; therefore, the question presented is one of fact for the jury. *See Sawyer v. Pioneer Leasing Corporation,* 244 Ark. 943, 428 S.W.2d 46 (1968).

We have found no authority, nor has Trans Union cited any, which supports the claim that in order to prove agency the agent must be joined as a party to the action. In this case the Hamiltons' defenses and counterclaim were directed toward Trans Union, not AVI. Whether or not AVI and its employee, Biggerstaff, were agents of Trans Union was a question of fact for the jury. If AVI or Biggerstaff are found to be agents of Trans Union, the Hamiltons' defenses against Trans Union should also be considered. The trial court erred in excluding evidence of agency.

In view of the result we reach we do not consider the other points raised by the Hamiltons on appeal.

The cause is reversed and remanded to the trial court for a new trial, consistent with this opinion.

IT IS SO ORDERED.

SOSA, C. J., and EASLEY, J., concur.

600 P.2d 258

STUCKEY'S STORES, INC., a Delaware Corporation, Individually and as Representative on behalf of its Franchisees in the State of New Mexico, George Bassett, Robert B. Gottlieb and Shelby C. Phillips, Jr., Plaintiffs-Appellants,

v.

Fred O'CHESKEY, Chief Highway Administrator, State Highway Department, Defendant-Appellee.

No. 11946.

Supreme Court of New Mexico.

Aug. 6, 1979.

Rehearing Denied Sept. 11, 1979.

Olmsted & Cohen, Charles D. Olmsted, G. Gary Duncan, Santa Fe, for plaintiffs-appellants.

Jeff Bingaman, Atty. Gen., V. Henry Rothschild, Stephen S. Hamilton, Asst. Attys. Gen., State Highway Dept., Santa Fe, for defendant-appellee.

Sutin, Thayer & Browne, Raymond W. Schowers, NMCLU, Albuquerque, amicus curiae.

OPINION

SOSA, Chief Justice.

The questions we address in this appeal are:

1) Does the New Mexico Highway Beautification Act, §§ 67–12–1 to 14, N.M.S.A. 1978 (hereinafter referred to as the Act), abridge plaintiffs' freedom of speech in violation of the first [1] and fourteenth amend-

1. The first amendment provides in relevant part that:
Congress shall make no law . . . abridging the freedom of speech, ...

ments[2] to the United States Constitution and Article II, § 17[3] of the New Mexico Constitution?

2) Do the permit provisions of the Act violate the just compensation and due process clauses[4] of the United States and New Mexico Constitutions?

3) Are plaintiffs' outdoor advertising signs erected prior to the 1971 amendments to the Act "lawfully erected" under state law and thus entitled to compensation in the event the State condemns them under the Act?

4) Did the State Highway Department waive any right to claim it can destroy all of plaintiffs' lawfully erected signs for which 1976 permit fees had been paid by reason of the Department's acceptance of the fees?

5) Is the State Highway Department equitably estopped from claiming that certain of the plaintiffs' signs may be taken by it without the payment of just compensation?

On August 9, 1976, plaintiff Stuckey's Stores, Inc. (hereinafter referred to as Stuckey's), a Delaware corporation, individually and as a representative of its New Mexico franchisees, filed this action in the District Court of Santa Fe County seeking a judgment declaring the Act and certain regulations adopted thereunder unconstitutional. Stuckey's also sought a preliminary injunction enjoining defendant from destroying plaintiffs' outdoor advertising signs pursuant to the Act.

On January 11, 1978, after a three-day non-jury trial, the district court entered its judgment against plaintiffs on all issues. The court concluded that the Act is a valid exercise of the State's police power. It also concluded that enforcement of the Act against plaintiffs does not deny them due process of law or freedom of speech in violation of the United States and New Mexico Constitutions. Plaintiffs appeal.

Plaintiffs Bassett, Gottlieb and Phillips own lands adjacent to the rights-of-way of interstate and primary highways in New Mexico. Outdoor advertising signs relating to plaintiffs' stores are situated on these lands, which are located outside of any zoned industrial or commercial areas. Plaintiffs' businesses consist of furnishing and selling gasoline and other motor products, food, candy, souvenirs and novelties to motorists using the interstate and primary highways along which their businesses are located. Plaintiffs' stores are rurally located and, in most instances, are a substantial distance from the closest town along the same interstate or primary highway at which similar goods or services are available. Approximately 80 percent of plaintiffs' customers are out-of-state passenger car motorists; 15 percent are in-state passenger car motorists from other parts of New Mexico; and 5 percent are local passenger car motorists.

The location of a Stuckey's store along an interstate or primary highway is made known to motorists of such highways by means of outdoor advertising signs located outside, but within 660 feet of, the right-of-way of such highways on privately owned

2. Section 1 of the fourteenth amendment provides in part that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, ...

3. Article II, § 17 provides in pertinent part that:

> Every person may freely speak, write and publish his sentiments on all subjects, . . and no law shall be passed to restrain or abridge the liberty of speech . . . .

4. The fifth amendment to the United States Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article II, § 20 of the New Mexico Constitution provides that:

> Private property shall not be taken or damaged for public use without just compensation.

Article II, § 18 of the New Mexico Constitution provides in part that:

> No person shall be deprived of life, liberty or property without due process of law; . . . .

land pursuant to agreements between the store owner and the owner of the land on which the signs are situated. Advertising signs are spaced at intervals along the highway in both directions from plaintiffs' stores.

The New Mexico Highway Beautification Act was promulgated in 1966 in response to the federal Highway Beautification Act of 1965, *as amended*, 23 U.S.C. §§ 131, 136, 319 (1966 & Supp.1979). *See* N.M. Laws 1966, ch. 65, §§ 1–17. The federal Act specifies that unless a state provides for effective control over outdoor advertising along its interstate and primary highways, federal-aid highway funds will be reduced by amounts equal to 10 percent of the amounts which would otherwise be apportioned to that state. 23 U.S.C. § 131(b).

The New Mexico Act conforms with the requirements of the federal Act. It provides that:

> In order to promote public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in public highways and to preserve and enhance the scenic beauty of lands bordering public highways, it is the public policy of this state to regulate the erection and maintenance of outdoor advertising . . . in areas adjacent to the interstate and primary systems in accordance with the Highway Beautification Act [67–12–1 to 67–12–14 NMSA 1978]. The legislature finds that regulation of outdoor advertising . . . is for a highway purpose.

§ 67–12–3.

The Act only applies to New Mexico's federal-aid interstate and primary highway systems. It does not apply to New Mexico's secondary system or to other state highways. According to State Highway Department surveys, approximately 5.6 percent of the total highways and roads in New Mexico are currently designated as interstate and primary highways. The Act prohibits the erection and maintenance, after 1966, of any outdoor advertising within 660 feet of the nearest edge of the right-of-way of an interstate or primary highway, unless it is an on-premise sign, an off right-of-way sign located in areas which are zoned industrial or commercial [5] under authority of law, or in unzoned industrial or commercial areas [6] as defined by regulations promulgated by the State Highway Commission (hereinafter referred to as Commission). § 67–12–4.

The Act also provides that the Commission shall establish and collect uniform fees for the issuance of permits for outdoor advertising. § 67–12–5(C). Failure of timely payment of the permit fee renders the outdoor advertising subject to removal by the Commission without compensation and at the owner's expense. § 67–12–5(D).

I. *Whether the Act Abridges Plaintiffs' Freedom of Speech*

In their first point, plaintiffs claim that the Act impermissibly infringes upon the first amendment guarantee of freedom of speech made applicable to the states by the fourteenth amendment to the United States Constitution and Article II, § 17 of the New Mexico Constitution. Plaintiffs challenge the court's findings which provide, in effect, that:

5. Article 1050, paragraph 33 of the State Highway Commission's regulations defines "zoned industrial or commercial areas" as

> those areas which are reserved for business, commerce, trade, manufacturing, or industry, pursuant to a validly promulgated state or local ordinance or regulation.

6. Article 1050, paragraph 29 of the regulations defines an "unzoned commercial or industrial area" as

> any unzoned lands upon which there is located a bona fide commercial or industrial activity operating for at least six (6) continuous months of the year with a valid 12 months business license issued by a city, county or the state, whether or not a permanent structure is located thereon, and the area along the highway extending outward 1,000 feet from and beyond the edge of such commercial or industrial activity and extending perpendicular from the center line to a depth of 660 feet from the nearest edge of the right-of-way line on the same side of the highway as the commercial or industrial activity.

1) outdoor advertising signs limited to locations on the premises or within 1,000 feet of a Stuckey's store or to commercially or industrially zoned areas along interstate or primary highways in New Mexico afford a reasonable means of informing the motorist on such highways of the presence and location of a Stuckey's store;
2) the Act sets forth a regulatory scheme for outdoor advertising which is reasonable, tends to promote the purposes of the Act, and does not impose an undue burden upon any class of persons; and
3) the regulatory scheme constitutes a reasonable regulation as to time, place and manner of plaintiffs' communications of commercial information through outdoor advertising.

Plaintiffs argue that these findings are not supported by substantial evidence. They contend that the limited advertising allowed by the Act does not afford timely, adequate or feasible means of informing traveling motorists on interstate and primary highways of the presence of, or the goods and services available at, its stores. Plaintiffs argue that the evidence supports their requested finding that patronage, sales and property values have been substantially reduced by the limited advertising allowed under the Act. Defendant counters that the court's findings are supported by substantial evidence.

We have previously addressed the issue of the Act's constitutionality. In *National Advertising Co. v. State, Etc.*, 91 N.M. 191, 571 P.2d 1194 (1977), sign owners brought suit seeking a declaratory judgment that they should be compensated for the value of their signs which had been removed pursuant to the Act, or alternatively, if their signs were not compensable, that the Act be held unconstitutional as applied to them. This Court specifically held that the Act "is a constitutional enactment by the Legislature." *Id.* at 193, 571 P.2d at 1196. The Court said:

> [I]t was implicit in the Memorandum Opinion that the Act was considered a valid exercise of the state's police power. Property is always held subject to the fair exercise of the state's police power, and reasonable regulations enacted for the benefit of the public health, convenience, safety, or general welfare are not unconstitutional. (Citations omitted.)

Id. at 193, 571 P.2d at 1196.

Plaintiffs argue that the holding in *National Advertising* is inapplicable to the case at bar because the Act was challenged on due process, rather than first amendment, grounds. For the purpose of clarification, we now hold that the Act does not abridge plaintiffs' guarantee of freedom of speech in violation of the United States and New Mexico Constitutions.

Like the federal Highway Beautification Act, the state Act restricts the place and manner of erection of plaintiffs' outdoor advertising structures. It does not regulate the advertising on the basis of its content nor does it completely prevent the dissemination of the same information by alternative means. Thus, we are not faced with a content regulation. In addition, the Act, as applied to plaintiffs, involves restrictions on commercial, rather than political or ideological, speech. The next question, then, is whether plaintiffs' advertising constitutes the type of speech protected by the first and fourteenth amendments to the United States Constitution and Article II, § 17 of the New Mexico Constitution. For the reasons set forth below, we hold that it does not.

Two recent United States Supreme Court cases have accorded first amendment protection to commercial speech. In *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), the Supreme Court reversed a conviction for violation of a Virginia statute that made circulation of any publication encouraging or promoting abortions in Virginia a misdemeanor. The Court rejected the argument that the advertisement involved in that case was unprotected because it was commercial speech. Instead, the Court held that advertising is not stripped of all first amendment protection. The Court stated:

> Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. (Citations and footnote omitted.) To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged.

Id. at 826, 95 S.Ct. at 2234, 2235.

In *Va. Pharmacy Bd. v. Va. Consumer Council,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), consumers of prescription drugs brought suit against the Virginia State Board of Pharmacy challenging the validity of a Virginia statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. The Supreme Court affirmed the district court's decision holding the statute void. The Court held that first amendment protection extends to advertising of a purely commercial nature and that it is not limited to speech of "public interest." Though the Court concluded that commercial speech is protected, it did not hold that such speech could never be regulated. Indeed, the Court stated that "[s]ome forms of commercial speech regulation are surely permissible." *Id.* at 770, 96 S.Ct. at 1830. The Court concluded that a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity . . . ." *Id.* at 773, 96 S.Ct. at 1831.

In *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977), the Supreme Court invalidated as unconstitutional a municipal ordinance which prohibited the posting of real estate "For Sale" and "Sold" signs for the purpose of stemming what the municipality perceived as white flight from a racially integrated community. The Court stated:

> [T]he Willingboro ordinance is not genuinely concerned with the *place* of the speech—front lawns—or the *manner* of the speech—signs. The township has not prohibited all lawn signs—or all lawn signs of a particular size or shape—in order to promote aesthetic values or any other value "unrelated to the suppression of free expression," . . . . (Citation and footnote omitted.) Willingboro has proscribed particular types of signs based on their *content* because it fears their "primary" effect—that they will cause those receiving the information to act upon it. That the proscription applies only to one mode of communication, therefore, does not transform this into a "time, place, or manner" case. (Citations omitted and emphasis added.)

Id. at 93–4, 97 S.Ct. at 1619.

■ A regulation must satisfy three criteria in order to constitute a legitimate time, place, and manner restriction. These criteria are:

> (1) the restriction on speech must be "justified without reference to the content of the regulated speech," (2) the restriction must "serve a significant governmental interest," and (3) in so doing, the restriction must "leave open ample alternative channels for communication of the information." (Citations omitted.)

John Donnelly & Sons v. Mallar, 453 F.Supp. 1272, 1277 (S.D.Me.1978). *See also Va. Pharmacy Bd.,* 425 U.S. at 771, 96 S.Ct. 1817.

The North Dakota Supreme Court recently addressed the constitutionality of the North Dakota Highway Beautification Act in *Newman Signs, Inc. v. Hjelle,* 268 N.W.2d 741 (N.D.1978), *appeal dismissed,* 440 U.S. 901, 99 S.Ct. 1205, 59 L.Ed.2d 449 (1979). The court concluded that §§ 24–17–01 through 15, N.D.C.C.1967 (Repl.1978), which is almost identical to our Act, did not violate the first amendment guarantee of freedom of speech in that the time, place, and manner restrictions under the North Dakota Act satisfied the criteria set forth in *Va. Pharmacy Bd., supra,* and in *John Donnelly & Sons, supra.* The court in *Newman* said:

> [W]e must balance the interests of the State against those of Newman. The State has an interest in providing a safe place for the users of the State highways. . . . The nature of highway driving

is such that the eyes of the driver may be diverted, sometimes subconsciously, from the road to the billboard. It is therefore reasonable to assume that the existence of highway billboards could have a detrimental effect on traffic safety.

. . . . .

The State also has a legitimate interest in protecting, preserving, and enhancing the aesthetic quality of its land . . .

Id. at 761. The court continued:

The interests of Newman are minimal in comparison with the public interest involved and the effect that the regulations have on the public and the businesses contracting for advertising space is not so substantial as to outweigh the State's interest in providing a safe and visually pleasing environment.

Id. at 761–2.

We hold that the Act meets the three-pronged test used to determine whether a time, place, and manner restriction is valid. First, the Act's restrictions on plaintiffs' exercise of their freedom of speech is "justified without reference to the content of the regulated speech." None of the Act's stated purposes—promotion of public safety, health, welfare, convenience and enjoyment of public travel, protection of public investment in public highways, and preservation and enhancement of the scenic beauty of lands bordering the public highways—are related to a particular message of such signs. § 67–12–3.

Secondly, the Act's restrictions on plaintiffs' freedom of speech "serve a significant governmental interest." Those interests are matters with which states have been traditionally concerned. In *John Donnelly & Sons, supra,* the federal district court stated:

The emerging majority position, however, and the one to which this Court subscribes, is that the preservation and promotion of aesthetic standards do serve as an adequate basis for comprehensive anti-billboard legislation . . . . (Citations omitted.)

453 F.Supp. at 1278. *See also Village of Belle Terre v. Boraas,* 416 U.S. 1, 5–6, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974); *Berman v. Parker,* 348 U.S. 26, 33, 75 S.Ct. 98, 99 L.Ed. 27 (1954).

Section 67–12–3 also provides that the Act is designed to "protect the public investment in public highways". State compliance with the terms prescribed by the federal Highway Beautification Act insures that New Mexico receives its share of federal-aid highway funds.

[W]hen legislation based on aesthetic considerations also promotes economic growth, a significant governmental interest is served. (Citations omitted.)

John Donnelly & Sons, 453 F.Supp. at 1279. *See also Moore v. Ward,* 377 S.W.2d 881 (Ky.1964); *General Outdoor Adv. Co. v. Department of Public Wks.,* 289 Mass. 149, 193 N.E. 799 (1935).

As to the third prong of testing a time, place, and manner restriction, we find that the Act "leave open ample alternative channels for communication of the information." Section 67–12–4 provides six exceptions to the outdoor advertising prohibited by the Act. Three of these exceptions are the placement of signs on premises occupied by plaintiffs' stores, in areas zoned commercial or industrial under the authority of law, and in areas unzoned commercial or industrial as defined by the Commission's regulations.

An additional alternative is provided by the "Logo Program." This program allows the State Highway Department to place signs approximately one-half of a mile before an interchange at which a commercial establishment, such as plaintiffs', is located, advertising the name of the business and the fact that it provides gas, food, or lodging. The Logo signs are placed within the rights-of-way of the interstate and primary highways in order to adequately inform traveling motorists on these highways of the presence of such businesses. Indeed, four of plaintiffs' ten New Mexico establishments have been approved for placement on such Logo signs. In addition, plaintiffs introduced no evidence that any

of their stores, which availed themselves of on-premise or unzoned commercial or industrial area signs after other off-premise signs had been removed, had suffered a great loss of business so as to rebut the presumption that the Act provides adequate means for plaintiffs to exercise their freedom of speech.

Finally, we note that other courts that have considered the first amendment constitutionality of comprehensive anti-billboard legislation, such as is involved in the instant case, have sustained the statute. *See John Donnelly & Sons,* 453 F.Supp. at 1280. For the foregoing reasons, we hold that the Act does not violate plaintiffs' first amendment rights.

II. *Whether the Act Violates the Just Compensation and Due Process Clauses*

In their second point, plaintiffs attack the Act's permit provisions on two constitutional grounds. First, plaintiffs contend that the permit provisions allow for the taking of private property without payment of just compensation in violation of the fifth amendment to the United States Constitution and Article II, § 20 of the New Mexico Constitution. Second, they argue that the provisions abridge their due process rights in violation of the fourteenth amendment to the United States Constitution and Article II, § 18 of the New Mexico Constitution. Plaintiffs challenge the court's conclusions which provide, in effect, that:

1) enforcement of the Act against plaintiffs does not take or damage their private property for public use without just compensation and therefore does not violate the United States and New Mexico Constitutions; and
2) enforcement of the Act against plaintiffs does not deprive them of due process of law under the United States and New Mexico Constitutions.

The specific provisions attacked by plaintiffs include §§ 67–12–4(B) and (C), 67–12–5(C) and (D), 67–12–6(A)(1) and (2), and 67–12–6(C) and (F). These provisions were added to the Act in 1971 and became effective on March 15, 1971. *See* N.M. Laws 1971, ch. 108 §§ 2, 3 and 4.

Under § 67–12–4(B) and (C), any outdoor advertising which was lawfully in existence on the effective date of the Act and which has continued to so exist may remain in place until it is acquired by the Commission, but only so long as the advertising conforms with standards and bears permits for which the fee has been paid. The Commission may acquire outdoor advertising if it bears the requisite permit and the permit fee required in connection with the advertising's maintenance has been timely paid. § 67–12–6(A)(1) and (2). A permit fee is deemed timely paid if it is received by the Commission on or before the first day of the year for which it is being paid. Failure of timely payment renders the outdoor advertising subject to removal by the Commission without any compensation whatsoever and at the expense of the owner of the outdoor advertising. § 67–12–5(D). Finally, no notice is required in connection with permit fees. § 67–12–6(C).

■ The regulation of outdoor advertising along interstate and primary highways is a reasonable and proper exercise of the police power. *See, e. g., National Advertising,* 91 N.M. at 193, 571 P.2d at 1196; *Markham Advertising Company v. State,* 73 Wash.2d 405, 439 P.2d 248, 261 (1968), *appeal dismissed,* 393 U.S. 316, 89 S.Ct. 553, 21 L.Ed.2d 512 (1969), *rehearing denied,* 393 U.S. 1112, 89 S.Ct. 854, 21 L.Ed.2d 813 (1969); *In Re Opinion of the Justices,* 103 N.H. 268, 169 A.2d 762, 764 (1964); *General Outdoor Adv. Co.,* 193 N.E. at 816.

In *Newman Signs, Inc., supra,* the North Dakota Supreme Court considered whether that state's Highway Beautification Act's purposes were within the scope of the state's police power. The court said:

> [A] reasonable restriction of the use of property pursuant to a State's police power does not constitute a taking of private property for public use requiring payment of just compensation so long as the regulation is reasonably related to a proper purpose and does not unreasonably deprive the property owner of all or sub-

stantially all beneficial use of his property. (Citations omitted.)

268 N.W.2d at 755–6. The court concluded that the North Dakota Act was reasonably related to legitimate governmental purposes and that it did not deprive plaintiff of all or substantially all of the beneficial use of its property.

We note that the purposes of North Dakota's Act are similar to those provided in § 67–12–3 of the Act. Those purposes include "promoting the safety and convenience of those traveling on the highways; protecting the public investment in the State highway system; and promoting the enjoyment and recreational value of the State highways." *Id.* at 757. *See also Markham Advertising Company,* 439 P.2d at 260.

We hold that the Act's restrictions are "reasonably related to proper purposes." Furthermore, the restrictions do "not unreasonably deprive the property owner of all or substantially all beneficial use of his property." The owner of the land upon which a sign is situated merely loses the right to use or lease certain areas of his property for the purpose of highway billboards. The sign owner merely loses the right to place the billboard on certain sites. In addition, the State Highway Department only orders the removal of those signs which are illegal. Thus, a sign owner only loses the use of a sign in a particular location if he either erects the sign after 1966 in contravention of the Act or if he fails to keep his permit current. *Cf. Sullivan Outdoor Advertising v. Dept. of Transp.,* 420 F.Supp. 815 (N.D.Ill.1976). In *Sullivan Outdoor Advertising,* the federal district court addressed the constitutionality of the Illinois Highway Advertising Control Act of 1971, Ill.Rev.Stat. ch. 121, § 501 *et seq.* (1973). Like our Act, the Illinois statute provides that certain classes of signs, which are declared unlawful, are subject to removal without just compensation. The court determined that plaintiff's contention, that the provision allowing for the taking of signs without compensation conflicted with the just compensation clause of the federal Act, was insubstantial and devoid of merit. *Id.* at 819.

We conclude that the Act is a valid exercise of the police power. We, therefore, affirm the court's conclusion that enforcement of the Act against plaintiffs does not violate the just compensation clauses of the United States and New Mexico Constitutions.

Plaintiffs next argue that even if the Act is upheld as a valid exercise of the state's police power, the Act's permit provisions are unreasonable, arbitrary and capricious and, therefore, violate the due process clauses of the United States and New Mexico Constitutions. Plaintiffs' argument focuses on § 67–12–6(C). Even though § 67–12–6(C) does not require the State Highway Department to give notice in connection with permit fees, we note that the Department's standard procedure for removal of any illegal sign is the issuance of a thirty-day notice to the sign owner. Section 1063.00 of the Commission's regulations pertains to the removal of non-compensable signs. It provides:

> Permit Violations: Any outdoor advertising device, which has been erected or maintained in violation of the permit requirements of the Beautification Act or Regulations, which has been erected or maintained without timely payment of all permit fees required by the Beautification Act or Regulations, is subject to removal by the Department without any compensation whatsoever and at the expense of the owner of the outdoor advertising device. *Such removal will be preceded by notice to the owner of the outdoor advertising device,* if known, that the device must be removed within 30 days or will be subject to removal by the Department at the owner's expense. If the outdoor advertising device is not removed within the 30 days, the Department may thereafter remove the device at the expense of the owner of the device without any compensation whatsoever. (Emphasis added.)

This procedure was followed in regard to all of the signs involved in this lawsuit. We find that this procedure complies with the requirements of procedural due process.

In *John Donnelly & Sons, supra,* plaintiffs challenged the constitutional validity of the Maine Traveler Information Services Act, 23 M.R.S.A. §§ 1901–1925 (1978). Plaintiffs claimed that the Maine statute constituted an invalid exercise of the police power in contravention of the fourteenth amendment due process clause. The court determined that plaintiffs' claim was without merit. 453 F.Supp. at 1280. In *Sullivan Outdoor Advertising, supra,* the federal district court concluded that plaintiff's substantive due process claim was insubstantial. 420 F.Supp. at 820.

Plaintiffs in *Markham Advertising Company, supra,* contended that Washington's Highway Control Act deprived them of due process because it authorized the taking of their property without compensation. The Washington Supreme Court said:

> When a court determines, as we have in this case, that the police power has been properly invoked, there is no basis for this contention. (Citations omitted.) . . . Plaintiffs' due process rights have been secured to them once it has been determined that the exercise of the polic [*sic*] power is in harmony with constitutional requirements.

439 P.2d at 261.

We adopt the rationale followed by the courts in *John Donnelly & Sons, supra, Sullivan Outdoor Advertising, supra,* and *Markham Advertising Company, supra.* Plaintiffs have failed to show that the Act is not in furtherance of legitimate legislative objectives or that the means set out by the Act and by the Commission's regulations are not reasonably related to the Act's objectives. We conclude that the Act's permit provisions are not arbitrary or capricious and that they are reasonably necessary in order for the State Highway Department to ensure compliance with the Act's provisions. The court's conclusion that enforcement of the Act against plaintiffs does not violate the due process clauses of the United States and New Mexico Constitutions is hereby upheld.

III. *Whether Plaintiffs' Signs Erected Prior to the 1971 Amendments to the Act were "Lawfully Erected" Under the Act*

In their third point, plaintiffs assert that their signs, which were erected after the effective date of the Act, but prior to the 1971 Amendments to the Act, were "lawfully erected" under the Act and, therefore, that they are entitled to just compensation in the event that the State condemns them.

Section 67–12–6(A)(4) provides that the Commission may acquire all outdoor advertising which "was lawfully in existence on the effective date of the . . . Act . . . and has continued to so exist, or was lawfully erected subsequent to said effective date." Plaintiffs contend that the Legislature intended that all outdoor advertising erected subsequent to the 1966 Act and prior to the 1971 Amendments was "lawfully erected" under the statute. Defendant counters that plaintiffs' signs which, were erected subsequent to the 1966 Act and which are not within one of the exceptions set forth in § 67–12–4, were not lawfully erected and, therefore, plaintiffs are not entitled to just compensation for the removal of their signs.

The district court found that plaintiffs' signs, which were erected subsequent to the effective date of the Act, have at all times since the date of their erection failed to qualify under any of the exceptions set forth in § 67–12–4(A). Permit applications and permit fees were not tendered as required by the Act. The court concluded that these signs are public nuisances because they failed to qualify under § 67–12–4(A) and because they failed to comply with the Act's permit provisions.

Section 67–12–4(A) establishes six exceptions to the Act's prohibition against outdoor advertising. These six exceptions are the only signs that may be lawfully erected after 1966. We conclude that those devices erected after the effective date of

the Act and prior to the 1971 Amendments which do not qualify under § 67–12–4(A)(1) through (4) were erected in violation of the Act. Therefore, we hold that plaintiffs' signs erected after the Act's effective date and prior to the 1971 Amendments were not lawfully erected.

IV. *Whether the State Highway Department Waived the Right to Claim It Can Destroy Plaintiffs' Signs*

In their fourth point, plaintiffs argue that the trial court erred in refusing to rule that the State Highway Department had waived any right to claim it could destroy all of plaintiffs' signs which had paid their permit fees by reason of the Department's acceptance of late fees. The fees for the years 1968, 1969, 1970 and 1971 for the signs at issue were paid on November 18, 1971. Plaintiffs claim that because the Department accepted the fees, it waived its right to claim that the permit fees were untimely paid and, therefore, that it could acquire the signs without paying just compensation. Defendant counters that there was no waiver because a State Highway Department employee cannot waive the provisions of the Act and because there was no intent to waive the provisions.

Section 67–12–5(D) provides in relevant part that:

> Any permit fee payable for the years 1966 through 1971 inclusive shall be deemed timely paid if, but only if, the fee is received by the commission prior to July 1, 1971. . . .

The fees for the signs at issue were not paid prior to July 1, 1971; they were paid on November 18, 1971. There is no dispute that the fees were not timely paid. The question is whether the Department waived its right to claim it could destroy plaintiffs' signs due to untimely payment once it accepted the fees.

A waiver has been defined as "the intentional relinquishment or abandonment of a known right, . . . the act of waiver may be evidenced by conduct as well as by express words. (Citations omitted.)" *Cooper v. Albuquerque City Commission,* 85 N.M. 786, 790, 518 P.2d 275, 279 (1974). *See also* 28 Am.Jur.2d *Estoppel and Waiver* § 154 (1966). To constitute a waiver, the right claimed to have been waived must have been in existence at the time of the alleged waiver. 28 Am.Jur.2d *Estoppel and Waiver* § 157 (1966).

In the case before us, the State Highway Department knew that the fees in question were not timely paid when it accepted the fees. Nonetheless the Department issued the permits. Under these circumstances, we hold that the Department cannot claim the benefit of § 67–12–5(D) in an effort to acquire plaintiffs' signs. We are of the opinion that the Department's acceptance of the late permit applications and permit fees and the issuance of the permits constituted a waiver by the Department of § 67–12–5(D). The court's conclusion that acceptance of the late applications and fees did not constitute a waiver is reversed.

V. *Whether the State Highway Department is Equitably Estopped*

In their final point, plaintiffs argue that the trial court erred in ruling that the State Highway Department is not equitably estopped from claiming that certain of plaintiffs' signs may be taken by it without just compensation. Defendant counters that the Department is not estopped from ordering the removal of these signs.

The nine signs at issue were erected prior to the effective date of the Act. The signs became subject to a State Highway Department right-of-way acquisition in 1967; however, the signs were not condemned by the Department. On November 2, 1967, the Department granted plaintiffs McClure permission to relocate the signs without affecting the owner's right to compensation in the event that the signs were subsequently acquired by the Commission. The Department indicated to the sign owner before the erection of the signs at the new locations that they would be considered on-premise signs for the present. At trial defendant argued that the signs were not

relocated, but were instead "newly erected" signs, thus allowing the signs to be removed without compensation since their placement occurred after the effective date of the Act. Permit fees had been paid for the signs each year through 1968.

In *State ex rel. State Highway Department v. Yurcic,* 85 N.M. 220, 223, 511 P.2d 546, 549 (1973), the Court quoted the following language which is set forth in *Westerman v. City of Carlsbad,* 55 N.M. 550, 555–6, 237 P.2d 356, 359 (1951):

> 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.

In *State ex rel. State Highway Dept. Etc. v. Shaw,* 90 N.M. 485, 565 P.2d 655 (1977), the Court agreed with the defendants' assertion that equitable estoppel precluded the State from denying their recovery of the enhanced value of their land in that condemnation proceeding. This Court rejected the trial court's reasoning that estoppel did not apply because there was no false representation or concealment on the part of the State Highway Department. We said:

> The trial court failed to apply that part of the *Yurcic* test which triggers an estoppel claim when the "conduct . . . is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert . . ."
>
> It is clear that the Department is now adopting a position that is contrary to its representations to the defendants in 1973. *Representations that are contrary to the essential facts to be relied upon, even though made innocently or by mistake, will support the application of the estoppel doctrine.* (Emphasis added.)

Id. at 488, 565 P.2d at 658.

In the case at bar, the district court found that plaintiffs failed to show that they had relied on the Department's representation that the relocation of the signs would not affect the owner's right to compensation. It is our opinion that this finding is in error. By granting permission to plaintiffs to relocate the signs, the Department's conduct conveyed to plaintiffs that the right to compensation would not be affected. Plaintiffs acted upon that permission as is evidenced by the fact that the signs were moved to new locations soon after the permission was granted. The finding of the district court in this regard is reversed. We hold that the Department is equitably estopped from claiming that plaintiffs McClures' signs were "newly erected" and are subject to removal without just compensation.

The decision of the district court is thus affirmed in part and reversed in part. The cause is remanded to the district court for further proceedings not inconsistent with this opinion.

IT IS SO ORDERED.

PAYNE and FEDERICI, JJ., concur.

600 P.2d 271

Ken MARSH, d/b/a Rental Tools, Plaintiff-Appellant,

v.

James R. COLEMAN and Ronald E. Burkham and Marsha R. Burkham, his wife, and Carlsbad Savings & Loan Assn., Defendants-Appellees.

No. 11710.

Supreme Court of New Mexico.

Aug. 30, 1979.

Reynolds, Bryan & Francoeur, Warren F. Reynolds, Hobbs, for plaintiff-appellant.

Shuler, Murphy & Schuler, James L. Schuler, M. Jane Shuler, Carlsbad, for defendants-appellees.

OPINION

JOSEPH F. BACA, District Judge.

Plaintiff-appellant, M & M Rental Tools, a partnership composed of Ken and Florine Marsh, brought this action to foreclose a lien on real property owned by defendants-appellees, James R. Coleman, Ronald E. Burkham, and Marsha R. Burkham, and upon which defendant-appellee Carlsbad Savings & Loan Association had a mortgage. The alleged lien arose from unpaid rental fees on a water well drilling rig leased by Rental Tools to Sides Water Well Service, a water well drilling contractor, for use in drilling a well on defendant-appellee Coleman's property. After trial on the merits, the trial court held for defendants-appellees. Rental Tools appeals. We reverse.

On December 5, 1975, Rental Tools leased the water well drilling rig to Sides Water. At the time Sides Water leased the rig, and

during the time it used it on Coleman's property, Sides Water was not a licensed water well driller under § 72–12–13, N.M.S.A. 1978. The rig was returned to Rental Tools in April 1976. Shortly thereafter, Sides Water obtained a driller's license. On June 17, 1976, Rental Tools filed a claim of lien against Coleman's property for the rental value of the rig for a sixteen-week period. Subsequent to the filing of the claim of lien, Coleman conveyed the property to the Burkhams, and Carlsbad Savings & Loan recorded its mortgage on the property.

The trial court held that Rental Tools was not entitled to file a claim of lien for the rental charges because Sides Water was not a licensed driller at the time the drilling rig was leased and used on Coleman's property. The court also found that the claim of lien contained several fatal variances, which rendered it unenforceable. Rental Tools contends that these findings were erroneous. We agree.

I.

Rental Tools' first point is that the trial court erred in holding that a lessor of a drilling rig could not file a claim of lien for the rental value of the rig, where the driller-lessee was unlicensed at the time the rig was used.

Section 60–13–30B, N.M.S.A. 1978, provides that

> [a]ny contractor operating without a license *as required by the Construction Industries Licensing Act* shall have no right to file or claim any mechanic's lien as now provided by law. (Emphasis added.)

However, under § 60–13–3C(2), N.M.S.A. 1978 (Supp.1978), for purposes of the Construction Industries Licensing Act, §§ 60–13–1 to 57, N.M.S.A. 1978, a contractor is expressly defined not to include "any person who drills . . . any . . . water well . . . ." In addition, § 60–13–3C(1) states that a contractor does not include "any person who merely furnishes materials or supplies at the site without fabricating them into, or consuming them in the performance of, the work of a contractor."

As a water well driller, Sides Water was required to be licensed under § 72–12–13, not under the Construction Industries Licensing Act. Rental Tools, as a supplier of materials or supplies, which were not fabricated into or consumed in the work Sides Water performed, was also not required to be licensed under the Construction Industries Licensing Act. Thus, § 60–13–30B is inapplicable in this case.

Unlike the Construction Industries Licensing Act, the act pertaining to the licensing of water well drillers contains no provision which would prohibit an unlicensed water well driller or its supplier from filing a claim of lien against property on which drilling work is performed. The fact that in one licensing situation the Legislature has explicitly provided that non-licensed contractors may not file claims of lien, and in another licensing situation, has not enacted a similar prohibition, is an indication that the Legislature did not intend to preclude the filing of liens in the latter situation. *Wilson v. Kealakekua Ranch, Ltd.*, 57 Haw. 124, 551 P.2d 525 (1976).

It should be noted that in a previous decision, this Court held that one who leased equipment to a contractor could not file a claim of lien for the rental value of that equipment. *Lembke Construction Co. v. J. D. Coggins Company*, 72 N.M. 259, 382 P.2d 983 (1963). *Cf. Albuquerque Foundry & Machine Works v. Stone*, 34 N.M. 540, 286 P. 157 (1930) (holding that an oil well driller could not file a claim of lien for the value of a drilling rig temporarily used on a job site). In 1965, apparently in response to the *Lembke* decision, the Mechanics' Lien Law was amended to provide that any person "providing or hauling equipment, tools or machinery" for the construction of any structure is entitled to a lien for the value of such services. N.M. Laws 1965, ch. 184, § 1. The right created by this amendment is not dependent upon, nor is it derivative from, the rights of the contractor or other person with whom the property owner dealt.

Therefore, the fact that Sides Water was an unlicensed water well driller has no effect on the right of Rental Tools under § 48–2–2, N.M.S.A. 1978, to file a claim of lien for the rig it provided to Sides Water for the drilling of a water well on Coleman's property. The trial court erred in holding that it did.

II.

The second issue we address is whether the variances in the claim of lien between the allegations contained therein and the evidence produced at trial are fatal to its validity.

Section 48–2–6, N.M.S.A. 1978, provides that a claim of lien must state the demands of the party filing it, the name of the owner of the property, the name of the person by whom the party was employed or to whom he furnished materials, a description of the property sought to be charged with the lien, and a statement of the terms, time given and conditions of the party's contract. The claim of lien must be verified by the oath of the party "or some other person."

This Court has repeatedly held that only substantial compliance with the terms of this statute is required. *Weggs et al. v. Kreugel et al.*, 28 N.M. 24, 205 P. 730 (1922); *Lyons v. Howard & Destree*, 16 N.M. 327, 117 P. 842 (1911); *Minor v. Marshall*, 6 N.M. 194, 27 P. 481 (1891). In determining whether there has been substantial compliance, the purpose of the statutory requirements must be kept in mind, the primary object being "to give notice to subsequent purchasers and incumbrancers and inform the owner of the extent and nature of the lienor's claim." *Weggs, supra*, 28 N.M. at 27, 205 P. at 731.

Rental Tools' claim of lien stated that Rental Tools was "a business located in Lovington, New Mexico," which had leased a drilling rig to Sides Water from December 5, 1975 to April 24, 1976 for use on the property of Coleman. The claim of lien contained a detailed description of Coleman's property. Rental Tools alleged that it was due $5,263.44 "for labor and the contract price for the lease" of the rig.

The trial court found that the claim of lien was defective because it contained six fatal variances. First, the trial court found that the designation of Rental Tools as simply a business in Lovington was defective because the claim of lien should have stated that Rental Tools was a partnership.

There is no requirement under § 48–2–6 that the claim of lien contain a description of the type of entity that filed it. It is only necessary that the name of the claimant appear on the claim of lien, and courts have been liberal in upholding claims or statements in this respect. 57 C.J.S. *Mechanics' Liens* § 156 (1948). Defendants do not contend that the failure of the claim of lien to describe Rental Tools as a partnership prejudiced them in any way.

The second alleged variance is that the description of Coleman's property was not the exclusive property the drilling rig was to be used upon, but rather, the rig was to be used on several properties. This is not a variance. The uncontradicted evidence was that the rig was used solely on the property of Coleman during the period of time described on the claim of lien. The fact that this period of time might have been unreasonable in light of the work which was performed may be relevant to the proper amount of the lien. However, in the absence of fraud or bad faith, an overstatement of the amount due does not invalidate the claim of lien. 53 Am.Jur.2d *Mechanics' Liens* § 234 (1970). The court did not make a finding of fraud or bad faith.

The third alleged variance is that Rental Tools did not supply labor as alleged in the claim of lien. Rental Tools now concedes that no labor was supplied. However, the evidence showed that Rental Tools claimed $261 for transportation of the rig to and from Coleman's property. One of the partners in the Rental Tools partnership testified that he was not certain whether to classify the transportation charge as a labor or as a material item. Section 48–2–2 provides that a person may file a lien for labor *or* for providing or hauling equipment, tools or machinery. It does not require that the

claimant do both. At most, this alleged variance was an innocent misclassification, which defendants have failed to show has worked to their prejudice.

The fourth alleged variance is that sixteen weeks was an unreasonable period of time for the drilling of the well on Coleman's property, and indicated that the drilling rig was not used for the exclusive purpose of drilling a well on that property. Whether or not sixteen weeks was a reasonable time for which Rental Tools may be fully compensated is a question of damages, which is distinct from the issue of the validity of the claim of lien itself. As we noted above, an overstatement of the amount due does not invalidate a claim of lien, unless it results from fraud or bad faith on the part of the claimant. There is no allegation that Rental Tools' claim was fraudulent or was made in bad faith.

The fifth alleged variance is that the terms, time, and conditions of the alleged contract were in complete variance with the evidence. The evidence does not support this finding.

The final variance the court found was that Rental Tools' attorney verified the claim of lien without a showing that the attorney knew the facts as stated in the claim to be correct. The attorney signed the verification, stating that he had investigated the facts set forth in the claim of lien, and that they were true and correct to the best of his knowledge.

In *Lyons, supra,* this Court held that a verification stating that the matters set forth in the claim of lien were "true and correct, to the best of my knowledge, information, and belief" was a sufficient verification under the New Mexico Mechanics' Lien Law. The Court said:

> No particular form of verification is required by our statute, nor is it specifically required thereby that the verification shall be true to the knowledge of affiant.

16 N.M. at 331, 117 P. at 843.

The Court relied on cases construing verifications similar to the one in this case, including one in which an attorney signed a claim of lien based on his belief that the allegations contained therein were "just and true." *Finley v. West,* 51 Mo.App. 569 (1892). *See also Monarch Metal Weather Strip Co. v. Clynick,* 117 Cal.App. 270, 3 P.2d 593 (1931). Therefore, the trial court erred in holding that the verification of the claim of lien in this case was improper.

We are persuaded that none of the so-called variances were of such a nature that the property owner, and subsequent purchasers and incumbrancers, could be said to have had no notice from the claim of lien of the extent and nature of Rental Tools' claim.

Defendants contend that even if each individual variance is not fatal to the claim of lien, the cumulative effect of the six variances was highly prejudicial. However, defendants do not point to any evidence in the record which demonstrates the manner in which they have been prejudiced.

Therefore, the trial court erred in holding that Rental Tools' claim of lien was unenforceable. The judgment is reversed, and the cause is remanded for purposes of determining the amount to which Rental Tools is entitled.

IT IS SO ORDERED.

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

600 P.2d 274

In the Matter of the ESTATE OF Lois Faye SEYMOUR, Deceased.

Dale Allen SEYMOUR, Individually and as Special Administrator and Personal Representative, Vicki McClintic and Andrew J. Gonzales, Petitioners,

v.

Jay Lynn DAVIS, aka Jay Davis, Respondent.

No. 12386.

Supreme Court of New Mexico.

Sept. 6, 1979.

Clayburgh, Ashby, Rose & Paskind, Stewart Rose, III, Albuquerque, for petitioners.

John P. Dwyer, Albuquerque, for respondent.

W. Garrett Flickinger, Pamela Minzner, U. N. M. School of Law, Albuquerque, amicus curiae.

OPINION

PAYNE, Justice.

This dispute arose over the admissibility to probate of Lois Faye Seymour's will. The district court admitted the will to probate over the objections of her son, Jay Lynn Davis, and held that Davis should be disinherited for contesting it. On appeal, the Court of Appeals reversed the district court. We granted certiorari and now reverse in part and affirm in part the decision of the Court of Appeals.

The decedent executed the will at issue in October 1971 while she was married to Dale R. Seymour. Excepting a few specific bequests, the will provided that her estate was to go to her husband, unless he predeceased her, died simultaneously with her, or died within sixty days following her death. In any of those events an alternate disposition provided that Davis, her son, would receive $10,000 plus certain mortgage notes.

The alternate disposition also provided that the residue of her estate would go to her stepson, Dale Allen Seymour, an appellee.

After execution of the will, the decedent divorced Dale R. Seymour in September 1975. Lois Faye Seymour died in March 1977. The decedent's former husband makes no claim and asserts no rights under the will. The district court admitted the will to probate over Davis' objections and entered an additional finding that Davis was disinherited under a provision in the will which stated:

> I expressly provide that if either JAY LYNN DAVIS or DALE ALLEN SEYMOUR shall contest the terms and provisions of this Will, making claim that he is entitled to a greater share of my estate than is provided herein, or contesting in any way the terms and provisions hereof, then I direct that said son shall be disinherited.

Davis argues on appeal that his mother's will was revoked on the date of divorce by operation of § 30–1–7.1, N.M.S.A.1953 (Supp.1975) enacted in 1967. He argues that the statute which was in effect on the date of divorce did not prescribe an alternative disposition of the estate following revocation of the primary dispositive provisions.

Section 30–1–7.1 of the old law provides as follows:

> B. If after making a will the testator becomes divorced, all provisions in the will in favor of the testator's spouse so divorced are thereby revoked.
>
> C. Except for the circumstances described in subsections A and B of this section and the provisions of 29–1–16 and 30–1–7 New Mexico Statutes Annotated, 1953 Compilation, no written will nor any part thereof can be revoked by any change in the circumstances or condition of the testator.

Davis therefore argues that the alternative distribution of the estate cannot be given effect, and thus that the alternative distribution of the estate should be distributed under the New Mexico intestacy laws. Davis asserts that the district court order was contrary to the decedent's intention. Davis further asserts that he did not intend to contest his mother's will as such, but only to have a court construe the meaning and effect of the will.

The appellees argue that the decedent's will was not revoked at the instant of her divorce since wills are "ambulatory" until the instant of death. They argue that the Legislature's enactment of the Probate Code, specifically § 45–2–508, N.M.S.A.1978, prior to decedent's death governs the effect of the divorce.

Section 45–2–508 provides:

> A. If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power or appointment on the former spouse, and any nomination of the former spouse as personal representative, trustee, conservator or guardian, unless the will expressly provides otherwise.
>
> B. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent.
>
> . . . . .
>
> E. No change of circumstances other than as described in this section revokes a will.

The pertinent distinction between the application of the two sections is that under the prior law the provisions relating to the divorced spouse are revoked, while under the present law the divorced spouse is considered to have predeceased the testator.

The Court of Appeals held that revocation of the will by divorce takes effect as of the date of divorce and that under § 30–1–7.1(B) of the former law that the decedent's will did not make an effective disposition of her estate. The court further held that there was no practical reason to admit the will to probate and that the "no contest"

provision would therefore not be effective to disinherit Davis.

The issues presented are matters of first impression in New Mexico. We will first deal with the matter of whether the old law or the new Probate Code governs the disposition of the decedent's will. We will then deal with the effect of the no-contest provision in the will. While the position taken by the Court of Appeals on the first issue is not without precedent in other states, we feel that the better view and the weight of authority are to the contrary.

Thirty-five states have adopted legislation which revokes wills or will provisions in favor of divorced spouses. In only a few states have courts considered whether new statutes should apply to divorces obtained before the effective dates of the statutes. In the present case, however, we need look only to the legislative intent in the enactment of the Probate Code in New Mexico.

The Probate Code states that "the affairs of decedents dying on or after the effective date of the Probate Code" will be controlled by the provisions of the Code; the effective date of the Probate Code was July 1, 1976, prior to decedent's death in March 1977. N.M.Laws 1975, ch. 257, § 10–101(A). Therefore, the affairs of Lois Faye Seymour's estate are governed by the new Code. We hold that the terminology used by the Legislature encompasses wills of decedents, even though executed prior to the effective date of the Code.

The enabling act distinguishes the term "affairs of decedents" for persons "dying on or after the effective date", N.M.Laws 1975, ch. 257, § 10–101(B), from other matters governed by the Probate Code, such as missing persons, minors and incapacitated persons. In these areas, the Probate Code is effective only where such matters were "commenced on or after the effective date." N.M.Laws 1975, ch. 257, § 10–101(B). Thus it is clear that the Legislature recognized the distinction between the effective date of the Code as it applied to different circumstances governed by the Act. The Probate Code provided for a time lag prior to its effective date. This provided time for adjustments by parties who felt their wills would need to be changed. The Code's planning period provision would not have been necessary if the Legislature had intended the Code to apply only to wills executed after its effective date.

Under the new Code, a testator's will can be revoked in three cases. These are divorce (§ 45–2–508), an omitted spouse (§ 45–2–301, N.M.S.A.1978), and a pretermitted child (§ 45–2–302, N.M.S.A.1978). In each of these provisions, something in addition to the cited event is required to revoke the will. Additionally, § 45–2–104, N.M.S.A.1978 imposes a condition of survival on intestate takers. All these provisions point to the testator's death as being the moment of revocatory effect intended by the Legislature. Historically, the statutory scheme for revocations by operation of law allowed a less than total revocation of a will. *See* § 30–1–7.1, N.M.S.A.1953. This scheme also required that affected parties survive the testator in order to trigger revocatory effect.

Our holding, that § 45–2–508 controls the effect of divorce on the construction of the unrevoked portions of the will, is supported by modern case authority and the Uniform Probate Code § 2–508, after which our Legislature modeled New Mexico's new Probate Code. The majority of recent cases follow the dictates of the Uniform Probate Code, holding that divorce is equivalent to death. *Calloway v. Estate of Gasser,* 558 S.W.2d 571 (Tex.Civ.App.1977).

Two additional factors compel the admission of the Seymour will to probate. First, as previously stated, decedent's will is governed by the new Probate Code because she died after July 1, 1976. To determine whether any of the provisions of decedent's will can dispose of her property, the court must first determine the will's validity and whether it was the last one she executed. Even if decedent's will had no dispositive provisions, its admission to probate is nevertheless necessary because of the revocatory clause contained in it. *See Matter of Estate of Gardner,* 561 P.2d 1079 (Utah 1977).

Second, the decedent appointed a series of successor personal representatives, none of whose service was conditioned on her husband's predeceasing her. The fact that a personal representative for decedent Seymour remains to be designated is another reason for allowing the will to go to probate. § 45–3–203(A)(1), N.M.S.A.1978; *Matter of Estate of Gardner, supra.*

Finally, we address the validity of decedent's no-contest provision and whether appellee Davis is disinherited by its operation. On this issue, we agree with the Court of Appeals and overrule the trial court.

We hold that no-contest provisions are valid and enforceable in New Mexico, but they are not effective to disinherit a beneficiary who has contested a will in good faith and with probable cause to believe that the will was invalid. *See Hartz' Estate v. Cade,* 247 Minn. 362, 77 N.W.2d 169 (1956). No-contest provisions are valuable will devices. They serve to protect estates from costly and time-consuming litigation and they tend to minimize family bickering over the competence and capacity of testators, and the various amounts bequeathed. However, the function of the court is to effect the testator's intent to the greatest extent possible within the bounds of the law. To strictly construe no-contest provisions in the face of obvious indications of unresolved legal questions, such as were present in this case, could result in complete destruction of a testator's intent. Accordingly, where the circumstances upon which a will is based have changed substantially between the time of its execution and the time of its probate, courts should not discourage contests. The circumstances relative to the Seymour will were sufficiently changed to justify appellee Davis in seeking a judicial determination construing its meaning and effect. We hold that Davis is entitled to share in the estate of his mother under her will.

Whenever a beneficiary contests a will in the face of a no-contest provision, he does so at the peril of his bequest. But, when he does so in good faith and for probable cause, his bequest should not be jeopardized by the contest. The court should infer the existence or absence of good faith and probable cause from the totality of the circumstances. *See* 80 Am. Jur.2d *Wills* § 1575 (1975); Annot., 125 A.L.R. 1135 (1940); 5 Bowe—Parker, *Page on Wills* § 44.29 (rev. 1962); Leavitt, *Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments,* 15 Hastings L.J. 45, 67, n. 87 (1963); Note, 23 U.Pitt.L.Rev. 767 (1962); Notes, 43 Marq.L.Rev. 528 (1960).

The case is remanded to the district court for such further action as is necessary to conform to this opinion.

IT IS SO ORDERED.

SOSA, C. J., and EASLEY, FEDERICI and FELTER, JJ., concur.

600 P.2d 278

ABO PETROLEUM CORPORATION et al., Plaintiffs-Appellees,

v.

James W. AMSTUTZ et al., Defendants-Appellants.

No. 12184.

Supreme Court of New Mexico.

Sept. 10, 1979.

Rehearing Denied Sept. 25, 1979.

Montgomery, Andrews & Hannahs, Walter J. Melendres, Seth D. Montgomery, Santa Fe, for defendants-appellants.

Losee, Carson & Dickerson, Chad D. Dickerson, Artesia, for plaintiffs-appellees.

OPINION

PAYNE, Justice.

This action was brought in the District Court of Eddy County by Abo Petroleum and others against the children of Beulah Turknett Jones and Ruby Turknett Jones to quiet title to certain property in Eddy County. Both sides moved for summary judgment. The district court granted Abo's motion, denied the children's motion, and entered a partial final judgment in favor of Abo. The children appealed, and we reverse the district court.

James and Amanda Turknett, the parents of Beulah and Ruby, owned in fee simple the disputed property in this case. In February 1908, by separate instruments entitled "conditional deeds," the parents conveyed life estates in two separate parcels, one each to Beulah and Ruby. Each deed provided that the property would remain the daughter's

> during her natural life, . . . and at her death to revert, vest in, and become the property absolute of her heir or heirs, meaning her children if she have any at her death, but if she die without an heir or heirs, then and in that event this said property and real estate shall vest in and become the property of the estate of . . [her], to be distributed as provided by law at the time of her death. . . .

At the time of the delivery of the deed, neither daughter was married, nor were any children born to either daughter for several years thereafter.

In 1911, the parents gave another deed to Beulah, which covered the same land conveyed in 1908. This deed purported to convey "absolute title to the grantee . . . ." In 1916, the parents executed yet another deed to Beulah, granting a portion of the property included in her two previous deeds. A second deed was also executed to Ruby, which provided that it was a "correction deed" for the 1908 deed.

After all the deeds from the parents had been executed, Beulah had three children and Ruby had four children. These children are the appellants herein.

Subsequent to the execution of these deeds, Beulah and Ruby attempted to convey fee simple interests in the property to the predecessors of Abo. The children of Beulah and Ruby contend that the 1908 deeds gave their parents life estates in the property, and that Beulah and Ruby could only have conveyed life estates to the predecessors in interest of Abo. Abo argues that the 1911 and 1916 deeds vested Beulah and Ruby with fee simple title, and that such title was conveyed to Abo's predecessors in interest, thereby giving Abo fee simple title to the property.

We begin our inquiry by examining the nature of the estates James and Amanda Turknett conveyed in the 1908 deeds.

First, the deeds gave each of the daughters property "during her natural life." As Abo apparently concedes, these words conveyed only a life estate.

Second, each deed provided that upon the daughter's death, the property would pass to her "heir or heirs," which was specifically defined as "her children if she have any at her death." Because it was impossible at the time of the original conveyance to determine whether the daughters would have children, or whether any of their children would survive them, the deeds created contingent remainders in the daughters' children, which could not vest until the death of the daughter holding the life estate. C. Moynihan, *Introduction to the Law of Real Property* 123 (1962).

Third, each deed provided that if the contingent remainder failed, the property would become part of the daughter's estate, and pass "as provided by law at the time of her death." The effect of this language would be to pass the property to the heirs of the daughter upon the failure of the first contingent remainder. Because one's heirs are not ascertainable until death, (C. Moynihan, *supra* at 127), the grant over to the daughter's estate created a second, or alternative, contingent remainder.

The only issues that remain are whether the parents retained any interest, whether by their subsequent deeds to their daughters they conveyed any interest that remained, and whether those conveyances destroyed the contingent remainders in the children.

The grantor-parents divested themselves of the life estate and contingent remainder interests in the property upon delivery of the first deed. Because both remainders are contingent, however, the parents retained a reversionary interest in the property. C. Moynihan, *supra* at 124, n. 1.

Abo's position is that by the subsequent conveyances to the daughters, the parents' reversionary interest merged with the daughters' life estates, thus destroying the contingent remainders in the daughters' children and giving the daughters fee simple title to the property. This contention presents a question which this Court has not previously addressed—whether the doctrine of the destructibility of contingent remainders is applicable in New Mexico.

This doctrine, which originated in England in the Sixteenth Century, was based upon the feudal concept that seisin of land could never be in abeyance. From that principle, the rule developed that if the prior estate terminated before the occurrence of the contingency, the contingent remainder was destroyed for lack of a supporting freehold estate. The one instance in which this could happen occurred when the supporting life estate merged with the reversionary interest.

Although New Mexico has adopted the common law of England by statute, § 38–1–3, N.M.S.A.1978, it has been repeatedly held that "if the common law is not 'applicable to our condition and circumstances' it is not to be given effect." *Flores v. Flores*, 84 N.M. 601, 603, 506 P.2d 345, 347 (Ct.App. 1973), *cert. denied*, 84 N.M. 592, 506 P.2d 336 (1973). *See also Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975). In *Hicks* this Court held that sovereign immunity—another doctrine of the common law—could be "put to rest by the judiciary" once it had reached a point of obsolescence. *Id.* at 590, 544 P.2d at 1155.

The doctrine of destructibility of contingent remainders has been almost universally regarded to be obsolete by legislatures, courts and legal writers. *See, e. g., Whitten v. Whitten*, 203 Okl. 196, 219 P.2d 228 (1950); 1 L. Simes and A. Smith, *Law of Future Interests* § 209 (2d ed. 1956). It has been renounced by virtually all jurisdictions in the United States, either by statute or judicial decision, and was abandoned in the country of its origin over a century ago. Section 240 of the *Restatement of Property* (1936) takes the position that the doctrine is based in history, not reason. Comment (d) to § 240 states that "complexity, confusion, unpredictability and frustration of manifested intent" are the demonstrated consequences of adherence to the doctrine of destructibility. Furthermore, because operation of the doctrine can be avoided by the use of a trust to support the contingent remainder, the doctrine places a premium on the drafting skills of the lawyer. 49 Mich.L.Rev. 762, 764 (1951).

The only tenable argument in support of the doctrine is that it promotes the alienability of land. It does so, however, only arbitrarily, and oftentimes by defeating the intent of the grantor. Land often carries burdens with it, but courts do not arbitrarily cut off those burdens merely in order to make land more alienable.

Because the doctrine of destructibility of contingent remainders is but a relic of the feudal past, which has no justification or support in modern society, we decline to apply it in New Mexico. As Justice Holmes put it:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Holmes, *The Path of the Law*, 10 Harv.L. Rev. 457 at 469 (1897).

We hold that the conveyances of the property to the daughters did not destroy the contingent remainders in the daughters' children. The daughters acquired no more interest in the property by virtue of the later deeds than they had been granted in the original deeds. Any conveyance by them could transfer only the interest they had originally acquired, even if it purported to convey a fee simple. *Cook v. Daniels*, 306 S.W.2d 573 (Mo.1957).

The summary judgment and partial final judgment entered in favor of Abo are reversed, and the cause is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

SOSA, C. J., and FELTER, J., concur.

600 P.2d 281

STATE of New Mexico, Plaintiff-Appellee,

v.

Raymond GARDUNO, Defendant-Appellant.

No. 12047.

Supreme Court of New Mexico.

Sept. 25, 1979.

Donald C. Schutte, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Janice Marie Ahern, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

FEDERICI, Justice.

The question presented by this appeal is whether the trial court properly sentenced defendant to life imprisonment under § 30–31–20(B)(2), N.M.S.A.1978 after his convictions for violation of the Controlled Substances Act.

Defendant was convicted of two counts of trafficking in a controlled substance contrary to § 30–31–20(A). Defendant does not challenge the convictions but argues that the trial court improperly imposed life sentences for the two convictions. The statute, § 30–31–20(B), provides that:

> Except as authorized by the Controlled Substances Act, it is unlawful for any person to intentionally traffic. Any person who violates this subsection is:
>
> (1) for the first offense, guilty of a felony and shall be punished by a fine of not more than ten thousand dollars ($10,000) or by imprisonment for not less than ten years nor more than fifty years, or both; and
>
> (2) *for the second and subsequent offenses,* guilty of a felony and shall be punished by a fine of not more than fifteen thousand dollars ($15,000) or by imprisonment for life, or both. (Emphasis added.)

On the basis of defendant's prior federal conviction for possession with intent to distribute a controlled substance (heroin) contrary to 21 U.S.C. § 841 (1976), the trial court imposed two concurrent life sentences for the two convictions in this case, pursuant to § 30–31–20(B)(2).

Defendant claims his due process rights were violated by the imposition of the life sentences without a hearing or finding of fact on the question of whether he was the same person convicted of the prior federal offense. We do not agree.

Defendant had ample notice that a life sentence would be imposed if he was convicted of the state charges. The indictment specifically stated at page 2:

> NOTE: In the present case, as to *each* count, the life sentence provisions will apply (unless waived in writing by the State); the State will show Defendant to have been convicted of Trafficking (possession with intent to distribute) Heroin . . . in the United States District Court. . . .

Defendant's claim that he was not afforded notice that a conviction would result in a penalty of life imprisonment is not well taken. As to the argument that there was no specific finding of fact that defendant was the same person convicted of the prior federal offense, the record now contains such a finding. We remanded this case to the trial court following oral argument in October 1978. After a hearing on the matter the trial court made a specific finding that defendant was the same person convicted of the prior federal offense.

Defendant next contends that "second and subsequent offense" means a second or subsequent violation of § 30–31–20, and that a federal offense cannot be used to increase the penalty for the state offense. We do not agree. The statute merely refers to "second and subsequent offenses." It does not specify that the prior offense must have been committed in New Mexico or prosecuted under this Act. In this case the federal offense was substantially the same as the state offense. In other words, the same offense for which defendant was convicted in federal court was a crime under the state statute. Obviously, the intent of the statute is to deter people from repeating their previous offenses. Under similar circumstances, a fed-

eral conviction of possession with intent to distribute heroin, a felony, was sufficient to enhance a defendant's conviction under our Habitual Offender Statute. *McGuinness v. State,* 92 N.M. 441, 589 P.2d 1032 (1978). The relevant federal statute reads, in pertinent part, as follows:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . . .

21 U.S.C. § 841 (1976). Heroin is designated a "controlled substance" at 21 U.S.C. § 812(c)(b)(10) (1976).

Similarly, § 30–31–20(B) designates as unlawful, and felonious, the intentional trafficking of a controlled substance. And, as defined in § 30–31–20(A), "traffic" means the "manufacture . . . distribution, sale, barter or giving away . . or . . . possession with intent to distribute" heroin. The statutes proscribe the same acts and require the same knowledge or intent.

Defendant pled guilty to the federal violation on March 31, 1975. Defendant's convictions in this case occurred on April 13, 1978. The state convictions were "subsequent" to the federal conviction. The elements necessary to prove the federal offense were the same as those required to prove the state charges. The federal offense was a prior conviction for purposes of the penalty provisions of the Controlled Substances Act, § 30–31–20(B)(2).

The trial court is affirmed.

IT IS SO ORDERED.

EASLEY and PAYNE, JJ., concur.

600 P.2d 283

Herbert A. SCHOBER,
Plaintiff-Appellant,

v.

MOUNTAIN BELL TELEPHONE,
Defendant-Appellee.

No. 3585.

Court of Appeals of New Mexico.

Oct. 31, 1978.

Anne Kass, Albuquerque, for plaintiff-appellant.

Ronald Segel, Sutin, Thayer & Browne, Albuquerque, for defendant-appellee.

OPINION

HENDLEY, Judge.

Plaintiff brought suit under the Workmen's Compensation Act, § 59–10–1 et seq., N.M.S.A.1953 (2d Repl.Vol. 9, pt. 1, 1974) as amended, claiming that his allergic reaction to cigarette smoke in the work environment provided by his employer was a compensable injury under the Act. Defendant's motion for summary judgment was granted on the basis that plaintiff's allergic reaction, which caused him to eventually collapse, was not an "accidental injury" as a matter of law as contemplated by the Act. We disagree.

Webb v. New Mexico Pub. Co., 47 N.M. 279, 141 P.2d 333 (1943) is dispositive of this issue. There the employer provided Webb, a printer-operator, with a soap which he used to wash his hands several times a day over a period of about six months. Solely because of his allergic reaction to the soap Webb developed large painful eruptions on the backs of his hands which completely incapacitated him in his work. The court found this injury to be accidental.

In reaching its conclusion the court refused to define "accident" in its "restricted and technical sense" but instead opted for a "wider and practical" definition necessary "to give workable effect to the proper and just administration of the Compensation Law." The court found that there must be a time:

> ". . . when it can be said with certainty that a compensable accidental injury has been inflicted; but the cause, and the coming into existence of the evidence characterizing it as a compensable one, need not be simultaneous events . . ."

See also, *Stevenson v. Lee Moor Contracting Co.,* 45 N.M. 354, 115 P.2d 342 (1941).

Thus, under *Webb,* supra, the happenings may be gradual and may involve several different accidents which culminate in an accidental injury. In the present case the claim is that the constant exposure to cigarette smoke in the work environment triggered the allergies which in turn caused plaintiff to collapse. We see no distinguishing features between the instant case and *Webb,* supra, insofar as accidental injury is discussed. The motion for summary judgment should have been denied.

Defendant urges us to analogize this case to the "silicosis" cases where workmen who developed this respiratory ailment over a prolonged period were denied workmen compensation benefits. See *Aranbula v. Banner Min. Co.,* 49 N.M. 253, 161 P.2d 867 (1945); *Simion v. Molybdenum Corporation,* 49 N.M. 265, 161 P.2d 875 (1945). Silicosis, however, is an occupational disease now covered by the Occupational Disease Disablement Law (§ 59–11–1, et seq. N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 1, 1974) as amended; *Vincent v. United Nuclear-Homestake Partners,* 89 N.M. 704, 556 P.2d 1180 (Ct. App.1976). An allergic reaction to cigarette smoke is not an occupational disease. It is no different than the allergic reaction in *Webb,* supra. *Aranbula,* supra, and *Simion,* supra, are not on point.

This court has reviewed defendant's other arguments that the injury did not arise out of or in the course of employment as required by § 59–10–6, supra, and that plaintiff has already been compensated. These are questions of fact which are for the trier of fact to decide and not for an appellate court to resolve. *Goodman v. Brock,* 83 N.M. 789, 498 P.2d 676 (1972).

Reversed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HERNANDEZ, J., dissents.

HERNANDEZ, Judge (dissenting).

I respectfully dissent.

The defendant stated in its motion for summary judgment that it was based upon the pleadings, the deposition of the plaintiff, affidavits, etc. In its answer the defendant alleged several affirmative defenses, the second of which is pertinent:

> "Plaintiff's alleged disability is not compensable under the Workmen's Compensation Act because it does not arise out of

and in the course of his employment for defendant."

The trial court in its order granting defendant's motion, gave its reason for granting it: "The court concludes as a matter of law, that plaintiff did not sustain an accidental injury within the meaning of the Workmen's Compensation Act . . . ."

I agree with the trial court's conclusion, that plaintiff's injury was not compensable. However, I disagree with the trial court's reasoning. In my opinion, plaintiff's injury did not arise out of his employment. Our Supreme Court in *Gilbert v. E. B. Law & Sons, Inc.,* 60 N.M. 101, 107, 287 P.2d 992 (1955) stated:

"Before an injury may be said to be compensable as 'arising out of employment,' the accident causing the injury must result from a risk reasonably incident to the employment; *a risk common to the public generally and not increased in any way by the circumstances of the employment is not covered by our act;* . . ." [Emphasis added.]

In *Berry v. J. C. Penny Co.,* 74 N.M. 484, 394 P.2d 996 (1964) stated:

"There must not only have been a causal connection between the employment and the accident, but the accident must result from a risk incident to the work itself.

"When the employee, as in this case, solely because of a non-occupational, preexisting physical condition, suffered a muscle spasm of the lower back, the question arises whether the muscle injury is one arising out of the employment.

"This court, along with the courts of most states, has interpreted 'arising out of employment' to require a showing that the injury was caused by a peculiar or increased risk to which claimant, as distinguished from the general public, was subjected by his employment. [Citations omitted.]

"Under the facts in this case, it is quite clear that claimant's injury arose out of risks or conditions personal to her and not out of a risk peculiar to the employment. Such injuries do not 'arise out of' the employment unless the employment contributes to the risk or aggravates the injury. Those injuries within the category of risks personal to the claimant are universally held to be non-compensable." See 1 Larson's Workmen's Compensation Law, § 700.

The increased-risk doctrine might be summarized as follows: there must be a showing that the injury was caused by an increased risk to which the worker, as distinct from the general public, was subjected by his employment. The following Texas cases are good examples of the use of the doctrine.

American General Ins. Co. v. Webster, 118 S.W.2d 1082 (Tex.Civ.App.1938):

"It is, of course, the rule, as contended by appellant that to be compensable the heatstroke must originate in the business of the employer and at a time when the employee is engaged in the performance of duties that subject him to greater hazards from heatstroke than applied to the general public. The location of the place of work and the condition of the premises may constitute such extra hazard, in whole or in part. . . . The extra hazard may be supplied by the very nature of the work itself. It is a known fact, and was so testified by a medical witness in the instant case, that heavy exertions tend to generate a great deal of bodily heat. . . . In the case before us the very work which the deceased was doing for his employer exposed him to greater hazard from heatstroke than the general public was exposed to for the simple reason that the general public were not pushing wheelbarrow loads of sand in the hot sun on that day."

Weicher v. Insurance Company of North America, 434 S.W.2d 104 (S.Ct.Tex.1968): The petitioner was a saleslady in a department store who was seeking compensation due to heat exhaustion.

"It would appear, then, that Petitioner in order to recover would be required to show that the heat and humidity inside the building where Petitioner worked had been intensified by some circumstance of the condition of the premises. It takes

evidence of this nature to prove that the heat and humidity inside the building is more hazardous than the natural heat and humidity outside to which the general public was subjected."

Any member of the public who entered those buildings would be exposed to the same air. The underlying reason for his disability was personal not work connected. It was purely coincidental that this sensitivity happened at work, it could have happened most any place.

In my opinion, the trial court reached the right conclusion for the wrong reason.

600 P.2d 286

STATE of New Mexico, Plaintiff-Appellee,

v.

Judy ROBINSON, Defendant-Appellant.

No. 3673.

Court of Appeals of New Mexico.

Jan. 2, 1979.

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

Toney Anaya, Atty. Gen., Robert G. Sloan and Sammy J. G. Quintana, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant was convicted of two counts—child abuse resulting in the death of her daughter, Adrianne, and child abuse resulting in great bodily harm to her daughter, Ashley. See § 40A–6–1(C), N.M.S.A.1953 (2d Repl. Vol. 6, 1975 Supp.). We discuss: (1) collateral estoppel; (2) severance; (3) evidentiary issues pertaining to Adrianne; (4) evidentiary issues pertaining to Ashley; and (5) instructions.

Collateral Estoppel

By pretrial motion, defendant sought dismissal of the child abuse charge involving Ashley on the basis that prosecution of the charge was barred by the doctrine of collateral estoppel.

The basis for the motion was a Children's Court hearing on a petition asserting that Ashley was a neglected child. The neglect

grounds asserted were those set forth in § 13–14–3(L), subparagraphs 2, 5, 6(a) and 6(b), N.M.S.A.1953 (Repl. Vol. 3, pt. 1 and 1976–77 Int.Supp.). The Children's Court found neglect on two grounds: (a) lack of proper parental care under § 13–14–3(L)(2), supra; and (b) the parents had knowingly, intentionally or negligently placed the child in a situation that might endanger her life or health, see § 13–14–3(L)(6)(a), supra.

The Children's Court orally remarked: "I don't feel there has been a showing of abuse, and make no finding in that regard." Defendant's collateral estoppel argument is based on this remark. For the purposes of this case, we do not consider the effect of an oral remark as opposed to a written finding. See § 13–14–28(D), N.M.S.A.1953 (Repl. Vol. 3, pt. 1).

The Children's Court "abuse" remark is ambiguous, an ambiguity resulting from statutory differences. The finding that the parents had knowingly, intentionally or negligently placed the child in a situation that might endanger the child's life or health covers most of the elements of child abuse set forth in the criminal statute. See § 40A–6–1(C)(1), supra. These elements are also included within the definition of neglect in the Children's Code. See § 13–14–3(L)(6)(a), supra. The Children's Code, however, sets forth "abuse" as a separate definition of "neglect", see § 13–14–3(L)(5), supra. It was Children's Code "abuse" on which the Children's Code made no finding. As to "abuse", as defined in the criminal statute, the Children's Court affirmatively found most of the elements of the crime defined by § 40A–6–1(C)(1), supra. The Children's Court record is entirely silent as to the alternative criminal child abuse charged in the "neglect" petition; that alternative appears in § 40A–6–1(C)(2), supra.

Although the record as to the Children's Court "abuse" remark is ambiguous, we do not decide the collateral estoppel issue on the ambiguity.

Paulos v. Janetakos, 46 N.M. 390, 129 P.2d 636, 142 A.L.R. 1237 (1942) states: "[A] prior judgment in a different cause of action between the same parties operates as an estoppel only as to questions, points or matters of fact in issue in that cause which were essential to a decision, and which were decided in support of the judgment." What is an issue of fact? "It must be a fact, the determination of which is material, relevant, and necessary to a decision of the case upon its merits". *Paulos v. Janetakos,* supra. This approach has not been changed by decisions on collateral estoppel in criminal cases. The discussion in *State v. Tijerina,* 86 N.M. 31, 519 P.2d 127 (1973) points out that in deciding a collateral estoppel issue, we look to the entire proceedings to determine whether the prior judgment could have been grounded upon an issue other than that which defendant seeks to foreclose from consideration.

One of the Children's Court findings of neglect was based on a definition of neglect which comports with criminal child abuse. Compare § 13–14–3(L)(6)(a), supra, with § 40A–6–1(C)(1), supra. There is no mention in the Children's Court proceedings of the criminal child abuse set forth in § 40A–6–1(C)(2), supra. Defendant's argument is based entirely on "abuse" as neglect under § 13–14–3(L)(5), supra, and not on neglect as defined in § 13–14–3(L)(6)(a) and (b), supra. This record affirmatively shows the Children's Court decision was based on "neglect" issues other than the "abuse" as "neglect" which defendant seeks to foreclose from consideration. There was no basis for the application of the doctrine of collateral estoppel.

Severance

Defendant did not file a pretrial motion for severance. After the jury was selected and sworn, and after opening statements of counsel, defendant moved to sever the two child abuse counts. She asserted that the two charges were unrelated and that she would be prejudiced if the two counts were jointly tried because there would be evidence that each of the children had skull fractures. We do not know on what basis the trial court denied the motion to sever. Two reasons sustain the denial.

The motion was untimely under Rule of Crim.Proc. 33. See *State v. Palmer,* 89 N.M. 329, 552 P.2d 231 (Ct.App.1976).

Defendant did not claim the two counts were improperly joined under Rule of Crim.Proc. 10; the charges were of a "same or similar character." Severance was sought under Rule of Crim.Proc. 34(a) on the basis of prejudice. The trial court's decision to deny severance in light of the prejudice claimed was a discretionary ruling; the appellate issue is whether there was an abuse of discretion. *State v. Schifani,* 92 N.M. 127, 584 P.2d 174 (Ct.App.1978). The record does not show an abuse of discretion.

Evidentiary Issues Pertaining to Adrianne

(a) Defendant asserts the charge involving Adrianne's death should not have been submitted to the jury because "there was no testimony establishing the cause of death of Adrianne." Defendant's argument incorrectly reviews the evidence in the light most favorable to herself. We review the evidence as to cause of death in the light most favorable to the State. *State v. Ewing,* 79 N.M. 489, 444 P.2d 1000 (Ct.App. 1968). Defendant recognizes that the cause of death may be established circumstantially. *State v. Coyle,* 39 N.M. 151, 42 P.2d 770 (1935); *State v. Adams,* 89 N.M. 737, 557 P.2d 586 (Ct.App.1976); *State v. Coulter,* 84 N.M. 647, 506 P.2d 804 (Ct.App.1973). She claims, however, that no expert witness specifically testified to a cause of death and, therefore, the evidence of the cause of death was not substantial. We disagree.

Adrianne had numerous bruises—head, forehead, cheeks, neck, chest, both arms, both sides of the body, back, buttocks and legs. There was also a large fracture on the left side of Adrianne's skull. Dr. Gile testified that Adrianne's injuries were consistent with the Battered Child Syndrome. See *State v. Adams,* supra. The large fracture on the left side of the skull had associated with it an area of subgaleal hemorrhaging with a collection of blood at the fracture site. Dr. Jones' testimony was to the effect that death was not consistent with the Sudden Infant Death Syndrome, that a majority of the bruises were recent, occurring shortly before the time of death, and that the head bruises occurred at approximately the time of death. Dr. Milligan testified that a blow to the head severe enough to fracture the skull "absolutely" could cause death. This is substantial evidence for an inference that the bruises to the head and the skull fracture were the cause of death. See *State v. Bell,* 90 N.M. 134, 560 P.2d 925 (1977).

(b) Dr. Jones performed the autopsy. He testified, without objection, that Adrianne had a healing fracture of the right thigh bone. Dr. Milligan testified that he had treated Adrianne for this injury. Defendant objected to testimony about this prior fracture and asserts the overruling of this objection was error. Dr. Milligan's testimony as to defendant's explanation of this fracture was that defendant had grabbed the leg and heard a "snapping" sound.

Defendant contends testimony concerning this fracture was irrelevant. Adrianne was born October 16, 1975. Dr. Milligan treated the fracture site on November 25, 1975 when the fracture was approximately one week old. Adrianne died February 11, 1976. Within this time frame, the fracture was relevant to the issue of child abuse.

Defendant contends that testimony concerning the fracture should not have been admitted under Evidence Rule 404(b). This rule permits evidence of wrongs or acts to prove an absence of accident. The testimony was properly admitted under this rule. She also contends that the probative value of the testimony concerning the fracture was outweighed by its prejudicial impact. The trial court ruled to the contrary. This record does not show this ruling was an abuse of discretion. See *State v. Fuson,* 91 N.M. 366, 574 P.2d 290 (Ct.App.1978).

Evidentiary Issues Pertaining to Ashley

(a) As to Ashley, the trial court submitted two child abuse instructions; one was child abuse resulting in great bodily

harm and one was child abuse not resulting in great bodily harm. If great bodily harm resulted, the felony was a second degree felony; if great bodily harm did not result, the felony was a fourth degree felony. Section 40A–6–1, supra.

The jury was instructed that "great bodily harm" means an injury which creates a high probability of death. Section 40A–1–13, N.M.S.A.1953 (2d Repl. Vol. 6). Defendant contends the evidence was insufficient to submit the "great bodily harm" issue to the jury.

Defendant asserts "not a single one of the witnesses testified that the injuries involved created a high probability of death." *State v. Bell,* supra, states: "[T]he law does not require that 'great bodily harm' be proved exclusively by medical testimony. The jury is entitled to rely upon rational inferences deducible from the evidence." If a rational inference of great bodily harm was deducible from the evidence, the evidence was sufficient.

Ashley, born November 25, 1976, was hospitalized in both June and July, 1977 as a "failure to thrive" baby. During the July, 1977 hospitalization, after a visit from defendant, Ashley had blood in her mouth and had occult blood in her stool for three or four days. On November 16, 1977 Ashley's pediatrician observed swollen bruised areas on her mid-forehead and below her left eye. Defendant told the doctor that Ashley had fallen against the kitchen table. According to the doctor, the injuries were not consistent with the explanation because there were two separate bruises which would have required two separate points of impact at the same time. On January 4, 1978 Ashley was hospitalized. She had a swollen tender area at the back right part of her skull, redness of both ear drums and superficial abrasions of the abdomen. She had bloody fluid in her middle ear and a break in the mid-ear space. She had a four-inch vertical, linear skull fracture underneath the swollen area of the skull. According to the doctor, defendant's explanation of a fall from a high chair was inconsistent with a fracture at the back of the skull.

The doctor testified it would take a lot of force to break the infant's skull; that the worst complication of the blow to the head would be death from swelling of the brain or a blood clot within the brain area. The doctor kept Ashley under close observation because of concern for a deterioration in her level of consciousness. The doctor considered such observation to be "most important".

The deceased child, Adrianne, had had a large fracture on the left side of her skull. This fact, together with the above evidence, permitted a rational inference by the jury that Ashley's injuries created a high probability of death. The trial court did not err in submitting the great bodily harm issue to the jury. See *State v. Hollowell,* 80 N.M. 756, 461 P.2d 238 (Ct.App. 1969).

(b) Cross-examining the pediatrician, defendant brought out that, in the past, the doctor had testified that Ashley was not an abused child. The context of the questioning indicates this testimony occurred prior to November, 1977. The cross-examination then brought out that the doctor was anticipating transferring his practice to someone else because the doctor had applied for a full-time position with the Los Lunas Hospital and Training Center, a State agency. Defendant then asked: "And haven't you changed that opinion now and that story as a result of applying for a job with a State agency?" Defendant argued to the trial court that the question was designed to show the doctor's bias and asserts, on appeal, that sustaining the objection to the question was error.

The State objected to the question on the basis that the question was no more than harassment of the witness. The trial court agreed, ruling that the question had nothing to do with the case—that is, the question was irrelevant.

Bias of a witness is always relevant. See *State v. Santillanes,* 86 N.M. 627, 526 P.2d 424 (Ct.App.1974). Assuming there could be a connection between the doctor's changed opinion and his application

for employment with a state medical facility, that connection was tenuous in the question asked. The doctor's testimony was based on incidents occurring subsequent to his prior testimony—his observations in November, 1977 and January, 1978. The obvious answer to the question would have been that his changed opinion was based on subsequent events and not because of his employment application. The question asked was marginal in developing bias. The record does not show the trial court abused its discretion in sustaining the objection to the question. *State v. Bell,* supra.

(c) A radiologist testified that X-rays showed Ashley had a skull fracture in July, 1977 and a different skull fracture in January, 1978.

Defendant objected to testimony concerning the X-ray taken in January, 1978 on the basis there was "no guarantee" that the X-ray was of Ashley. The radiologist explained that the number on the X-ray film matched the X-ray number on the X-ray requisition request. The requisition request was in Ashley's name and had her medical record number. This was a prima facie identification that the X-ray was of Ashley. This prima facie identification was sufficient for admission of the X-ray over an objection on identification grounds. Testimony that X-rays can be, and are, mixed up by hospital employees went to the weight of the testimony, but did not bar admission of the X-ray. See *State v. Belcher,* 83 N.M. 130, 489 P.2d 410 (Ct.App.1971); *State ex rel. Hwy. Dept. v. Kistler-Collister Co., Inc.,* 88 N.M. 221, 539 P.2d 611 (1975); *Gass v. United States,* 135 U.S.App.D.C. 11, 416 F.2d 767 (D.C.Cir.1969); Annot., 5 A.L.R.3d 303, § 6(d) at 327 (1966).

Defendant objected to the testimony concerning the X-ray taken in July, 1977 on the basis that such testimony was prejudicial and irrelevant. Testimony concerning a skull fracture in July, 1977 was relevant to the issue of child abuse. The fact that the testimony was adverse to defendant did not render it inadmissible on the basis that it was prejudicial. *State v. Hogervorst,* 90 N.M. 580, 566 P.2d 828 (Ct.App. 1977).

To the extent that defendant can be said to have made a chain of custody objection, see *State v. Chavez,* 84 N.M. 760, 508 P.2d 30 (Ct.App.1973). Other appellate arguments concerning the X-rays are not considered because not raised in the trial court. N.M.Crim.App. 308.

Instructions

The child abuse instructions as to both Adrianne and Ashley tracked the language of § 40A–6–1, supra, in stating the elements of the offenses. As to "neglect" child abuse, an instruction defined negligence in terms of tort negligence. Defendant did not object to these instructions in the trial court. On appeal, for the first time, defendant claims that negligence was improperly defined, that negligence in the child abuse statute means criminal negligence and that if the child abuse statute encompasses tort negligence, it is unconstitutional for a variety of reasons. We do not reach the merits of these contentions; however, see *State v. Lucero,* 87 N.M. 242, 531 P.2d 1215 (Ct.App.1975) and *State v. Grubbs,* 85 N.M. 365, 512 P.2d 693 (Ct.App.1973).

The instructions tracked the language of the statute; they covered all the essential elements of the crimes charged. See *State v. Gunzelman,* 85 N.M. 295, 512 P.2d 55 (1973). Defendant's contentions do not go to a failure to instruct on an element of the crime, but go to how "negligence" was defined. This is not a jurisdictional issue. *State v. Padilla,* 90 N.M. 481, 565 P.2d 352 (Ct.App.1977). Not having any objection in the trial court to the definition of negligence, that issue may not be raised for the first time on appeal. Rule of Crim. Proc. 41(d); *State v. Urban,* 86 N.M. 351, 524 P.2d 523 (Ct.App.1974).

There is no basis for defendant's claims of cumulative and fundamental error.

The judgment and sentences are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

600 P.2d 292

STATE of New Mexico, Plaintiff-Appellant,

v.

Joseph D. MONTOYA, Defendant-Appellee.

No. 3681.

Court of Appeals of New Mexico.

Jan. 2, 1979.

Toney Anaya, Atty. Gen., Janice M. Ahern, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

James M. Scarborough, Espanola, for defendant-appellee.

OPINION

WOOD, Chief Judge.

This appeal, from the trial court's dismissal of the indictment, presents issues concerning: (1) double jeopardy, and (2) jurisdiction of the trial court.

A delinquency petition was filed in the Children's Court alleging: (a) D.W.I. (driving while under the influence of intoxicating liquor or drugs), (b) reckless driving, (c) involuntary manslaughter, and (d) homicide by vehicle. During the trial on these charges before a Children's Court jury, defendant's motion for a mistrial was granted. Thereafter, the Children's Court dismissed allegations (a), (b) and (d) with prejudice. The State filed a nolle prosequi as to allegation (c).

Subsequently, defendant was indicted. The indictment charged three of the allegations in the Children's Court petition—items (a), (b) and (d). The indictment did not charge item (c)—involuntary manslaughter.

Defendant's motion to dismiss the indictment was granted. The trial court found that the four allegations in the Children's Court petition and the three charges in the indictment "all related to one and the same matter, a collision between an automobile and a motor cycle". The trial court concluded:

> B. The Defendant, Jospeh [sic] D. Montoya was in jeopardy in the Children's Court at least as to the charge of Involuntary Manslaughter contained in the Petition filed in Children's Court Cause J–77–167.
>
> C. It would constitute double jeopardy for him to be required to stand trial on the three charges contained in the Indictment filed herein.

D. The District Court does not have jurisdiction over the Defendant for the purpose of trying him on the Indictment filed herein, there having been no transfer ordered by the Children's Court although evidence had been heard in Children's Court and the charges contained in the Indictment being "based upon the conduct alleged in the Petition" filed therein.

Double Jeopardy

Defendant was over fifteen years of age at the time he allegedly committed the various offenses. Defendant recognizes that the Children's Court lacked jurisdiction over the D.W.I., reckless driving, and vehicular homicide offenses. Sections 32–1–3(N) and 32–1–48, N.M.S.A.1978; *Doe v. State*, 88 N.M. 627, 545 P.2d 93 (Ct.App.1976). Because the Children's Court lacked subject matter jurisdiction, defendant does not claim that the D.W.I., reckless driving, and vehicular homicide charges in the indictment were barred by Children's Court proceedings involving those charges. *State v. Mabrey*, 88 N.M. 227, 539 P.2d 617 (Ct.App. 1975); see *State v. Peavler*, 88 N.M. 125, 537 P.2d 1387 (1975).

Defendant's contention is that the prosecution of the three charges in the indictment was barred, under double jeopardy concepts, because of the Children's Court proceedings involving the involuntary manslaughter allegation.

First, defendant asserts double jeopardy applies because the Children's Court improperly granted a mistrial. It is unnecessary to answer this contention; however, we note that the mistrial was granted on defendant's motion. See *State v. Castrillo*, 90 N.M. 608, 566 P.2d 1146 (1977).

Second, defendant contends that *State v. Tanton*, 88 N.M. 5, 536 P.2d 269 (Ct.App. 1975) bars prosecution of the indictment. That Court of Appeals opinion was reversed by the Supreme Court. See *State v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975). The "same evidence" test for double jeopardy, stated in *State v. Tanton*, 88 N.M. 333, 540 P.2d 813, supra, is whether the facts offered in support of one offense would sustain a conviction of the other offense. As explained in *Owens v. Abram*, 58 N.M. 682, 274 P.2d 630 (1954), cert. denied, 348 U.S. 917, 75 S.Ct. 300, 99 L.Ed. 719 (1955): "If either information requires the proof of facts to support a conviction which the other does not, the offenses are not the same and a plea of double jeopardy is unavailing." See *State v. Sandoval*, 90 N.M. 260, 561 P.2d 1353 (Ct.App.1977).

The indictment charged D.W.I. and reckless driving. Obviously, the trial court's double jeopardy ruling was incorrect as to these charges because neither involves a death, while involuntary manslaughter does involve a death.

The indictment charged vehicular homicide either by driving while under the influence of intoxicating liquor or by reckless driving. Involuntary manslaughter does not require proof of either of these alternatives; the vehicular homicide charge does require proof of at least one of the alternatives. The same evidence test was not met and double jeopardy did not bar prosecution of the charges in the indictment.

There is another reason why the trial court's double jeopardy ruling was erroneous. Since enactment of Laws 1969, ch. 138, § 1, New Mexico has had a specific statute concerning homicide by vehicle. This statute is compiled as § 66–8–101, N.M.S.A.1978. The statute applies when the vehicular killing is while driving under the influence of intoxicating liquor, while driving under the influence of drugs, or while driving recklessly. See *State v. Trujillo*, 85 N.M. 208, 510 P.2d 1079 (Ct.App. 1973). As stated in the commentary to U.J.I. Crim. 2.60:

> The statute for homicide by vehicle controls over the general, involuntary manslaughter statute and must be used. See *State v. Blevins*, 40 N.M. 367, 60 P.2d 208 (1936); *State v. Lujan*, 76 N.M. 111, 412 P.2d 405 (1966).

Neither the trial court's findings nor the partial transcripts on appeal inform us whether the specific vehicular homicide

statute was applicable to the facts of this case. The trial court went no further than to find that the allegations in the Children's Court petition and the charges in the indictment "all related to one and the same matter," an automobile-motorcycle collision. Defendant's answer brief resolved our question as to whether the facts showed that the specific vehicular homicide was applicable. The answer brief states:

> Although Count III of the Petition in Children's Court charges Involuntary Manslaughter in statutory language . . . it is clear, at least to defendant, that the manslaughter charged was the homocide [sic] of Billy D. Lucero by Joseph D. Montoya while operating a vehicle in a reckless manner and while under the influence of intoxicating liquor.

With this concession that the vehicular homicide statute was applicable, the involuntary manslaughter allegation was an allegation under the inapplicable statute. A court lacks jurisdiction, because of lack of authority, to proceed under an inapplicable statute. *State v. Madrid*, 82 N.M. 525, 484 P.2d 367 (Ct.App.1971); *State v. McNeece*, 82 N.M. 345, 481 P.2d 707 (Ct.App.1971). Since jurisdiction was lacking over the involuntary manslaughter alleged in the Children's Court proceeding, that allegation provided no basis for a double jeopardy claim. *State v. Mabrey*, supra.

Jurisdiction of the Trial Court

Section 32–1–27(I), N.M.S.A.1978 states:

> I. Criminal proceedings, actions and other proceedings based upon an offense alleged in a petition under the Children's Code, or an offense based upon the conduct alleged in the petition, are barred if the court has begun taking evidence in the proceedings or has accepted a child's admission of the allegations of a petition in the proceeding, except that nothing in this subsection bars criminal proceedings in a tribunal upon proper transfer to that tribunal under the Children's Code.

Defendant points out that the indictment charges were based on conduct alleged in the Children's Court petition, and the Children's Court had taken evidence in connection with that conduct prior to the time the mistrial was granted. Since no transfer order was entered, see § 32–1–29, N.M.S.A. 1978, he claims that § 32–1–27(I), supra, bars proceedings under the indictment. He claims that the statute is mandatory.

Section 32–1–27(I), supra, is not to be construed to bar criminal proceedings because of evidence taken in Children's Court proceedings, when the Children's Court lacked jurisdiction over the allegations being heard in the Children's Court. See *State v. Doe*, 90 N.M. 249, 561 P.2d 948 (Ct.App.1977).

The order dismissing the indictment is reversed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

600 P.2d 294

STATE of New Mexico HEALTH AND SOCIAL SERVICES DEPARTMENT, Petitioner-Appellee,

v.

Peggy SMITH, Respondent-Appellant.

No. 3614.

Court of Appeals of New Mexico.

Jan. 9, 1979.

Manuel J. Lopez, Southern New Mexico Legal Services, Clovis, for respondent-appellant.

Jeff Bingaman, Atty. Gen., Julia C. Southerland; Garry Wamser, Asst. Attys. Gen., Santa Fe, for petitioner-appellee.

OPINION

WOOD, Chief Judge.

This appeal involves the termination of the parental right of the mother of a child, approximately 2½ years old at the termination hearing. The mother's appeal raises issues as to the trial court's findings, which need not be discussed, either because the particular finding is supported by substantial evidence or because irrelevant to the decision. We discuss: (1) Evidence Rule 504, the psychotherapist-patient privilege, and (2) requirements for termination of the mother's parental right.

The child, whose father is unknown, was born October 15, 1975; the child had been in foster care with the H.S.S.D. (Health and Social Services Department) for over two years at the time of the termination hearing in April, 1978. Thus, the child has not lived with his mother most of its life. The reason was the condition of the mother; she had been "unable to discharge her natural responsibilities as a parent due to mental incapacity, hospitalization and incarceration periods, and the use of alcohol."

Evidence Rule 504, The Psychotherapist-Patient Privilege

Dr. Lowe testified as to the mother's mental condition. The trial court found:

> Dr. William R. Lowe is a licensed psychologist in the State of New Mexico, and he has over the past three (3) years examined, counselled, and treated Peggy Smith pursuant to court commitment while she was confined to the New Mexico State Hospital, Las Vegas and while incarcerated in the Clovis City Jail, and at the request of personnel of HSSD.

Substantial evidence supports this finding.

The mother objected to Dr. Lowe testifying, claiming the privilege stated in Evidence Rule 504(b), against disclosure of confidential communications. The mother tendered nothing indicating any communication was "confidential", that is, "not intended to be disclosed". See *State v. Gallegos*, 92 N.M. 370, 588 P.2d 1045 (Ct.App.1978) cert. denied, 92 N.M. 353, 588 P.2d 554 (1978). Rather, the mother's argument centers on the meaning of communication. She argues that communication means more than the oral communication of the patient to the psychotherapist. See *Williams v. City of Gallup*, 77 N.M. 286, 421 P.2d 804 (1966). Dr. Lowe's testimony was based on his examinations, counseling, and treatment of the mother over a three-year period. The mother asserts the examinations, counseling, and treatment all involve communication and, therefore, Dr. Lowe's testimony should have been excluded because in violation of the privilege. We do not answer this contention.

■ Assuming, but not deciding, that communication has the broad meaning asserted by the mother, a part of the communications were in connection with court ordered examinations of the mother's mental condition. Communications made in the course of those examinations were not privileged with respect to the particular purpose of the examination unless the judge ordered otherwise. Evidence Rule 504(d)(2). The judge did not order otherwise. To the extent Dr. Lowe's testimony was based on court ordered examinations, there was no privilege. *State v. Milton*, 86 N.M. 639, 526 P.2d 436 (Ct.App.1974).

■ The mother objected to Dr. Lowe's testimony in its entirety. She did not attempt to distinguish between non-privileged testimony and testimony allegedly subject to the privilege. Since the objection went to the entire testimony, the objection was properly overruled. *State v. Carlton*, 83 N.M. 644, 495 P.2d 1091 (Ct.App.1972).

Requirements for Termination of the Mother's Parental Right

The termination of the mother's parental right was under § 40–7–4, N.M.S.A.1978. The trial court found the mother was unfit; thus, the specific ground for termination was § 40–7–4(A)(3), which reads:

> (3) the parent is unfit, that is, the parent has repeatedly or continually neglected or willfully abused the child, or failed or refused to perform the natural and legal obligations of care and support; and because of such parental conduct the minor has suffered serious physical, mental or emotional harm; and such parental conduct will probably continue and the continuation of such parental conduct will probably cause further and serious harm to the minor and the disintegration of the parent-child relationship.

The quoted provision states four components for an "unfit" finding:

(a) The parent has repeatedly or continually neglected or willfully abused the child, or failed or refused to perform the natural or legal obligations of care and support.

(b) Because of such parental conduct the child has suffered serious physical, mental or emotional harm.

(c) The parental conduct will probably continue.

(d) The continuation of such parental conduct will probably cause further and serious harm to the child and the disintegration of the parent-child relationship.

The mother asserts that mental illness was an insufficient basis to terminate her parental right. We agree, in this case the requirements for "unfit" must have been met. The mother asserts her parental right was terminated on the ground that she was unable to care for the child because of mental illness. We disagree.

The trial court found that the child had been placed in the custody of H.S.S.D. "[p]ursuant to a determination . . . . that the child was dependent and neglected". Other findings are to the effect that the mother had failed to perform the natural and legal obligations of care and support because of mental illness. These findings went to component (a).

The trial court found the child had been subjected to mental or emotional harm; this went to component (b).

The trial court found that the mother's mental illness was continuing "and no indication exists that she will ever improve"; this went to component (c).

The trial court found that "[c]ontinuation of this atmosphere will probably cause further harm to the child and the disintegration of the parent-child relationship"; this went to component (d).

Although the trial court made findings directed to each of the statutory components, such findings were not required. The trial court was only required to find the ultimate fact. The ultimate fact was that the mother was unfit. The trial court was not required to make findings as to the components of "unfit" because those components were not ultimate facts. See *McCleskey v. N. C. Ribble Company*, 80 N.M. 345, 455 P.2d 849 (Ct.App.1969).

Having found the ultimate fact that the mother was unfit, the appellate issue does not involve the sufficiency of *findings* as to the components of "unfit"; rather, the appellate issue is whether there was substantial *evidence* of each of the components so that the finding of the ultimate fact was supported by the evidence.

There is no serious claim concerning the sufficiency of the evidence as to components (a), (c) or (d). The mother contends, however, that there is no substantial evidence as to component (b), that because of parental conduct, the child has suffered serious physical, mental or emotional harm. The mother refers us to evidence concerning the physical condition of the child after visiting the mother and asserts the physical harm was not "serious". We do not review this evidence because the trial court findings, even though not required, show the trial court did not rule that the child suffered serious physical harm. The trial court found that the child suffered mental or emotional harm.

Prior to the 1975 amendment to § 40–7–4, supra, the required showing as to "serious harm" was stated in the alternative; the requirement was that "the minor is suffering or will probably suffer serious . . . . harm." The statutory wording, prior to the 1975 amendment, is quoted in Judge Hernandez' specially concurring opinion in *Huey v. Lente*, 85 N.M. 585, 514 P.2d 1081 (Ct.App.1973). Judge Hernandez' opinion was approved by the Supreme Court. *Huey*, supra, 85 N.M. 597, 514 P.2d 1093 (1973). As presently worded, however, § 40–7–4(A)(3), supra, requires evidence that the child *has suffered* serious harm and evidence that parental conduct probably *will cause further* serious harm.

The mother's evidentiary attack asserts an insufficiency of evidence that the child has suffered serious harm; she does not assert an insufficiency of evidence as to serious harm in the future. In this case, the evidence as to harm is interrelated; specifically, evidence as to future harm bears on the question of existing harm.

What is the meaning of "serious harm" in § 40–7–4(A)(3), supra? *Silva v. State*, 152 Tex.Cr.R. 545, 215 S.W.2d 887 (1948) held that "serious injury" meant an injury as would give rise to apprehension or attended with danger. Similarly, "serious harm" means harm giving rise to apprehension or attended with danger. Whether "serious harm" exists must be determined according to the particular facts of each case. See *State v. Jones*, 258 N.C. 89, 128 S.E.2d 1 (1962).

The conduct of the mother, considered here, is the failure to perform the natural obligation of care and support. This obligation was to personally care for, support, educate, give moral and spiritual guidance, and provide a home and the love

and security which a home provides. See *Adoption of Doe*, 89 N.M. 606, 555 P.2d 906 (Ct.App.1976). The evidence shows a consequence of the mother's failure was the absence of a parent-child relationship.

As a result of the mother's conduct, custody of the child was awarded to H.S.S.D. Another result was that the child was placed with foster parents, a temporary arrangement. See *Huey v. Lente*, supra; see also *Smith v. Organization of Foster Families*, 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed.2d 14, (1977).

An obvious mental or emotional harm to the child was the absence of a parent-child relationship—the absence of the performance of the parental obligation. The trial court could properly view this harm as serious; that is, giving rise to apprehension or attended with danger, for three reasons. First, the turnover among the social workers who supervised the child's foster care arrangements. Three had been assigned to the child's case. Second, the child had been with foster parents for over two years. Although the same foster parents had cared for the child most of this time, it nevertheless was a temporary arrangement attended with the danger that the child would develop deep emotional ties with the foster parents. Third, the social workers had affirmatively sought to restore a parent-child relationship through visitations. The efforts were unsuccessful. During the last visitation arrangement, of visits of approximately one hour in the presence of the social worker, the mother's acceptance of the child rarely lasted longer than thirty minutes. Thus, it is clear that the child will not be returned to the mother.

Smith v. Organization of Foster Families, supra, states:

> It is not surprising then that many children, particularly those that enter foster care at a very early age and have little or no contact with their natural parents during extended stays in foster care, often develop deep emotional ties with their foster parents.
>
> Yet such ties do not seem to be regarded as obstacles to transfer of the child from one foster placement to another. . . . The intended stability of the foster-home management is further damaged by the rapid turnover among social work professionals who supervise the foster-care arrangements on behalf of the State. . . . Moreover, even when it is clear that a foster child will not be returned to his natural parents, it is rare that he achieves a stable home life through final termination of parental ties and adoption into a new permanent family.

The considerations in this quotation apply to this case.

The mother contends that even if there was evidence that the child had suffered serious mental or emotional harm, that evidence was not "clear and convincing" as required by § 40–7–4(F), supra. "Clear and convincing" evidence is defined in *Matter of Valdez*, 88 N.M. 338, 540 P.2d 818 (1975). The evidence met this standard.

The decision and judgment of the trial court are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

600 P.2d 298

In the Matter of the ESTATE of Leoma Joyce Doss WILLARD, Deceased.

Connie Royal PUGH, Jr., Petitioner-Appellee,

v.

Sparkye MABE, personal representative, Respondent-Appellant.

No. 3626.

Court of Appeals of New Mexico.

Jan. 18, 1979.

Charles J. Crider, Albuquerque, for respondent-appellant.

Dick A. Blenden, Paine, Blenden & Diamond, Carlsbad, John R. Lee, Kermit, Tex., for petitioner-appellee.

OPINION

WOOD, Chief Judge.

This interlocutory appeal in this probate case involves the validity of the trial court's ruling that Connie Royal Pugh, Jr. and Joyce, who died February 5, 1977, had entered a valid common-law marriage in Texas. The parties agree that New Mexico will recognize a common-law marriage as valid if the marriage was valid where consummated. *Gallegos v. Wilkerson*, 79 N.M. 549, 445 P.2d 970 (1968). The appellate issue is whether the evidence supports the requirements for a valid common-law marriage in Texas.

Vernon's Texas Codes Annotated, *Family*, Vol. 1, § 1.91 (1975) states:

> (a) In any judicial, administrative or other proceeding, the marriage of a man and woman may be proved by evidence that:
>
> * * * * * *
>
> (2) they agreed to be married, and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.

See *Durr v. Newman*, 537 S.W.2d 323 (Tex. Civ.App. 1976).

. In 1969, Joyce and Pugh began living together in Jal, Lea County, New Mexico. Both were aware that Pugh was married and that they could not enter a valid marriage. Pugh obtained a divorce on March 9, 1970. After the divorce, Pugh could enter a valid common-law marriage in Texas. *Rodriguez v. Avalos*, 567 S.W.2d 85 (Tex.Civ.App. 1978); *Howard v. Howard*, 459 S.W.2d 901 (Tex.Civ.App. 1970).

The trial court found:

> 4. That after March 9, 1970, and specifically the Friday preceding Easter, Connie Royal Pugh, Jr. and Leoma Joyce Doss Willard contracted and agreed to enter into a marriage relationship in the State of Texas and consummated said marriage by cohabiting together as husband and wife in Abilene, Texas.
>
> 5. That immediately thereafter Connie Royal Pugh, Jr. and Leoma Joyce Pugh continuously and continued to cohabit one with the other in the State of Texas, both parties introduced themselves

as husband and wife, and held themselves out to be married to all people including the parents and family of the decedent.

6. That this relationship of husband and wife and holding out to the public as being married to all members of both sides of the family continued from the period of March, 1970, up to the death of the decedent.

7. That to further consummate and solidify the contract, the parties both bought wedding rings for each other and subsequent to the date of March, 1970, displayed said wedding rings as a symbol and indication of their marriage contract.

8. That the decedent used the name of Joyce Pugh during the period of her employment with the El Paso Natural Gas Company. The name was used for the purpose of obtaining credit through Bankamericard as well as other credit arrangements, and the decedent and Connie Royal Pugh, Jr. maintained a joint bank account in the name of Pugh, one of such banking accounts being in the State of Texas.

9. That the parties to this marriage, namely the decedent and Connie Royal Pugh, Jr., intended for the contract to bind them as husband and wife and they consummated the marriage by living and cohabiting together in the State of Texas and holding themselves out to the public and to friends and family in the State of Texas and elsewhere as husband and wife.

There is substantial evidence to support the findings which go to an agreement to marry and a public holding out, in Texas, that they were married. The dispute goes to the requirement that Joyce and Pugh lived together, in Texas, as husband and wife.

Pugh was employed as an oil field pumper in Texas; Jal was the closet place to live. Joyce and Pugh lived together, as husband and wife, from shortly after his divorce in March, 1970 until Joyce's death on February 5, 1977. Because their residence was in Jal, New Mexico, the question arises whether they lived together in Texas so as to establish a common-law marriage in Texas.

There is evidence that Joyce and Pugh visited Joyce's mother in Lubbock, Texas on an average of five or six times a year. They also visited Pugh's parents in Palestine, Texas. They stayed at a motel in El Paso, Texas for three days in connection with an awards banquet given by Joyce's employer and also stayed at a motel in Galveston, Texas. They visited and stayed with Pugh's brother-in-law in Lubbock, Texas, with Joyce's daughter in Canadian, Texas, and at a friend's home in Dimmit, Texas. These visits were more than casual; they "spent considerable time in Texas"; Pugh's mother testified they would "come down and spend two weeks at a time with us". In addition to their physical visitations to Texas, they maintained a joint account at a bank in Kermit, Texas. Joyce had surgery in a hospital in Andrews, Texas, wearing an identification band, "Mrs. Connie Pugh".

Walter v. Walter, 433 S.W.2d 183 (Tex. Civ.App. 1968) stated that the following definition was substantially correct: " 'The term lived and cohabited together as husband and wife means living together, claiming to be married and doing those things ordinarily done by husband and wife.' " *Walter*, supra, indicates that the living together need not be for any specified length of time, but there must be a constancy of dwelling together. *Durr v. Newman*, supra, states: "The short three-day period of time that the parties were together is not controlling".

The evidence supports the trial court's finding that Joyce and Pugh lived and cohabited together in Texas, and the trial court's conclusion that Joyce and Pugh entered a valid common-law marriage in Texas.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

HENDLEY, J., concurs.

SUTIN, J., dissenting.

SUTIN, Judge (dissenting).

I dissent.

It does not require coruscations of genius to conclude that Connie and Joyce did not effect a common-law marriage in Texas because they had not "lived together in this state as husband and wife."

Connie and Joyce were domiciled in Jal, New Mexico from about the time they first met until the time of Joyce's death. During the years they lived together in New Mexico, they established a common-law marriage, one not recognized in New Mexico. During the years of this New Mexico relationship, Joyce never changed her will. Let us compare the New Mexico relationship with that of Texas. When Connie was asked to characterize all of his visits to Texas in the company of Joyce, he said:

> My wife and I went on vacation, a week, two weeks, week-ends. Went for sickness, deaths.

Connie and Joyce never established residence or domicile in Texas. They never purchased or leased a place of residence and never lived together there as husband and wife on a temporary or permanent basis. We recognized a common-law marriage in the State of Texas. *Gallegos v. Wilkerson*, 79 N.M. 549, 445 P.2d 970 (1968). In doing so, Justice Moise said:

> . . . Such a marriage is considered to be a status arrived at by express or implied mutual consent or agreement of the parties, *followed by cohabitation as husband and wife* and publicly holding themselves out as such. . . . Proof is present that they went to El Paso, *rented an apartment*, agreed to a marriage between themselves, *lived together there*, and held themselves out as husband and wife. . . . [Emphasis added.] [Id. 552, 445 P.2d 973.]

To cohabit means living together as man and wife within a common dwelling. *People v. Burke*, 400 Ill. 240, 79 N.E.2d 488 (1948); *Graham v. Graham*, 130 Colo. 225, 274 P.2d 605 (1954). It does not include mere visits or journeys. *Jones v. State*, 182 Tenn. 60, 184 S.W.2d 167 (1944); *Colley v. Colley*, 204 Va. 225, 129 S.E.2d 630 (1963). "Rather, the living together should be in the same house on a permanent basis." Davis, Common-Law Marriage in Texas, 21 Sw.L.J. 647, 652 (1967).

In re Estate of Stahl, 13 Ill.App.3d 680, 301 N.E.2d 82 (1973) did not recognize an alleged common-law marriage in Texas. Mrs. Stahl and decedent, who had lived together in Illinois, had travelled to Texas for a period of three days for purposes of a vacation and to consider whether Texas should be a future retirement site. They held themselves out as husband and wife during this stay in Texas and privately exchanged marital vows in their hotel room. Mrs. Stahl claimed she was the common-law widow of decedent and was entitled to an intestate share of decedent's estate. The court said: "No." She failed to establish that she and decedent had been domiciled in Texas. They had not contracted a common-law marriage.

The statutory provision that "they had lived together in this state" is equivalent to "has a domicile," *Holt v. Holt*, 253 Mass. 411, 149 N.E. 40 (1925); *Nelson v. Nelson*, 71 S.D. 342, 24 N.W.2d 327 (1946), or an established place of abode with which the parties may be identified as members of the community. *Kennedy v. Damron*, 268 S.W.2d 22 (Ky.1954).

52 Am.Jur.2d *Marriage*, § 46 (1970) says:

> Despite its judicial acceptance in many states, the doctrine of common-law marriage is generally frowned upon in this country, even in some of the states that have accepted it. It has been declared contrary to public policy and public morals, and in view of the ease with which it can be contracted, it has been described as a fruitful source of perjury and fraud—to be tolerated and not encouraged.

One of the reasons is that "It puts in doubt the certainty of the rights of inheritance. It opens the door to false pretenses of marriage and the imposition upon estates of supposititious heirs." *Sorensen v. Sorensen*, 68 Neb. 500, 100 N.W. 930, 932 (1904), adhered to on rehearing, 68 Neb. 509, 103 N.W. 455 (1905).

A stringent test of common-law marriage required by a standard of strict scrutiny has the desirable effect of weeding out fraudulent claims where property rights are involved and the claimed spouse is dead. The Connie-Joyce New Mexico relationship is presumed to continue. Only upon clear and convincing proof of an actual common-law marriage in Texas wherein Connie and Joyce lived together there as husband and wife, can the New Mexico relationship be changed to one of marriage. Otherwise harsh and inequitable results will occur.

There is no evidence that Connie and Joyce intended to make Texas their home, residence or domicile. They did not live together in Texas as husband and wife.

Although I disagree with Judge Neal, I compliment him on stating the reasons for his decision. It is unfortunate that oral arguments were not recorded. Judge Neal seemed to have been without legal authority on the subject matter of common-law marriage. In his comments, he omitted any statements that Connie had established any form of residence, domicile, or cohabitation in Texas sufficient to prove a common-law marriage. In matters of this kind, memorandum briefs should be submitted to the court long before trial, not after the decision of the court. These comments are of little value because the vast majority of trial lawyers do not read these opinions to discover the art of presenting a case to a district court. The appellant's attorney on this appeal did not represent Mabe in the trial court.

The judgment of the trial court should be reversed.

600 P.2d 302

John THOMPSON, Plaintiff-Appellant,

v.

Ernest CHAPMAN, Defendant-Appellee.

No. 3565.

Court of Appeals of New Mexico.

March 27, 1979.

Owen Russell, Raton, for plaintiff-appellant.

Paul A. Kastler, Kastler, Erwin & Davidson, Raton, for defendant-appellee.

OPINION

SUTIN, Judge.

Plaintiff sued defendant for alienation of affections. Summary judgment was granted defendant and plaintiff appeals. We affirm.

Plaintiff's complaint alleged that sometime in 1974, defendant began to interfere with the marital relationship of plaintiff and his wife; such interference continued and contributed significantly to a divorce that took place, September 29, 1976. The interference consisted of (1) defendant maintaining as close a social relationship with plaintiff's wife as circumstances would permit, (2) placing himself in social situations near plaintiff's wife, (3) arranging and participating in clandestine rendezvous with her, (4) inviting her to attend social outings, (5) otherwise acting affirmatively to induce her to develop greater affection toward him with a commensurate loss of affection of her husband. Defendant knew and intended that his misbehavior would have a deleterious effect upon the marriage.

Defendant filed a motion to dismiss for failure to state a claim upon which relief could be granted and two affidavits, which when taken together, treats the motion as one for summary judgment. Rule 12(b) of the Rules of Civil Procedure.

The affidavits of defendant and plaintiff's former wife stated:

(1) They did not date nor visit each other alone prior to the date of the divorce.

(2) They did not discuss any matters of personal relationship nor have any personal relationship at any time prior to the date of the divorce.

(3) They did not do or say anything which encouraged or created or fostered a relationship or social relationship until after the divorce, and in fact saw each other only in the context of their jobs during the day in the presence of many other people and then only in the nature of the business itself.

(4) The complaint filed by plaintiff is just one more in a continued and repeated harassment of plaintiff's wife, which harassment has induced physical assault, verbal abuse and molestation, and there is no truth to any of the matters set forth in the complaint.

The burden shifted to plaintiff. Plaintiff filed an affidavit in which he verified the allegations of the complaint. In addition, he stated:

(1) During 1974 and 1975, defendant and plaintiff's wife attended and associated together at choir practice on frequent occasions at the Methodist church in Raton.

(2) In July of 1974, plaintiff's wife was in the company of the defendant and others from 10 a. m. to 12 p. m. for the purpose of appearing in the Jaycees Rodeo Parade and other activities related to the Rodeo.

(3) During 1974 and 1975, on numerous occasions defendant provided plaintiff's wife with rides to work.

(4) In the winter of 1974, plaintiff's wife, in the company of her parents, participated with defendant in an afternoon of snow mobiling at a lake near Raton.

(5) On one occasion the defendant and plaintiff's wife were seen together at a restaurant in Raton for an extended period of time.

Another affidavit was filed by a person that stated:

(1) One wintery afternoon in late 1974 at a lake near Raton, defendant and plaintiff's wife departed from a social gathering and were alone for several minutes.

(2) On July 10, 1976, defendant and plaintiff's wife were at a dance in Maxwell, New Mexico, and were together at various social events surrounding and including the Raton Jaycees Rodeo of July 1976.

In *Birchfield v. Birchfield*, 29 N.M. 19, 22, 24, 217 P. 616, 618–19 (1923) Justice Bratton set forth the guidelines of a claim for alienation of affections:

> The loss of the society, companionship, fellowship, comfort, conjugal affections and support of the husband, when caused by any third person maliciously invading the hallowed precincts of the home, and without justification severing the ties which bind the husband and wife together, from which a separation flows, is tortious, and the person who does so may be required to respond in damages. *But the burden is upon the plaintiff to show that the opposite spouse did love and had af-*

fection for him or her, as the case may be, and that the defendant maliciously caused the alienation thereof by direct interference. . . .

* * * * * *

Not only must there be proof of direct interference on the part of the defendant, which results in alienating the love and affection of plaintiff's spouse, but it must affirmatively appear that such interference proceeded from a malicious design. Even though there be interference, yet, if it does not arise from and is not prompted by malice, the case must fall, as such is a necessary ingredient of the tort. Malice, when used in this sense, does not mean that which proceeds from a mean, hateful or revengeful disposition, but may imply conduct from an ill-regulated mind, not sufficiently cautious before it occasions the injury. [Emphasis added.]

Defendant established two undisputed facts:

(1) that nothing of a "personal relationship" existed between defendant and plaintiff's wife prior to the divorce. "Personal relationship" means a relationship between the parties that related to such conduct in this private affair that induced plaintiff's wife to develop greater affection for defendant and loss of affection for plaintiff. In fact, it has been held that evidence of sexual intercourse between defendant and plaintiff's wife does not alone constitute proof that defendant was blameable or had the necessary willful intent necessary for imposition of liability in an action for alienation of affections. *Wheeler v. Fox*, 16 Ill.App.3d 1089, 307 N.E.2d 633 (1974). The fact of adultery is not a necessary element. The crucial issue is whether defendant was the "aggressor." *Trainor v. Deters*, 22 Ohio App.2d 135, 259 N.E.2d 131 (1969).

(2) Plaintiff repeatedly harassed his wife with physical assault, verbal abuse and molestation.

Nothing appears in plaintiff's complaint or affidavits that plaintiff's wife loved and had affection for him and that the defendant maliciously caused the alienation thereof by direct interference.

We look with disfavor on claims for damages based upon alienation of affections. It came to New Mexico in 1923 by way of the common law. Over a half century later, public policy declares that it is in the best interest of the people to abolish the remedy. If we had the power to do so, we would follow in the footsteps of *Wyman v. Wallace*, 15 Wash.App. 395, 549 P.2d 71 (1976). It abolished the common law remedy for alienation of affections. In concluding its opinion, the court said:

To us the action diminishes human dignity. It inflicts pain and humiliation upon the innocent, monetary damages are either inadequate or punitive, and the action does not prevent human misconduct itself. In our judgment, the interests which the action seeks to protect are not protected by its existence, and the harm it engenders far outweighs any reasons for its continuance. [549 P.2d at 74.]

Affirmed.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

600 P.2d 304

Clarence Elmer SENA,
Plaintiff-Appellant,

v.

GARDNER BRIDGE COMPANY,
Defendant-Appellee.

No. 3680.

Court of Appeals of New Mexico.

March 27, 1979.

James R. Toulouse, Toulouse, Krehbiel & DeLayo, P. A., Albuquerque, Donald A. Martinez, Las Vegas, for plaintiff-appellant.

James C. Ritchie and Diane Fisher, Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for defendant-appellee.

OPINION

SUTIN, Judge.

On August 15, 1975, judgment was entered that plaintiff was entitled to one week of compensation resulting from two weeks of temporary total disability. Disability had ended August 12, 1974, one year before the judgment was entered.

Plaintiff appealed the 1975 judgment to this Court and it was affirmed by Memorandum Opinion. *Sena v. Gardner Bridge Co.,* No. 2253, decided April 20, 1976. Judgment on the mandate was entered May 24, 1976. This judgment was final.

On May 4, 1977, pursuant to § 52–1–56(A), N.M.S.A.1978, which relates to an increase of disability, plaintiff moved the court to review this case, hear testimony of attending physicians and make new findings and conclusions. The reasons given were:

1. More than six months elapsed from the time the court entered judgment.

2. Plaintiff had an operation to correct an injury on his back within the past six months as a direct result of the aforesaid accident and injury.

3. Plaintiff has, in fact, been totally and temporarily or totally and permanently disabled for the past two years.

This motion did not allege an increase of disability.

On May 3, 1978, a year later, plaintiff filed an amended motion in which plaintiff alleged that disability had increased since the initial hearing. On June 2, 1978, plaintiff's motion was denied and plaintiff appeals. We affirm.

In the original 1975 judgment, temporary total disability had ended prior to the entry of judgment. "Temporary disability" means "that which lasts for a limited time only while the workman is undergoing treatment." *Lane v. Levi Strauss & Co.,* 92 N.M. 504, 590 P.2d 652, 654 (1979). A workman who has completely recovered from an accidental injury is no longer disabled as defined by law. At the time judgment was entered, plaintiff 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 any work for which he was fitted by age, education, training, general physical and mental capacity and previous work experience. Section 52–1–24, N.M.S.A.1978.

Ordinarily, following a judgment, § 52–1–56(A) allows a workman to seek an increase in compensation "if it shall appear . . . that *the disability of the workman . . . has increased . . . .*" [Emphasis added.] We hold that a workman who is not disabled at the time judgment is entered cannot, thereafter, seek an increase of a non-existent disability. Neither can a non-existent disability revive itself to become partial or total disability.

Plaintiff argues that when a judgment is entered and any compensation is paid, this payment, not disability, is the only requirement necessary to seek an increase in compensation; that § 52–1–28,

N.M.S.A.1978, which states the proof necessary to establish a workman's compensation claim, does not require a finding of permanent injury or disability at the time of trial. We disagree. Section 52–1–28(A)(3) states that one of the essential elements of a workmen's compensation claim is that "the disability is a natural and direct result of the accident." However, for total or partial disability, "the workman shall receive, *during the period of that disability,*" workmen's compensation benefits as provided by §§ 52–1–41 and 52–1–42, "but in no event to exceed a period of [600] weeks." The judgment entered shall state "the amount *then due,* and shall also contain an order upon the defendants for the payment of the workman, *at regular intervals during the continuance of his disability,* the further amounts he is entitled to receive. . . ." [Emphasis added.] Section 52–1–38(A).

At the time of trial, the court must find whether plaintiff's injury resulted in a disability that terminated before judgment was entered or plaintiff's injury resulted in total or partial disability in existence at the time judgment was entered. If plaintiff's injury resulted in a pre-judgment terminated disability, a workman is paid "the amount then due." If plaintiff's injury resulted in a post-judgment disability, a workman is also paid compensation "at regular intervals during the continuance of his disability."

A judgment that provides for "payment to the workman, at regular intervals *during the continuance of his disability*" is not a "Final Judgment." *Martinez v. Earth Resources Co.,* 90 N.M. 590, 594, 566 P.2d 838 (Ct.App.1977), Sutin, J., specially concurring. Where, however, the judgment does not contain an order for further payments, disability having terminated, the judgment is final.

Plaintiff now seeks to recover workmen's compensation benefits, not an increase thereof, by expert medical testimony that as a medical probability, there is a causal connection between the accidental injury and disability by reason of surgery resulting therefrom. Section 52–1–28. This, plaintiff cannot do. The parties, causes of action, subject matter capacities in the 1975 judgment and recovery sought now are identical in all respects. The first judgment is a conclusive bar upon the parties as to every issue which either was or could have been litigated in the previous case. *City of Santa Fe v. Velarde,* 90 N.M. 444, 564 P.2d 1326 (1977).

Three years have passed since the date of the original judgment and two years after judgment on the mandate. Plaintiff has been traveling down the wrong road for an inexcusably long period of time and should not be prejudiced thereby if plaintiff can find the right road to travel.

If plaintiff believes that he can show a causal connection between the accidental injury and subsequent surgery, plaintiff may, perhaps, have a remedy by seeking relief from the judgment. See *Phelps Dodge Corp. v. Guerra,* 92 N.M. 47, 582 P.2d 819 (1978).

Affirmed.

IT IS SO ORDERED.

ANDREWS, J., concurs.

HENDLEY, J., dissenting.

HENDLEY, Judge (dissenting).

I dissent and would allow the reopening of the judgment. I disagree that the motion to reopen the judgment is barred by the doctrine of res judicata. A liberal reading of the statute does not call for such a conclusion.

Section 52–1–56 A, N.M.S.A.1978, states in part:

> "A. The district court in which any workman has been awarded compensation under the Workmen's Compensation Act [52–1–1 to 52–1–69 N.M.S.A.1978] may, upon the application of the employer, workman or other person bound by the judgment, 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. And if it shall appear upon such hearing that the disability of the workman has become more aggravated or has increased without the fault of the workman, the court shall order an increase in the amount of compensation allowable as the facts may warrant. Hearings may not be held more frequently than at six-month intervals, . . ."

Segura v. Jack Adams General Contractor, 64 N.M. 413, 329 P.2d 432 (1958) stated:

"In view of provisions of the applicable statute the ordinary rules of res judicata cannot apply to a judgment rendered on the merits after trial."

Admittedly, the facts in *Segura* were different from the present case in that the judgment awarded compensation for a period in the future.

In *Burton v. Jennings Brothers,* 88 N.M. 95, 537 P.2d 703 (Ct.App.1975) a judgment was entered on June 12, 1973, providing for compensation to be paid for continued disability through August 24, 1973. In February, 1974, plaintiff's motion for an increase in the compensation award was denied. This court reversed the trial court holding that a satisfaction of judgment did not bar a reopening under § 59–10–25, N.M.S.A. 1953, now § 52–1–56, supra.

The fact that in both *Segura* and *Burton* the judgment provided for a future prediction of facts, whereas, in the instant case, the judgment was for an award in the past which did not involve a continuing disability past the time of the judgment does not change the situation. One of the few cases on this issue is *Gant v. Price,* 135 Kan. 333, 10 P.2d 1082 (1932). In *Gant* there was a finding that the claimant had been totally disabled for a number of weeks in the past, but had completely recovered before the date of the filing of the application for compensation. Subsequently, the claimant filed to reopen the judgment stating as one ground that the incapacity and disability had increased. In holding that the claimant was not entitled to a hearing, the *Gant* court stated:

"Here the commissioner of workmen's compensation had found the facts to be that the disability of appellee had ceased before the first application was filed with the commissioner. This finding and award were appealed to the district court. The court approved the findings and award. When this was done the judgment of the district court took on all the attributes of finality that any case takes that is submitted to a district court for determination. The only remedy left is the appeal provided for to the supreme court.

"The reason for this is plain. When the commissioner of workmen's compensation hears a case and makes a finding that extends into the future, he looks at an injured workman, hears the testimony of the doctors and finds what in his judgment will be the extent of his disabilities and how long the condition will last. The lawmakers knew this could not be determined with finality, so the provision for modification and review was written into the act. As far as the payments for the future are concerned this is a wise provision. The necessity for it does not exist, however, where the commission, and later the courts, are asked to look at a man and say what his condition is at the present time, and where this is done and a finding of fact is made not looking into the future at all, but establishing a present determinable fact. . . ."

I argue with *Gant* insofar as it relates to the period of time up to the date of the judgment. That is, the contested issue of disability up through judgment was decided. Compare *City of Santa Fe v. Velarde,* 90 N.M. 444, 564 P.2d 1326 (1977). However, this does not fully answer the question of the time remaining of the original 500 weeks after the date of judgment. It cannot be said that that period has been litigated and, since it was not litigated, it cannot be res judicata. The trial court was not looking into the future, but was only establishing a determinable fact as of the date of the judgment.

Consistent with this philosophy, our Supreme Court stated in *Churchill v. City of Albuquerque,* 66 N.M. 325, 347 P.2d 752 (1959):

> "There is no longer any question in this jurisdiction but that a judgment such as here involved is not final until the full statutory period of 550 weeks has elapsed."

See also *Martinez v. Earth Resources Co.,* 90 N.M. 590, 566 P.2d 838 (Ct.App.1977). There are, of course, certain exceptions to the rule which are not applicable in the instant case. See, for example, *Durham v. Gulf Interstate Engineering Company,* 74 N.M. 277, 393 P.2d 15 (1964).

The reasoning behind the allowing of a reopening is sound. The state of the medical arts is such that a reoccurrence of disability or relapse can happen in many instances. Given this possibility of relapse and consistent with the liberal construction policy of the Workmen's Compensation Act, I would hold that any attempt of relitigation of the period prior to judgment is barred by the doctrine of res judicata, but that the judgment may be reopened for the statutory period remaining after judgment.

Accordingly, I respectfully dissent.

600 P.2d 309

NEW MEXICO BAPTIST FOUNDATION, H. B. Horn, Foundation and Calvin P. Horn Foundation, Protestants-Appellants,

v.

BERNALILLO COUNTY ASSESSOR, Respondent-Appellee.

No. 3834.

Court of Appeals of New Mexico.

Aug. 16, 1979.

Ronald F. Horn, Keleher & McLeod, Albuquerque, for protestants-appellants.

Pedro G. Rael, Joe C. Diaz, Albuquerque, for respondent-appellee.

OPINION

LOPEZ, Judge.

Protestants-appellants, New Mexico Baptist Foundation, H. B. Horn Foundation and Calvin P. Horn Foundation, filed a petition protesting the assessed value placed on certain improvements owned by them in Bernalillo County. In their petition, appellants claimed that the assessed value was excessive. After a hearing, the Bernalillo County Valuation Protest Board entered a Decision and Order leaving the assessed value of the improvements unchanged. This appeal followed. We affirm.

The primary issue on appeal is whether the Order and Decision of the Bernalillo County Valuation Protest Board was arbitrary, capricious or an abuse of discretion, not supported by substantial evidence in the record taken as a whole, or otherwise not in accordance with law. Section 7–38–28D(1), (2), (3), N.M.S.A.1978. If the Order and Decision is of such a nature, this Court has the power to set it aside. Section 7–38–28D(1), (2), (3). In order to determine this issue, the following secondary issue must be decided: whether evidence of a sale of the property to be taxed is "sales of comparable property" for purposes of § 7–36–15B, N.M.S.A.1978.

Facts

Appellants are the owners of certain improved real property located in Albuquerque, New Mexico. The property consists of land and a commercial building which was used as the office of the Great West Savings and Loan Association before the Association was placed in receivership. In 1978, the Bernalillo County Assessor assessed the market value of the property to be $39,310. Of this assessed value, $15,312 was allocated for the value of the land and $23,998 was allocated for the value of the improvements. Appellants filed a protest with the Bernalillo County Assessor on the grounds that the assessment of the improvements was excessive and the property should not be valued at more than $25,312. Of this latter value, appellants claimed that $15,312 should be allocated for the value of the land and $10,000 allocated for the value of the improvements. After a hearing, the Bernalillo County Valuation Protest Board entered a Decision and Order which left the valuation assessed by the Bernalillo County Assessor unchanged. Appellants appeal the Board's Decision and Order only as it relates to the valuation of the improvements on the property.

"Sales of Comparable Property" for Purposes of § 7–36–15B, N.M.S.A.1978

Section 7–36–15A and B, N.M.S.A. 1978, provides:

A. Property subject to valuation for property taxation purposes under this article of the Property Tax Code [Articles 35 to 38 of Chapter 7 NMSA 1978] shall be valued by the methods required by this article of the Property Tax Code whether the determination of value is made by the department or the county assessor. The same or similar methods of valuation shall be used for valuation of the same or similar kinds of property for property taxation purposes.

B. Unless a method or methods of valuation are authorized in Sections 7–36–20 through 7–36–33 NMSA 1978, the value of property for property taxation purposes shall be its market value as determined by sales of comparable property or, if that method cannot be used due to the lack of comparable sales data for the property being valued, then its value shall be determined using an income method or cost methods of valuation. In using any of the methods of valuation authorized by this subsection the valuation authority shall apply generally accepted appraisal techniques.

In determining the value of the property for purposes of taxation, the Bernalillo County Assessor used the cost methods approach. By statute, the determination resulting from this approach is presumed to be correct. Section 7–38–6, N.M.S.A.1978. However, this presumption is rebuttable and can best be characterized as a prima facie inference which shifts the burden of going forward with the evidence to the taxpayer to prove the contrary. *Petition of Kinscherff*, 89 N.M. 669, 556 P.2d 355 (Ct. App.), *cert. denied*, 90 N.M. 8, 558 P.2d 620 (1976). The presumption can be overcome by a taxpayer's showing that the assessor did not follow the statutory provisions of the Act or by presenting evidence tending to dispute the factual correctness of the valuation. *First Nat. Bank v. Bernalillo Cty. Valuation*, 90 N.M. 110, 560 P.2d 174 (Ct.App.1977).

At the hearing before the Board, appellants submitted documentary evidence consisting of certified copies of pleadings filed in the Great West Savings and Loan Association's receivership proceedings. The first pleading submitted was an order to liquidate the Association in a manner reasonably consistent with good business practice. Other pleadings consisted of a receiver's report stating that an attempt was being undertaken to find a purchaser for the Association's building and a motion for approval and authorization to convey the building to a prospective buyer for $10,000. An order was subsequently entered by the trial court which granted the receiver the authority to convey the building at this price. This order was also submitted to the Board. The final documents submitted were a motion and order transferring the building to appellants for the same price.

On appeal, appellants contend that (1) the terms of § 7–36–15B make the use of a cost methods of valuation permissible only if there is a lack of comparable sales data for the property being valued; (2) the above documents constitute evidence of the availability of such data; (3) despite the availability of this data, the Bernalillo County Assessor used the cost replacement approach in determining the value of the property; and (4) the use of such an approach, under these circumstances, is in violation of the statutory provisions of the Act. Based upon these contentions, appellants claim that they have overcome the statutory presumption of correctness. Appellee responds by asserting that the documentary evidence submitted by appellants is not evidence of a comparable sale and that, therefore, the statutory presumption of correctness still stands. We agree.

Essentially, the documents relied upon by appellants as evidence of comparable sales are documents dealing with the sale of that very improvement whose valuation is the subject of the present dispute. Similarly, in *Peterson Prop., etc. v. Valencia City, Val. Protests Bd.*, 89 N.M. 239, 549 P.2d 1074 (Ct.App.1976), the only evidence submitted by the taxpayer was the purchase price of the land in question. Under these facts, this Court ruled that the taxpayer failed to present any evidence of sales of comparable property and that the evidence submitted did not establish a market value under § 7–36–15B. We conclude that the effect of this ruling was the determination that evidence of a sale of the property to be taxed is not "sales of comparable property" for purposes of § 7–36–15B. This conclusion is reinforced by this Court's discussion of the meaning of comparable sales of property in that case. We quoted the following rule with approval:

> As commonly used in valuing real estate, *a 'comparable' is property similar to the property being appraised*, and which has been recently sold or is currently being offered for sale. . . . (Emphasis added.)

Id. at 243, 549 P.2d at 1078. We conclude that the above rule precludes the use of the property being appraised as a "comparable" for establishing the value of that property. Accordingly, we hold that evidence of a sale of the property to be taxed is not "sales of comparable property" for purposes of § 7–36–15B. Based upon this holding, we further hold that appellants failed to overcome the statutory presumption of correctness

and that the Order and Decision of the Bernalillo County Valuation Protest Board was not arbitrary, capricious or an abuse of discretion, was supported by substantial evidence in the record taken as a whole, and was otherwise in accordance with the law.

Based upon the foregoing, we affirm the Order and Decision of the Bernalillo County Valuation Protest Board.

IT IS SO ORDERED.

HENDLEY and ANDREWS, JJ., concur.

600 P.2d 312

STATE of New Mexico, Plaintiff-Appellant,

v.

Connie LEYBA and Veronica Carrillo, Defendants-Appellees.

No. 4097.

Court of Appeals of New Mexico.

Aug. 23, 1979.

Jeff Bingaman, Atty. Gen., Michael E. Sanchez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Mary Jo Snyder, Santa Fe, for defendants-appellees.

OPINION

WALTERS, Judge.

Defendants were indicted by the grand jury for shoplifting in violation of § 30–16–20, and for conspiracy, in violation of § 30–28–2, N.M.S.A.1978. The trial court dismissed the charge of conspiracy on the ground that § 30–16–20 C expressly prohibits charging a separate or additional offense if it arises out of the same transaction upon which the shoplifting charge is based. The State contends the trial court misconstrued § 30–16–20 C, because it logically refers to additional similar charges such as larceny, and that the second charge should be reinstated.

The parties to this appeal are in error in agreeing that the charge of conspiracy "arises out of the same transaction" which resulted in the indictment for shoplifting. It is true that proof of the subsequent shoplifting may also tend to circumstantially prove the conspiracy charge, *State v. Thoreen*, 91 N.M. 624, 578 P.2d 325

(Ct.App.1978); *see, People v. Edwards,* 74 Ill.App.2d 225, 219 N.E.2d 382 (1966); but conspiracy is an initiatory crime, and it is a separate "common design or mutually implied understanding" between two or more persons to accomplish a criminal act at some time subsequent to reaching the common design or mutual understanding to do so. *See State v. Armijo,* 90 N.M. 10, 558 P.2d 1149 (Ct.App.1976); 16 Am.Jur.2d 131, Conspiracy, § 7. The overt act which constitutes the object of the conspiracy is no part of the crime of conspiracy; indeed, an overt act is not required, but the crime is complete when the felonious agreement is reached. *State v. Davis,* 92 N.M. 341, 587 P.2d 1352 (Ct.App.1978).

The alleged conspiracy did not arise from the same transaction as led to the charge of shoplifting, *see State v. Armijo,* 90 N.M. 12, 558 P.2d 1151 (Ct.App.1976); thus, the second count of the indictment should not have been dismissed on that ground.

The decision of the trial court is reversed with directions to reinstate the charge of conspiracy against defendants and to proceed accordingly.

IT IS SO ORDERED.

HENDLEY and ANDREWS, JJ., concur.

600 P.2d 820

STATE of New Mexico,
Plaintiff-Appellee,

v.

Jack STEPHENS and Michael Colby,
Defendants-Appellants.

No. 12271.

Supreme Court of New Mexico.

Oct. 1, 1979.

Reginald J. Storment, Sante Fe, Leon Taylor, Albuquerque, for defendants-appellants.

Jeff Bingaman, Atty. Gen., Arthur Encinas, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

EASLEY, Justice.

The defendants Jack Stephens and Michael Colby appeal from their convictions of first-degree murder. We discuss whether the trial court should have, sua sponte, ordered a severance of the trial of the two defendants, and whether the trial court abused its discretion in admitting certain evidence.

Both defendants and the victim were inmates at the penitentiary of New Mexico. Defendants were charged with beating the victim to death with baseball bats at the penitentiary.

Evidence was admitted against each defendant which, allegedly, would not have been admissible against the other defendant had they been tried separately. Over objections, the trial court also admitted into evidence testimony regarding splinters which had been removed from the hand of defendant Colby the day after the murder; two letters, one allegedly written by Colby and the other allegedly written to Colby by another inmate; and, two photographs of the victim.

The defendants, having insisted on being tried jointly, now assert that the trial court has discretion to order a severance, sua sponte, and that its failure to do so was an abuse of discretion. Defendants cite New Jersey cases holding trial courts have discretion to order a severance sua sponte. *State v. Tapia*, 113 N.J.Super. 322, 273 A.2d 769 (1971), and cases cited therein. The parties agree that this issue has not been decided in New Mexico. We decline to decide it now because, on the facts of this case, even if the trial court possessed such authority, there was clearly no abuse of discretion. The record plainly indicates that the defendants waived separate trials. Counsel for defendant Colby requested a severance; but his client, after being fully advised of his rights by the trial judge, refused a separate trial.

Colby argues that the trial court erred in allowing testimony that wood splinters were removed from his hand on the day following the murder. The splinters were not available because they had been lost or their whereabouts were unknown. He claims prejudice because it denied the defense an opportunity to perform tests in order to determine whether the splinters were in fact related to a cracked baseball bat allegedly used in the murder. Colby argues that this prejudice outweighed any probative value that the testimony may have had.

The testimony was clearly relevant and had probative value. There was testimony of an eye witness to the murder. The eye witness testified that he saw Colby and Stephens strike the victim with baseball bats. One of the bats which was admitted into evidence was cracked. The testimony that wood splinters were removed from the hand of defendant Colby on the day following the murder clearly had a tendency to make more probable the State's theory the Colby had struck the victim with the cracked baseball bat. N.M.R.Evid. 401, N.M.S.A.1978.

Regarding the prejudice to defendant Colby by the State's failure to produce the actual splinters, Colby argues that good or bad faith is immaterial, citing *Lauderdale v. State*, 548 P.2d 376 (Alaska 1976). The Supreme Court of Alaska held that it was reversible error for the State not to have produced an ampoule used in a breathalizer test, the results of which test were admitted against the defendant in his trial for driving while intoxicated. In *Lauderdale*, the evidence in question was clearly obtained by the police for the purpose of use in the subsequent criminal prosecution.

We recognize that the State has a duty to preserve, where reasonably practical, relevant evidence obtained in the investigation of a crime. However, in the present case, the splinters were not removed from Colby's hand for the purpose of obtaining them as evidence. The record does not indicate that the investigation of the murder had focused on either defendant at that time. The splinters were removed from Colby's hand for the purpose of providing medical treatment, which the penitentiary is required to do. The medical personnel at the penitentiary may well have thrown the splinters away, or lost them prior to there being any indication that they were relevant to the murder.

The trial court had discretion regarding the examination of witnesses. *State v. Hogervorst*, 90 N.M. 580, 566 P.2d 828 (Ct.App.1977); *cert. denied*, 90 N.M. 636, 567 P.2d 485 (1977). We find no abuse

of discretion in this case, and the testimony regarding the splinters was properly admitted.

Colby argues that the trial court erred in admitting into evidence two notes, one of which was allegedly written by Colby, and the other allegedly written to Colby by another inmate. The notes related to the defendant's alibi defense. A handwriting expert testified that the writing on each of the notes was the same as the handwriting which appeared on documents in the inmates' respective files at the penitentiary. The specific objection was that the samples used to compare the handwriting in the notes were not shown to have been written by the respective inmates.

The records custodian at the penitentiary testified that the samples which were used in the handwriting analysis were from the files regularly kept at the penitentiary. Although he did not personally testify that he saw the respective inmates make the writings which were used as samples, he did testify that the writings were the result of regular procedures at the penitentiary. We have held that similar evidence regarding fingerprints is admissible, if regularly kept in the course of penitentiary business, even though the records custodian did not personally see the fingerprints made. *State v. Linam*, 18 N.M.St.B.Bul. 67, 93 N.M. 307, 600 P.2d 253 (1979); *State v. Gallegos*, 91 N.M. 107, 570 P.2d 938 (Ct.App.1977). We see no reason why the same rule should not apply to writings made by inmates and regularly kept in the course of penitentiary business. We hold that the samples were admissible under N.M.R.Evid. 901(b)(7). We therefore conclude that the notes themselves were properly authenticated, and were admissible under N.M.R.Evid. 901(b)(3).

Finally, the defendants argue that the trial court abused its discretion in admitting into evidence photographs of the victim. Defendants argue that the photographs merely aroused the passions of the jury and that their prejudicial effect outweighed their probative value. Defendants argue that the photographs had no relevance because the means of death was not an issue; rather, alibi was the defense theory. However, the record indicates that on cross-examination of the State's medical witness, an issue was raised as to whether the injuries were caused by a brick rather than a baseball bat.

The admission into evidence of photographs of the victim is within the discretion of the trial court. *State v. Noble*, 90 N.M. 360, 563 P.2d 1153 (1977). "The photographs were used to illustrate, clarify, and corroborate the testimony * * * concerning * * * wounds of the victim * * * *" *Id.* at 363, 563 P.2d at 1156. We find no abuse of discretion in the admission into evidence of the photographs of the victim.

The convictions of the defendants are therefore affirmed.

IT IS SO ORDERED.

FEDERICI and FELTER, JJ., concur.

600 P.2d 822

Evelyn M. GEORGE, As Executrix of the Estate of Pearl George and Emma Dick Reed aka Emma Dick, Deceased,

v.

Byron CATON and Fred E. White, Defendants-Appellees.

No. 3375.

Court of Appeals of New Mexico.

March 6, 1979.

Laura M. Goldsmith, Window Rock, Ariz., for plaintiff-appellant.

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

OPINION

SUTIN, Judge.

This suit was brought to recover damages for losses sustained when defendants, as attorneys for Pearl George and Emma Dick, deceased, failed to file plaintiff's wrongful death action before expiration of the statute of limitations. Defendants' motion for summary judgment was granted because, based on principles of contract law, no attorney-client relationship was established. Plaintiff appeals. We reverse.

A. *Issues raised in the trial court.*

Plaintiff sued defendants on two counts:

(1) Defendants, as attorneys for plaintiffs failed to bring suit within three years and negligently allowed the statute of limitations to run; that defendants failed to exercise the degree of care required by members of the legal profession.

(2) As a result of representations of Caton, plaintiff assumed that defendants agreed to represent plaintiff and if they did not, defendants had a duty to put plaintiff on notice that they were unwilling to represent her, or in the alternative, defendants were under a duty to file the action prior to the effective date of the statute of limitations.

Defendants filed an answer, a motion for summary judgment, together with an affidavit of a Farmington lawyer. The affidavit stated that:

1. The standard and custom of the legal profession in Farmington is to obtain from a prospective client prior to, and as a condition of employment in contingent fee plaintiff's cases, a written employment agreement together with an advanced deposit of costs.

2. If an attorney informs a prospective contingent fee client that the case would be handled, and the client contacts the attorney once six months later, and not thereafter for 2½ years, in the absence of a written agreement the standards of skill, competence and practice would not require the attorney to file the complaint on the attorney's own initiative, even though the limitation period expired; that no negligence would occur; that the filing of the complaint by the attorney would fall below the standards of practice and ethics.

3. It would not fall below the standards for the attorney to fail or refuse to attempt to seek out the potential plaintiff, even if the prospective plaintiff was a Navajo and resided on the Navajo reservation.

4. The assumption or conclusion by the attorney that the potential plaintiff had either obtained other counsel, or had abandoned the lawsuit, would not fall below the standards.

Seventeen depositions were taken. We assume that the transcript of the record contains the entire record below. No order in writing from plaintiff to the clerk of the district court appears. Neither party requested a jury trial so that the district court is the trier of the fact.

B. *Trial court's letter decision filed of record controls effect of summary judgment.*

The district judge wrote the parties:

> Following the hearing this last Wednesday and Defendant's Motion for Summary Judgment, I reviewed the court file, the memorandums and briefs you each submitted, the deposition testimony that was attached as appendicies to these memorandum briefs and my notes taken at the hearing.
>
> As I indicated during my questioning of each of you at the Wednesday hearing, my primary concern in this case is whether there was an attorney-client relationship established. This meant a contract. . . .
>
> * * * * * *
>
> *I find that no attorney-client relationship existed or could at law be construed to have existed,* based upon the above pleadings, affidavits and depositions submitted.
>
> *Defendants' Motion for Summary Judgment will therefore be granted.* [Emphasis added.]

The trial court ordered the letter to be filed of record. *The trial court did not determine the validity of plaintiff's second count.* Defendants contend that the letter is not part of the record proper and should not be considered by this Court on appeal. We disagree.

When summary judgment is granted, the trial court is not required to state its reasons nor to make findings. *Garrett v. Nissen Corporation,* 84 N.M. 16, 498 P.2d 1359 (1972). But such findings are permissible and often quite helpful for appellate review. 6 Moore's Federal Practice, ¶ 56.-02(11) (1976). The parties then "know upon what grounds the judgment was granted in order to properly present the controversial issue to the appellate court." *See, Wilson v. Albuquerque Board of Realtors,* 81 N.M. 657, 661, 472 P.2d 371 (1970), *overruled* in *Garrett.*

The only controversial issue now present is the existence or non-existence of an attorney-client relationship.

Nevertheless, we feel compelled to determine whether the trial court erred in entering summary judgment. This will assist in determination of this case on the merits. "[I]n a suit against an attorney for negligence, plaintiff must prove three things in order to recover: (1) the attorney's employment, (2) his neglect of a reasonable duty, and (3) such negligence resulted in and was the proximate cause of loss to client." *Freeman v. Rubin,* 318 So.2d 540, 542–43 (Fla.App.1975); *Allied Productions, Inc. v. Duesterdick,* 217 Va. 763, 232 S.E.2d 774 (1977).

C. *A genuine issue of material fact exists on contract issues.*

The depositions of White and Caton established a prima facie case that no attorney-client relationship existed. The burden of establishing a genuine issue of material fact shifted to plaintiff.

The facts most favorable to plaintiff are:

In the evening of November 23, 1969, Pearl and Emma expired in a trailer purchased from Lone Star Trailer Sales. Two weeks thereafter, plaintiff was referred to the law firm of White and Caton in Farmington. Caton was an associate of White. But letterheads and business cards read "White and Caton."

The testimony that follows was gleaned from a series of depositions taken in 1976, some seven years after the relationship of the parties began. Plaintiff, a Navajo Indian, could neither speak nor understand the

English language. At her deposition, she spoke through an interpreter. At various visitations with defendants, a member of the family was present who conversed in the English language.

On November 26, 1969, three days after the tragedy, Paul V. Rupp, attorney for DNA enclosed five specified items by letter to Caton, together with information of photographs taken. On December 2, 1969, Rupp enclosed copies of letters written by Bob Smith together with a statement from the Gary Butane Service. Rupp thought the letters might serve as a notice to the sellers of propane.

Plaintiff's first visitation occurred two weeks after the tragic event. It consisted of a conversation with White. Present were plaintiff and her sister. In this conversation White said that it sounded like a good case and he would handle it. He obtained plaintiff's address and said he would write plaintiff a letter within two or three weeks. There was no discussion about a fee arrangement or contract of employment. No letter was ever received by plaintiff from defendants.

In January or February, 1970, Caton or White came to the office of Edward Boggio, Criminal Investigator for the Bureau of Indian Affairs at Shiprock and examined photographs and a ventilation pipe. Conversation centered around the condition of the ventilation pipe. Boggio's information was confidential and Boggio assumed that the attorney was handling the case. Boggio recalled no conversation on the subject of an attorney-client relationship.

Plaintiff's second visitation with White occurred at least six months after the first visit. Present were plaintiff and her brother. White was asked about the case, and he replied: "It's fine. It's doing okay. It's coming out all right." He also explained that there might be a conflict of interest if he were employed by Lone Star Trailer, and if so, he would notify plaintiff. He also said: "If there should be any other attorneys, any other lawyers that should come around to see you where you live at Newcomb and if they ask you to handle the case, to refuse and say, 'No' to any and all lawyers that come along."

The third visitation occurred in January or February, 1972, beyond the limitation period of three years. A week prior thereto, plaintiff's daughter called White to inquire about the case and was told that the case had "expired." Present at the third visitation was plaintiff, her daughter and son-in-law. White told plaintiff the case was good, but it had "expired;" that a complaint had been filed but it was good for only two years, and that White had sent a letter to plaintiff. Plaintiff requested to see the file of this case but none was shown to her. White also told plaintiff that the relatives of Emma had not come into his office and her case also "expired." Plaintiff was advised to see the tribal government, but it would tell her the same thing.

At the fourth visitation, neither Caton or White were in the office.

The fifth visitation occurred in the spring of 1975, although the year 1975 was uncertain. Present were plaintiff, her daughter and son-in-law. The firm of White and Caton had ended, and White advised plaintiff that Caton had taken the case and gave them the directions to Caton's office. Plaintiff, her daughter and son-in-law went to Caton's office. Plaintiff did not believe the case had expired because she was not shown the file or the papers of the case. The conversation varied because seven years had passed and memory had faded. The son-in-law was told by Caton that the case was not strong; that plaintiff should contact Joe Benally who would send this case back through the Navajo Tribe and then Caton would discuss the case with plaintiff again. Plaintiff's daughter testified that her mother said: "We came to find out how everything was coming along" and Caton said: "Everything is fine. I'm still working on the case." That was all Caton said.

It was at this visitation that plaintiff knew something was wrong and went to other attorneys.

Caton testified that he evaluated the case, was positive about it, and told plaintiff it was a good case and he would like to handle it on a contingency basis. He wanted to file the suit very badly, prepared a rough draft of a first cause of action, but after discussing the matter with White, he could not ethically do it because he "was in an ambiguous situation." Inasmuch as he felt he did not represent plaintiff, he could not ethically file a complaint on her behalf. He did not retain copies of any letters or contract of employment which he claimed had been mailed to plaintiff and not received by her.

Defendants claim that the visitations were with Caton and not White. Perhaps, plaintiff and her family were mistaken. This matter is of no significance. Plaintiff retained the firm of White and Caton. This was equivalent to retaining each member of the firm, although one member of the firm had been consulted. *Bossert Corporation v. City of Norwalk,* 157 Conn. 279, 253 A.2d 39 (1968).

Defendants had done business with Navajo Indians, were familiar with the Indian tradition and the difficulties of translation of the Indian language, and, orally or in writing, defendants had a duty to be precise, meticulous and definite so that no misunderstanding would arise as to the relationship of the parties.

No formal contract, arrangement or attorney fee is necessary to create the relationship of attorney and client. *Westinghouse Elec. Corp. v. Kerr-McGee Corp.,* 580 F.2d 1311 (7th Cir. 1978); *Farnham v. State Bar,* 17 Cal.3d 605, 131 Cal.Rptr. 661, 552 P.2d 445 (1976); *Kurtenbach v. TeKippe,* 260 N.W.2d 53 (Iowa 1977); *Alexander v. Russo,* 1 Kan.App.2d 546, 571 P.2d 350 (1977); *Tormo v. Yormark,* 398 F.Supp. 1159 (D.N.J.1975); *Crest Investment Trust, Inc. v. Comstock.* 23 Md.App. 280, 327 A.2d 891 (1974); *Bresette v. Knapp,* 121 Vt. 376, 159 A.2d 329 (1960); *Lawrence v. Tschirgi,* 244 Iowa 386, 57 N.W.2d 46 (1953); *Nicholson v. Shockey,* 192 Va. 270, 64 S.E.2d 813 (1951).

The contract may be implied from the conduct of the parties. *Kurtenbach, supra; Lawrence, supra.* All that is required is a statement by an attorney that he would "handle" her matter. *Fuschetti v. Bierman,* 128 N.J.Super. 290, 319 A.2d 781 (1974), or that the work requested will be done "in very good fashion." *Farnham, supra,* or, "it's all been taken care of," *Christy v. Saliterman,* 288 Minn. 144, 179 N.W.2d 288, 294 (1970), or, an attorney's promise "to see what could be done with regard to settlement," *Tormo, supra* [398 F.Supp. at 1169], or, when asked if he would take the case, the attorney said that he would. *Bresette, supra.*

The conversations between plaintiff and White were sufficient to meet plaintiff's burden of overcoming the prima facie case made by defendants. Where no contract arrangement was discussed with plaintiff, the fact that the standard in Farmington required a contract arrangement to establish an attorney-client relationship is irrelevant.

Defendants' response is untenable. All facts heretofore set forth were avoided. They rely on their own testimony, and their position is that "To establish the existence of such an attorney-client relationship, the essential terms thereof must be proven by plaintiff. *Setzer v. Robinson,* 386 P.2d 124 (Cal.1962) [sic] [57 Cal.2d 213] 18 Cal.Rptr. 524, 368 P.2d 124." In *Setzer,* the situation is reversed. Setzer, an attorney, sued his client to enforce a contingent fee agreement for legal services rendered and for satisfaction of the lien against his client's property. Setzer could recover because he did not commence any proceedings until his contingent fee agreement was executed. Defendants rely on the following quotation stated in the course of the opinion:

> . . . No attorney could safely or reasonably *negotiate* any fee agreement with a prospective client without some preliminary investigation of the facts of the case and a disclosure to the prospective client of the legal steps which in his judgment must be taken. *If by the very fact of such investigation and disclosure*

the relationship of attorney and client would thereby be created, the attorney would be placed in the impossible position of becoming the prospective client's attorney *while he was attempting to reach an agreement with him as to whether he should become his attorney or not.* [Emphasis added.] [18 Cal.Rptr. at 526, 368 P.2d at 126.]

The distinction between *Setzer* and the instant case is apparent. In *Setzer,* the attorney investigated the case but did not agree to "handle" the case before a contingent fee agreement was reached. In the instant case, defendants agreed to "handle" the case without negotiations for a contingent fee arrangement. *Westinghouse, supra,* said:

. . . A professional relationship is not dependent upon the payment of fees nor, as we have noted, upon the execution of a formal contract. [580 F.2d at 1317.]

A professional relationship exists though the services be rendered gratis. *Allman v. Winkelman,* 106 F.2d 663 (9th Cir. 1939), cited in *Westinghouse, supra.* In other words, a contingent fee arrangement is not an essential term of a contract that establishes an attorney-client relationship.

Defendants' suggestion that plaintiff may have a cause of action against her sister for faulty or improper interpretation placed a duty on defendants to inquire whether the interpreter correctly translated the testimony of plaintiff. In the framework of legal rights and responsibilities, the role of the lawyer has become increasingly crucial. As more individuals come to depend on him, his responsibility must broaden and deepen. An attorney cannot escape obligations by putting the onus on interpreters unless the record shows that the interpreter was disqualified to act.

We hold that a genuine issue of material fact exists on whether an attorney-client relationship was established.

If, upon trial of this issue, the district court remains adamant and finds that no attorney-client relationship was established, judgment shall be entered for defendants on Count I. If the trial court finds that an attorney-client relationship did exist, then the trial court shall make its findings on the remaining issues in this case.

D. *A genuine issue of material fact exists on defendants' negligence.*

We are not involved with the liability of defendants for negligence in connection with an adversary proceeding in court. This case is limited to the failure of defendants under contract with plaintiff to commence an action within the statutory period of limitations.

To "prosecute" an action includes the commencement thereof, and is not confined to the pursuit of the remedy thereafter. *Cheshire v. Des Moines City Ry. Co.,* 153 Iowa 88, 133 N.W. 324 (1911).

When a lawyer contracts to prosecute an action on behalf of his client, he impliedly represents as follows:

(1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess;

(2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and

(3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.

In addition, a lawyer is subject to the same general rules of law applicable to physicians, dentists and other professional people.

A lawyer is not liable, however, for an error in judgment if he acts in good faith and in an honest belief that his advice and acts are well founded and in the best interests of his clients. *Cook v. Irion,* 409 S.W.2d 475 (Tex.Civ.App.1966); *Hodges v. Carter,* 239 N.C. 517, 80 S.E.2d 144 (1954), 45 A.L.R.2d 1 (1956).

Davis v. Associated Indemnity Corporation, 56 F.Supp. 541, 543 (D.C.Pa.1944) adds the following admonition to lawyers:

. . . An attorney must be familiar with the well settled principles of law and rules of practice which are of frequent application in the ordinary business of the profession; must observe the utmost good faith toward his client; and must give such attention to his duties, and to the interests of his client, as ordinary prudence demands, or members of the profession usually bestow. [Citation omitted.]

We recognize, and give emphasis to the fact that a lawyer is not liable for every mistake that may occur in practice. No lawyer is bound to know all the law. It is not an exact science. There is no attainable degree of skill or excellence at which all differences of opinion or doubts upon questions of law can be removed from the minds of lawyers and judges. If the law on the subject is well and clearly defined and has existed and been published long enough to justify the belief that it was known to the profession, a lawyer who disregards the rule or is ignorant of it renders him liable for losses caused by such negligence or want of skill. *Gimbel v. Waldman,* 193 Misc. 758, 84 N.Y.S.2d 888 (1948).

All an attorney owes to his client is good faith and reasonable skill and diligence in the prosecution of the case. It does not require expert testimony to establish the negligence of an attorney who is ignorant of the applicable statute of limitations or who sits idly by and causes the client to lose the value of his claim for relief. An attorney who delays the bringing of an action until the statute of limitation has run is guilty of negligence if the attorney did not act solely with a view to promote the interest of his client. *Bland v. Reed,* 261 Cal.App.2d 445, 67 Cal.Rptr. 859 (1968). Ignorance of statutes or rules of limitation of legal remedies can in itself justify a finding of culpable negligence. *Parker-Smith v. Prince Mfg. Co.,* 172 App. Div. 302, 158 N.Y.S. 346 (1916). See *Winter v. Brown,* 365 A.2d 381 (D.C.App.1976). Even plaintiff's settlement and release of an original defendant does not bar plaintiff's claim for damages against partners in a law firm who failed to obtain service on defendant and negligently permitted plaintiff's course of action to become barred by the statute of limitations, *King v. Jones,* 258 Or. 468, 483 P.2d 815 (1971). *Drury v. Butler,* 171 Mass. 171, 50 N.E. 527 (1898).

Fuschetti, supra, says:

. . . The failure of an attorney to commence an action within the time of the statute would ordinarily be considered neglect. [Citation omitted]. Once plaintiff has shown that defendant allowed the statute to run against her claim, defendant should have the burden of coming forward with evidence that the statute would not be a bar. [Citation omitted.] [319 A.2d at 784.]

Hoppe v. Ranzini, 158 N.J.Super. 158, 385 A.2d 913, 916 (1978) says:

. . . Failure to file suit before the running of the period of the statute of limitations plainly constitutes malpractice where there is no reasonable justification shown therefor. . . .

Defendants in the instant case did not commence this action because they believed no attorney-client relationship existed. Therefore, it would be unethical for them to locate the plaintiff, and be retained before a complaint could be filed. Caton felt that he "was in an ambiguous situation." He may have been, but he was mistaken. Rule 2–103(A) of the Code of Professional Responsibility reads:

A lawyer shall not recommend employment . . . of himself . . . to a nonlawyer who has not sought his advice regarding employment as a lawyer.

Plaintiff did seek employment of defendants as an attorney. If defendants were in an "ambiguous situation," the Code of Professional Responsibility did not prohibit defendants from contacting plaintiff to resolve the ambiguity. To remain "in an ambiguous situation" for over three years is evidence that defendants did not act in good faith for the best interests of plaintiff, nor exercise reasonable skill and diligence in the prosecution of the case. "[A]s to doubtful matters, an attorney is expected to

perform sufficient research to enable him to make an informed and intelligent judgment on behalf of his client." *Smith v. Lewis,* 13 Cal.3d 349, 118 Cal.Rptr. 621, 628, 530 P.2d 589, 596 (1975).

A genuine issue of material fact exists whether defendants were negligent in failing to commence plaintiff's action within the statutory period of limitations.

E. *A genuine issue of material fact exists whether defendants' negligence was the proximate cause of plaintiff's loss.*

In a malpractice action charging that an attorney's negligence in prosecuting an action resulted in the loss of the client's claim, the measure of damages is the value of the lost claims, i. e., the amount that would have been recovered by the client except for the attorney's negligence. *Smith v. Lewis, supra; Freeman v. Rubin, supra; McDow v. Dixon,* 138 Ga.App. 338, 226 S.E.2d 145 (1976); *Baker v. Beal,* 225 N.W.2d 106 (Iowa 1975); *Measure and elements of damages recoverable for attorney's negligence, etc.,* 45 A.L.R.2d 62 (1956); 7 Am.Jur.2d, Attorneys at Law, § 190 (1963).

Caton evaluated the case. He was very positive about the case. It was a good case. Caton, as an expert witness, should be able to establish the value of the lost claim. The serious, complex problem that arises is the method of establishing the value of the lost claim. In *Hoppe v. Ranzini,* 158 N.J.Super. 158, 385 A.2d 913, 917 (1978) where the cases and authorities are collected, the court said:

> The rule elsewhere, although not without exception, appears to be that such a malpractice action against the attorney involves a trial within a trial, in which the plaintiff has the burden of proving by a preponderance of the evidence that (1) he would have recovered a judgment in the action against the main defendant, (2) the amount of that judgment, and (3) the degree of collectibility of such judgment. . . .

Plaintiff was not burdened with proving the value of the loss claim before trial. In any event, Caton had sufficient knowledge from his investigation to establish that a genuine issue of material fact exists.

The best procedure to use is bifurcation with the issue of defendants' neglect being tried first, and the issue of lost value for wrongful death be heard "back to back" with a hiatus of no more than one day. *Fuschetti, supra.* This is practical and logical where both hearings will be tried before the same judge. *See Chocktoot v. Smith,* 280 Or. 567, 571 P.2d 1255 (1977).

Reversed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HERNANDEZ, J., concurs in result.

600 P.2d 830

Richard E. HYDER and Pauline Hyder, his wife, Plaintiffs-Appellees,

v.

June Grimm BRENTON, David M. Meadmore and Manuel Medina Martin, Defendants-Appellants.

No. 3405.

Court of Appeals of New Mexico.

June 14, 1979.

Rehearing Denied June 28, 1979.

Keleher & McLeod, P.A., Michael L. Keleher, Robert H. Clark, Albuquerque, for plaintiffs-appellees.

Rodey, Dickason, Sloan, Akin & Robb, P.A., Bruce Hall, Edward T. Curran, Albuquerque, for defendants-appellants.

OPINION

ANDREWS, Judge.

This suit in Bernalillo County District Court results from a dispute between neighbors, Mr. and Mrs. Hyder and the Brentons (Mrs. Brenton, her son, Manuel Medina Martin and his cousin, David Meadmore). The Hyders sought an injunction against further improvements on land they had sold to Mrs. Brenton, along with damages, and rescission of the sale. The district court issued the injunction pending trial. After the non-jury trial the court found for the Hyders and granted rescission of the sale and injunctive relief. Defendants appeal, specifically objecting to conditions of the judgment which would permit them to retain the property if the property is replatted and if all permanent structures and improvements are removed. The question is whether erection of a wall and use of the property for gardens rather than a single family dwelling violates a restriction in the deed by which the Hyders conveyed the property to Mrs. Brenton. The restriction reads: "One family dwelling—2500 square feet exclusive of open porches and garage." We do not find this provision so limiting and therefore reverse.

The Hyders live on Hyder Avenue, S.E., on Lots 5 and 6 in Block 18 of the Monterey Hills Addition in Albuquerque, New Mexico. They also, along with Mr. Hyder's father, Latif Hyder, owned the adjacent Lots 3 and 4 to the east along Hyder Avenue. Martin and Meadmore owned Lots 10 and 11 and the eastern thirty-seven feet of Lot 9, which are located to the south of Lots 3 and 4, along San Rafael Avenue, S.E. Thus, the parties had common back property lines.

In April, 1975, while Mr. Meadmore and Mr. Martin were in the process of designing and building their home and gardens on

Lots 9, 10 and 11, they spoke to Mr. Hyder about the possible purchase of Lots 3 and 4. Their intention was to acquire the adjacent lots for Mrs. Brenton so that she could build a house for herself facing Hyder Street, with gardens in between and joining the two homes. Mr. Hyder accepted $1,000 from Mr. Meadmore and entered into an option agreement dated April 2, 1975, whereby Mr. Meadmore could purchase Lots 3 and 4 for a total price of $16,000 before August 3, 1975. The option mentioned no restrictions on the property. During the same month, Mr. Meadmore and Mr. Martin conveyed Lots 9, 10 and 11 to Mrs. Brenton.

Nothing transpired between the parties in regard to the property until August 1, when Mrs. Brenton met with Mr. Hyder and his father to close the transaction. The three talked for about one-half hour and Mrs. Brenton described the house she intended to build on Lots 3 and 4, indicating that she planned to begin building the next spring. Mr. Hyder drew up a standard printed short form warranty deed. The restriction at issue was discussed at the meeting and added to the deed after the meeting.

After purchasing Lots 3 and 4, Mrs. Brenton continued to plan her house and formal gardens, and in November, 1975, began the process of replatting her land into a single tract by vacating interior lot lines so that improvements could be placed across them. She had an architect draw preliminary plans for her house and broke ground in January, 1976. However, a short time later, she decided not to build the separate residence, but instead to remain in the original house with her son and Meadmore.

In February, 1976, the defendants obtained a building permit from the city and proceeded, in accordance with applicable zoning regulations, to build a seven foot high wall near the Hyder Street property line of Lots 3 and 4, with permanent formal gardens within.

The Hyders brought this action alleging violations of the zoning code, subdivision building restrictions, and restrictions in the deed. The district court, basing its decision on the August 1, 1975 meeting, found the existence of an oral agreement that Lots 3 and 4 would be used only for construction of a single family residence and entered judgment with the following provisions:

2. Defendants are directed to replat that parcel of land designated as Tract A on the replat of Lots 3, 4, Block 18, MONTEREY HILLS ADDITION, and Lots 10, 11 and East 37 feet of Lot 9, in Block 18, MONTEREY HILLS ADDITION No. 2, into two parcels, one parcel to be identical to that parcel of land known as Lots 3 and 4, MONTEREY HILLS ADDITION, Plat date November 9, 1939, which parcel for purposes of identification in this Judgment is designated as the north one-half of Tract A.

4. The cinderblock wall situate on the north one-half of Tract A and located within 20 feet of the lot line fronting Hyder Street SE, including all side walls within said 20 feet shall be removed, and all above ground improvements of whatever nature, exclusive, however of lawns, trees and shrubbery, there may be on the north one-half of Tract A, shall forthwith be removed by Defendants and at their expense.

5. The north one-half of Tract A shall henceforth be kept and maintained in such condition that the property is at all times compatible for construction of a single family dwelling and shall not be used as a back yard for any other residence.

6. The north one-half of Tract A shall have and contain a restriction or covenant running with the land consistent with this Judgment and is henceforth dedicated to use for a one family dwelling with a minimum size of 2,500 square feet exclusive of open porches and garage.

7. Plaintiffs are entitled to rescission and retransfer of the north one-half of Tract A and the Court therefore orders a rescission and directs the Defendants to reconvey good and merchantable title to Plaintiffs within thirty (30) days of date of this Judgment. Plaintiffs shall refund to Defendants the monetary purchase

price paid, $16,000.00 cash, without interest, at the time of Defendants' delivery of Warranty Deed. However, rescission is conditioned as stated in paragraph 8 hereof.

8. It is further ORDERED, ADJUDGED AND DECREED that the rescission herein granted by this Judgment and Order of the Court shall be delayed for a period of thirty (30) days from date of this Judgment and Defendants are hereby granted the option to retain title to the north one-half of Tract A, subject to replatting, removal of all permanent structures and improvements as herein noted, and subject to the covenants to run with the land heretofore imposed. The option to retain title shall be exercised by notice in writing filed with the Clerk within said thirty (30) day period. The Defendants however may retain a 3 foot high wall within the 20 foot setback area measuring from the lot line adjacent to Hyder Drive SE, but such 20 foot setback area shall be maintained as a front yard area, and shall not be used as the back yard of the residence situate on the south one-half of Tract A.

While this appeal raises a number of points stemming from the variety of legal theories adopted to support the judgment, including breach of contract, failure of consideration, scheme or pattern of development, dedication and zoning, we believe the decision should be made by considering the language of the deed. We therefore concentrate this discussion on the trial court's construction of the deed restriction.

The general rule for construction of deeds is that the intention of the parties is to be ascertained from the language employed, viewed in the light of the surrounding circumstances. *Garry v. Atchison, Topeka and Santa Fe Railway Co.*, 71 N.M. 370, 378 P.2d 609 (1963). Provisions in a deed are to be construed against the grantor and in favor of the grantee, *Harris v. Four Hills Development Corporation*, 79 N.M. 370, 443 P.2d 863 (1968); *Price v. Johnson*, 78 N.M. 123, 428 P.2d 978 (1967). This is particularly true where the construction given the provision works a forfeiture. *Garry v. Atchison, Topeka and Santa Fe Railway Co., supra.*

In our opinion, the restriction in question here merely sets a minimum size for any home to be built on the property, whenever a house is built. As construed by the trial court, the restriction requires Mrs. Brenton either to build a large home on the property or leave it completely unimproved. According to the trial court's literal interpretation of the deed restriction, each lot must be used *only* for a 2500 square foot home. Such an interpretation is too narrow. Restrictive covenants must be considered reasonably, though strictly, and an illogical, unnatural or strained construction must be avoided. *Montoya v. Barreras*, 81 N.M. 749, 473 P.2d 363 (1970).

As demonstrated by the following findings, the trial court based its construction of the deed restrictions on prior discussions between the parties:

7. Prior to the conveyance of August 1, 1975, Defendant June Grimm Brenton assured Plaintiffs that Defendant Brenton intended to build a one-family dwelling on Lots 3 and 4 compatible with other houses in the immediate neighborhood, with a minimum size of 2,500 square feet exclusive of open porches and garage.

8. By the negotiations and express intentions of the parties Defendants and June Grimm Brenton, in particular, agreed to dedicate Lots 3 and 4 to use only for construction of a single family residence and such expressed intention and agreement is a material part of the consideration for the conveyance of said lots.

While Mrs. Brenton did tell Mr. Hyder and his father about the intentions she had to build a house on Lots 3 and 4, these expressions of intent did not constitute an oral contract between the parties. There is nothing in the record to indicate that Mrs. Brenton did anything more than describe her architectural plans and state her intention to build. She never agreed or promised that she would build her house within

any particular time, and she never agreed or promised to leave the lots untouched until then. There were no express agreements as to exactly how Mrs. Brenton was going to use Lots 3 and 4. Mrs. Brenton's "assurances" on August 1 did not create a contract because they were simply expressions of intent.[1] 1 Corbin, Contracts § 15, "Expressions of Intent, Hope or Desire" (1963).

Furthermore, regardless of whether or not an oral contract was created in the discussions between the parties, the prior negotiations and agreements were "merged" into the deed and a judgment cannot be based upon them. As stated in *Birtrong v. Coronado Bldg. Corp.*, 90 N.M. 670, 568 P.2d 196 (1977):

> The intention of the grantor must be derived from the language of the instrument of conveyance, and it will not be impeached except to correct or prevent injustice for such reasons as accident, mistake or fraud. (Citations omitted.) Prior considerations, negotiations or stipulations are merged in the final and formal deed executed by the parties. Although the terms of the deed may vary from the prior negotiations, the deed alone must be looked to in determining the rights of the parties. (Citations omitted.)

This case does not come within the exception for "accident, mistake or fraud", because the trial court made no such findings. The plain meaning of the deed restriction is not such as would prevent the free use of one's property. There being no express deed restriction to the contrary, we will not infer an encroachment on the free use of one's property such as that involved here. *Harris v. Four Hills Development Corporation, supra.*

The Brentons did not violate the deed restriction, and the trial court erred in determining otherwise.

In view of our disposition of the principal appeal, it is not necessary for us to consider or discuss the claim for damages made by the Hyders.

The judgment of the trial court is reversed.

IT IS SO ORDERED.

HENDLEY, J., concurs.

WALTERS, J., dissents.

WALTERS, Judge (dissenting in part, concurring in part).

Defendants have appealed the judgment of the District Court ordering a rescission of a land sale contract between the parties unless defendant-appellant Brenton, the purchaser, complied with two conditions which would permit her to retain the property: (1) replat of the property, and (2) removal of all permanent structures and improvements.

I believe only two of appellant's points require determination: (1) If the evidence supports the trial court's finding of an oral agreement restricting the use of the land, and going to partial consideration for the contract of purchase and sale, is it an enforceable agreement to build? and (2) Have appellants so used the land already as to make compliance with the alleged restrictive covenant impossible? The trial court's finding of an oral agreement is the first matter requiring review.

The trial was to the court without a jury. Much of the considerable evidence introduced related to the acts and declarations of the parties, and tended either to establish or refute the existence of an oral contract requiring appellant Brenton to build a single-family dwelling on the lot she purchased from Hyders. Appellees-Hyder contended that Mrs. Brenton's oral promise to build was memorialized by a typewritten notation

1. In addition, the April 2, 1975, option agreement signed by Mr. Meadmore and Richard E. Hyder makes no reference to restrictions of any sort affecting Lots 3 and 4, but does establish the consideration—$16,000 for the lots. The option gave the optionee (Mrs. Brenton) the right to comply or not comply with the terms of the option, at her sole choice and election. *Northcutt v. McPherson*, 81 N.M. 743, 473 P.2d 357 (1970). The Hyders, as vendors, were bound to comply with the terms of the option when Mrs. Brenton chose to exercise it.

on the deed: "One family dwelling—2500 square feet exclusive of open porches and garage." Mrs. Brenton insisted at trial and again on appeal that there was no binding promise to build, and that the sole consideration for the conveyance of the land was stated in the option agreement (payment of $15,000), which she paid. At the time the quoted legend was typed on the deed in August 1975, she intended to commence building the following spring. Circumstances later prevented her from doing so.

The purchase of the property was initiated by appellant Brenton through her nephew and agent, David Meadmore, when on behalf of Brenton he signed an option agreement with Richard Hyder to purchase an empty lot adjacent to Hyder's residence and directly behind the residence Meadmore shared with Martin, Brenton's son. Shortly thereafter, Martin and Meadmore conveyed title to their property to Brenton. Upon the exercise of her option to purchase, the deed to the property was delivered by Hyder to Brenton, and it contained the notation cited above. Soon after taking title to the Hyder property, Brenton replatted the two lots, now in her name, and combined them into one residential lot. In contemplation of using the empty lot as a backyard for the residence in front, Brenton proceeded to have a seven-foot wall built around three sides of the combined lots, enclosing curbs, pillars and other landscaping for a formal garden.

The trial court found that the parties had entered into an oral agreement, which formed a material part of the consideration for the transfer of the Hyder lot, whereby Brenton agreed to use the property purchased from appellees as a residential lot for the building of a home 2500 square feet or greater in size.

Where the existence of an oral contract and the terms thereof are the points in issue it is for the trier of the facts to determine whether the contract did in fact exist. *Nordin v. Zimmer*, 373 P.2d 738 (Alaska 1962). *See, Kirchner v. Laughlin*, 4 N.M. (Gild.) 386, 17 P. 132 (1888); *Coston v. Adams*, 203 Okl. 605, 224 P.2d 955 (1950).

An appellate court may not substitute its judgment for that of the trial court so long as the challenged findings are supported by substantial evidence. *Getz v. Equitable Life Assurance Society*, 90 N.M. 195, 561 P.2d 468 (1977). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate support for a conclusion. *Samora v. Bradford*, 81 N.M. 205, 465 P.2d 88 (Ct.App.1970). In determining whether there is substantial evidence to support those challenged findings which are relevant, this court is guided by the following legal principles: (1) the reviewing court will indulge all presumptions in favor of the judgment; (2) the evidence will be viewed in the light most favorable to support the trial court's findings and to the prevailing party; and (3) all unfavorable evidence will be disregarded. These rules apply equally even when the burden of proof on the prevailing party at the trial court requires clear and convincing evidence. *Duke City Lumber Co. v. Terrel*, 88 N.M. 299, 540 P.2d 229 (1975); *United Veterans Organization v. New Mexico Prop. App. Dept.*, 84 N.M. 114, 500 P.2d 199 (Ct. App.1972); *Samora, supra.*

The record is replete with evidence of the expressions of Brenton's intentions to construct a single family dwelling on the lot. I believe that the conversations between the parties as evidenced by the record provide sufficient support for a finding of an oral agreement. We may not weigh the evidence to reach a finding contrary to the trial court's assessment of substantial evidence; fact-finding is the trial court's prerogative, *Duke City Lumber Co., supra.*

It is true that the only consideration stated in the option contract for transfer of the land was a promise to pay $15,000, and Brenton fulfilled that promise. But there may be other or different consideration than that which is stated in the contract for the sale of land, and the existence of such other consideration may be proved by parol evidence. The general rule that parol evidence cannot be received to contradict, vary, add to, or subtract from the valid written terms of a contract is subject to the

exception that if a written instrument fails to state the entire consideration, it may be shown by parol. *American Institute of Marketing v. Keith*, 82 N.M. 699, 487 P.2d 127 (1971); *People v. Orekar*, 22 N.M. 307, 161 P. 1110 (1916). The exception recognizes that there is no rule of law requiring all of the terms of an agreement for the sale of land to be found in the written option contract.

The exception is applied equally when the writing involved is a deed. Expression of its employment and its sustaining policy is found in 6 G. Thompson, Real Property § 3120 (1964 Repl.):

> More or less than is expressed in a deed may be proved by parol evidence as the consideration, and even a different consideration, if valuable, may be proved. . . . The effect of a consideration expressed is merely to estop the grantee from alleging that the deed was executed without consideration. For every other purpose it is open to explanation, and may be varied by parol proof.

In *Fraley v. Bentley*, 1 Dak. 25, 46 N.W. 506 (1874), although the only consideration stated in the deed was $500.00, the court found that part of the agreed consideration for the purchase of the land was vendee's oral promise to build a sawmill on the land he had purchased.

I would affirm the trial court's findings of an oral promise, since we are not at liberty to disturb those findings supported by substantial evidence, but then ask whether there exists an enforceable promise to build. If Brenton had done nothing at all with the land, would the Hyders have been able to enforce a promise to build by a decree demanding specific performance? I think not because of lack of specificity in the "agreement."

There is no doubt that Hyder intended to sell and Brenton intended to buy the lot for residential use. In fact, the evidence supports a finding that it was the intent of all of the parties involved that Brenton build a home on the premises, with some degree of understanding resulting from her detailed description of its proposed size and style. Notwithstanding the existence of this "agreement," courts do not enforce promises lacking in certainty, as this one is, against the promisor.

A promise, to be sufficient consideration for a return promise, cannot be "so vague and indefinite in its expression that it cannot be enforced. . . ." 1 A. Corbin, Contracts 615 § 143, (1963). With references to contracts as opposed to mere promises serving as the consideration for contracts, Professor Corbin analyzes the problem as follows:

> A court cannot enforce a contract unless it can determine what it is . . . . It is not even enough that they have actually agreed, if their expressions, when interpreted in the light of accompanying factors and circumstances, are not such that the court can determine what the terms of that agreement are. Vagueness of expression, indefiniteness, and uncertainty as to any of the essential terms of an agreement, have often been held to prevent the creation of an enforceable contract.

Id. § 95, at 394.

There is difficulty in framing an invariable rule since "[v]agueness, indefiniteness and uncertainty are matters of degree, with no absolute standard for comparison. . . In every case, the function of the court is to determine as far as possible, the intention of the contracting parties and to give legal effect thereto." *Id.* at 396.

The promise which the Hyders seek to have enforced is Brenton's assurance that she would build a home on the lot purchased, and that she may not use it for anything else. The terms of this promise would include the approximate size of the dwelling—3300 square feet; the style—Mediterranean; and prompt commencement of construction. Two very important prerequisites to beginning construction were expressed by Brenton during the negotiations, namely, that she did not plan to begin building until Spring; and that construction of a new home was contingent upon the sale of her existing residence. Those contingencies, together with the fact

that no time for completion of the project was ever decided upon, or even discussed, make her "promise" to build so indefinite as to render it unenforceable.

In reaching this conclusion I am cognizant of that branch of cases holding that time of performance is an essential term of an agreement, see *Crawford v. General Contract Corp.*, 174 F.Supp. 283 (W.D.Ark. 1959) and *High Knob, Inc. v. Allen*, 205 Va. 503, 138 S.E.2d 49 (1964). On the other hand, some courts have held that where no time is agreed upon for the completion of a contract, a promise to perform within a reasonable time will be implied. *See* 17 Am.Jur.2d 419–421, Contracts § 80. The presence or absence of an uncertainty in the time in which performance is required is determined according to the specific facts and circumstances of each case. *Benham v. World Airways, Inc.*, 296 F.Supp. 813 (D.Haw.1969). In this case, Hyder had no desire to sell the property until someone bought it for the purpose of building a house upon it. He was not actively seeking a purchaser; it was Brenton's agent who approached with an offer to buy. Because a residence on the property was appellee's stated prime concern, the element of time for construction and completion is elevated, in this case, to the level of an indispensable term, and a reasonable time for performance cannot be implied.

Since a promise to be enforceable must be sufficiently definite as to both time and subject matter, *Dale's Service Co. Inc. v. Jones*, 96 Idaho 662, 534 P.2d 1102 (1975); *Parks v. Atlanta News Agency, Inc.*, 115 Ga.App. 842, 156 S.E.2d 137 (1967); *Greer v. Stanolind Oil & Gas Co.*, 200 F.2d 920 (10th Cir. 1952), and Brenton's promise to build a home of a certain style and an approximate size did not specify any details concerning the time within which the promise was to be performed and did not commit her in any way to complete construction within a stated time period, it cannot be enforced.

Therefore, I would hold that there was no enforceable promise to build.

Restrictive Covenant

Appellants also argue that the deed restriction is ambiguous and, consequently, must be construed against the grantor. They further argue that the restriction merely sets a minimum size if and when a home is built and does not require that the property be left untouched by the owner until such time. With this I agree. Nevertheless, there remains the issue of whether the use to which the property is put, in the meantime, can be of a nature to preclude the eventual use clearly intended by the parties.

We should be guided by the principle that in construing restrictive covenants the primary objective is to determine the intention of the parties. 3 H. Tiffany, Real Property § 858 (3rd ed. 1939). The "restrictive covenant" in this case is not a model of clarity or legal efficacy. Nevertheless, it is an expression of the prior negotiations and agreements which have merged in the deed. The New Mexico Supreme Court, in *Hoover v. Waggoman*, 52 N.M. 371, 199 P.2d 991 (1948), declared that "effect is to be given to the intention of the parties as shown by the language of the whole instrument, considered with the circumstances surrounding the transaction, and the object of the parties in making the restrictions." *Id.* at 376, 199 P.2d 994. See also *Rowe v. May*, 44 N.M. 264, 101 P.2d 391 (1940). This rule is to be applied in conjunction with another which requires a restrictive covenant to be construed most strictly against the covenant so that no injunction issue unless the thing to be enjoined is plainly within the provisions of the covenant. *Hoover, supra.*

Although restrictive covenants must be construed where possible to favor free use of the property, *Montoya v. Barreras*, 81 N.M. 749, 474 P.2d 363 (1970); *Hoover, supra*, and all ambiguities strictly construed against the grantor, *Harris v. Four Hills Development Corp.*, 79 N.M. 370, 443 P.2d 863 (1968), we may not lose sight of the principles which justify valid restrictions. 3 H. Tiffany, *supra*, at 471, 472, points out:

> The basis of the modern rules for enforcement of such restrictions is that one taking land with notice that it is subject

> to an agreement of this character will not, in equity and good conscience, be permitted to violate its terms. . . . As stated in the leading case on the subject, "the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased."

Because I am persuaded that there was an oral agreement between Hyder and Brenton that the lot would be used for residential purposes, (although it is unenforceable as a contract to build), it is clear that Hyder intended, by inserting in the deed what he considered to be a restrictive covenant, to limit the use to be made of the land to erection of a single-family dwelling. Brenton acquiesced in the typewritten addition to the deed.

Appellees introduced evidence at trial concerning the "circumstances surrounding the transaction" and "the object of the parties in making the restriction." At the initial meeting with Brenton's agent, at which time the option contract was entered into, Richard Hyder discussed his objective in selling the lot; that is, that he wanted a buyer to build a large home next door to his own. Meadmore agreed that during the negotiations Hyder wanted to know what use was intended for the lot and Meadmore told him it would be used for a home for Brenton. Furthermore, at the closing meeting Brenton herself related her plans to build a thirty-three hundred square foot home as soon as her present residence was sold, and she gave a detailed description of the style of home which she was planning. Latif Hyder, father of appellee, was also present at that meeting. It is clear that every one was apprised of the existence of the intended restriction and agreed to its addition to the deed.

Some courts recognize oral agreements restricting the use of real property; others refuse to enforce them as falling within the statute of frauds. In *Thornton v. Schobe*, 79 Colo. 25, 243 P. 617 (1925), the court held the vendor's oral promise not to erect certain types of buildings on lots adjacent to those owned by plaintiffs enforceable in equity, resulting in an order to restore the property to the status quo by defendant-vendor.

Another oral agreement respecting the use of property was enforced in equity in *Lewis v. Gollner*, 129 N.Y. 227, 29 N.E. 81 (1891). There the court found existence of a restrictive covenant not to build tenements in a residential neighborhood, stating: "Neither party at all misunderstood that this was the material point of the contract." In the instant case the existence of the oral agreement was proved at trial by substantial evidence.

The typewritten addition to the deed sufficiently removes any statute of frauds objection. The provisions in the deed in this case referring to a single-family dwelling is a sufficient memorandum to render the agreement on the use of the property enforceable in equity.

Mrs. Brenton promised, and the deed restriction limits, the use of the property in such a way as will not permanently prevent compliance with the restriction. By replatting her property into one continuous lot, Brenton effectively precluded herself from building a one-family dwelling on the newly purchased portion, since the applicable city zoning regulations prohibit the erection of more than one house per lot. Albuquerque Comprehensive City Zoning Code § 10A(1) (Jan. 1, 1976). In order for Brenton to use the property in accordance with her promise, she may be required to replat the existing parcel into the original two lots, thus entailing the removal or modification of the wall and interior curbings because of city zoning wall height and setback requirements for fronting properties, unless she obtains municipal approval of the existing use and structures. She should have the opportunity to seek that approval.

To partially affirm the decision below would not limit the free use of the property in any other manner which is consistent with or would not preclude the eventual agreed-upon use of the land. Only existing or future improvements as will permanent-

ly prevent the building of a one-family home of the required size would be affected by this decision. Thus we would give effect to the rule favoring free use of the land until such time as a dwelling be build upon it, at the same time acknowledging appellees' right to insist that no permanent improvements or inconsistent use be made on or of the premises which destroy the essence of the agreement entered into by the parties. Brenton may not be required to build, but I would agree with the trial court that she may not so maintain the property that a one-family dwelling could not be constructed.

I have no disagreement regarding reasonable use of the property until such time as Mrs. Brenton constructs a single family dwelling; I respectfully dissent insofar as the majority opinion approves a use which blatantly proclaims the property as a walled back-yard appendage to the home of Meadmore and Martin facing on San Rafael Avenue S.E.

600 P.2d 839

STATE of New Mexico,
Plaintiff-Appellee,

v.

Reynaldo VALLEJOS,
Defendant-Appellant.

No. 3915.

Court of Appeals of New Mexico.

July 17, 1979.

Paquin M. Terrazas, Terrazas & Dorr, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Arthur Encinias, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Defendant was charged with murder, convicted of voluntary manslaughter and appeals. We affirm.

Two questions were raised in this appeal:

(1) Did the trial court err in denying defendant's motion to dismiss the criminal information when no evidence was presented at the preliminary hearing on the cause of death of deceased?

(2) Did the district court have jurisdiction to properly try defendant because of lack of such evidence or remand the case for a proper preliminary examination?

A. *Facts and Ruling at Preliminary Hearing.*

Defendant and deceased were involved in a traffic accident. Deceased stopped and defendant pulled up behind him. Both parties got out of their cars and exchanged verbal abuse. Defendant was armed with a gun and deceased with a knife. Defendant told deceased to get back in his car and deceased complied. Deceased started to drive off and defendant reached in and shot deceased. Blood was coming from his mouth. Deceased continued to drive away and three blocks later, while driving, lost consciousness. His wife, a passenger drove deceased to the hospital.

During his hospital stay, deceased was seen walking around, and, at one point in time, actually left the hospital naked and delirious. Deceased remained in the hospital two weeks before he died.

At the conclusion of the hearing, the Magistrate said:

> [T]here was a life taken; there was an incident and this court's only charged with probable cause. And I find that a crime has been committed and the defendant is the most likely suspect. So I will bind him over on a charge of murder.

B. *Probable Cause to Believe Defendant Committed the Crime was Established.*

Defendant claims that at the preliminary hearing the State was "required to prove the corpus delicti of murder by showing the fact of death and that death resulted from the criminal agency of another and not from natural causes, accident or suicide." *Hicks v. Sheriff, Clark County,* 86 Nev. 67, 464 P.2d 462 (1970); *Azbill v. State,* 84 Nev. 345, 440 P.2d 1014 (1968); *Sefton v. State,* 72 Nev. 106, 295 P.2d 385 (1956).

Defendant's attorney misread these cases. The rule stated is applicable in the trial of a case. *Sefton, supra.* In the preliminary hearing before a magistrate, two things must be proved: "(1) the fact that a crime has been committed; and (2) probable cause to believe that the person charged committed it." *Azbill, supra,* 440 P.2d at 1017; *Hicks, supra.*

This is the rule in New Mexico.

Rule 15(c) of the Rules of Criminal Procedure for the Magistrate Courts reads in pertinent part:

> . . . If the court finds that there is probable cause to believe that the defendant committed an offense not within magistrate court trial jurisdiction, it shall bind the defendant over for trial. . .

Rule 16(c) provides in pertinent part:

> . . . The showing of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing there is a factual basis for the information furnished.
>
> . . . . .

Defendant's argument is misplaced. It is not based upon "probable cause to

believe," but upon the State's failure to prove that decedent died of the gunshot wound.

Prior to the adoption of the new magistrate court rules, the Supreme Court held that the test at the preliminary hearing was not whether guilt is established beyond a reasonable doubt, but whether there is that degree of evidence to bring within reasonable probabilities the fact that a crime was committed by the accused. *State v. Garcia,* 79 N.M. 367, 443 P.2d 860 (1968). The State is only required to produce evidence sufficient to establish reasonable grounds for the Magistrate's exercise of judgment. *State v. Selgado,* 78 N.M. 165, 429 P.2d 363 (1967).

The Magistrate had probable cause to believe defendant committed the crime of murder.

C. *The District Court had Jurisdiction.*

After the information was filed in district court, defendant filed two motions to dismiss: (1) that at the preliminary hearing the State failed to show any probable cause as to the death of decedent, and (2) there was no evidence of the cause of death of the victim at the preliminary hearing.

Defendant submits that the trial court should have abated the information and remanded defendant back to the magistrate court for a proper preliminary hearing; that because there was no proof of the cause of death, defendant's constitutional rights were violated and the trial court lacked jurisdiction over the charge in the information. Reference is made to *State v. Vaughn,* 74 N.M. 365, 393 P.2d 711 (1964) and *State v. Vasquez,* 80 N.M. 586, 458 P.2d 838 (Ct.App.1969).

Having failed to argue the issues raised, we find it unnecessary to show the inapplicability of *Vaughn* and *Vasquez.*

There was a proper preliminary hearing and bind-over, and jurisdiction rested in the district court. No good cause for remand was shown.

The brief filed shows that defendant had no basis for appeal. It appears to be a delay of six months. Appeals of this nature should be avoided. "No man shall take advantage of his own wrong."

Affirmed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

ANDREWS, J., specially concurring.

ANDREWS, Judge (specially concurring).

I agree with the result reached in the majority opinion, but consider the inclusion of Rule 16(c) of the Rules of Criminal Procedure for Magistrate Courts relating to cases within magistrate trial jurisdiction, to be irrelevant and confusing. *State v. Selgado,* 78 N.M. 165, 429 P.2d 393 (1967), is ample authority for the proposition that a preliminary examination, the State is only required to produce evidence sufficient to establish reasonable ground for the magistrate's exercise of judgment.

600 P.2d 841

AAMCO TRANSMISSIONS, INC., Plaintiff-Appellant,

v.

TAXATION AND REVENUE DEPARTMENT of the State of the New Mexico, Defendant-Appellee.

No. 3704.

Court of Appeals of New Mexico.

July 24, 1979.

Clifford C. Gramer, Jr., Jones, Gallegos, Snead & Wertheim, Santa Fe, and R. Michael Kennedy, Jr., Bridgeport, Pa., for AAMCO Transmissions, Inc.

Brian F. Toohey, Felker & McFeeley, Santa Fe, and Lewis G. Rudnick, Lawrence A. Robins, Rudnick & Wolfe, Chicago, Ill., for International Franchise Ass'n as amicus curiae.

Jeff Bingaman, Atty. Gen., Santa Fe, Sarah Bennett, Sp. Asst. Atty. Gen., Santa Fe, for defendant-appellee.

OPINION

WALTERS, Judge.

The Taxation and Revenue Department assessed a gross receipts tax against appellant for franchise fees received from New Mexico AAMCO dealers. AAMCO appealed the assessment, arguing that it does no business in New Mexico; indeed, that it is a Pennsylvania corporation with no employees, assets or property located in New Mexico upon which the gross receipts tax could apply.

AAMCO further claims that its transactions are predominantly, if not wholly, in interstate commerce; thus, the imposition of the tax was violative of the Due Process and Commerce clauses of the federal Constitution, and that the decision was arbitrary, capricious, and contrary to law.

The Department Hearing Officer recognized in his decision that appellant is a Pennsylvania corporation with its principal place of business in Pennsylvania; that it has a federally registered trademark and trade name, "AAMCO Transmissions."

He noted that, as a franchisor, AAMCO enters into agreements with licensees for the use of its trade name and trademark, and also manufactures specialty equipment and inventory items for use by its franchisees. AAMCO receives, in return, a weekly percentage (9%) of the weekly gross receipts of its franchisee (which AAMCO terms "franchise fees") from every source connected with the franchisee's business. There are five dealerships in New Mexico which pay these franchise fees to AAMCO. It is only upon these franchise fee payments that the Department assessed a gross receipts tax. "License fees," "service fees," advertising assessments, and receipts from inventory and specialty sales paid to AAM-

CO by its franchisees were not included in the tax base.

AAMCO has no payroll, real property, personnel or offices located in New Mexico. It does furnish signs which must be leased or purchased by its dealers.

Upon these facts, the Department found that AAMCO's sales of tangible property and its granting of exclusive franchises constituted engaging in intrastate business in New Mexico, and the franchise fees received therefrom were subject to the gross Receipts Tax. We affirm.

By mandate of the legislature, this court will set aside a decision and order of the Department only if it is found to be: (a) arbitrary, capricious or an abuse of discretion; (b) not supported by substantial evidence in the record; or (c) otherwise not in accordance with the law. Section 7–1–25, N.M.S.A.1978.

The New Mexico Gross Receipts and Compensating Tax Act (§§ 7–9–1, et seq., N.M.S.A.1978) imposes a tax on the gross receipts of any person engaging in business in New Mexico. Section 7–9–4 A, N.M.S.A. 1978. "Engaging in business" is defined as "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." Section 7–9–3 E.

"Gross receipts" is defined, in relevant part, as "the total amount of money or the value of other consideration, received from selling property in New Mexico, from leasing property employed in New Mexico or from performing services in New Mexico." Section 7–9–3 F. "Property" means "real property, tangible personal property, *licenses, franchises,* patents, *trademarks* and copyrights." Section 7–9–3 I. Leasing is defined as "any arrangement whereby, for a consideration, property is employed for or by any person other than the owner of the property." Section 7–9–3 J. The Department imposed the tax on the determination that the signs, franchise, and franchise fees fall within these definitions of taxable New Mexico activity.

AAMCO denies any business dealings in New Mexico, and points out the following evidence from the record: AAMCO only advertises nationally for franchisees, and does not solicit franchise purchasers here in New Mexico; all negotiations with franchise prospects occur in Pennsylvania, and franchise agreements are executed there; AAMCO has no real estate holdings, offices or employees in New Mexico; franchise training courses and other company facilities are in Pennsylvania or New Jersey; there are no representatives stationed in New Mexico, and AAMCO personnel visit New Mexico franchisees only infrequently.

Under its franchise agreements with its dealers, AAMCO allows to them the use of its federally registered trade name and trademark. It requires its franchisees to purchase only AAMCO opening inventory and equipment, and AAMCO parts and assembly sets, or such other inventory, equipment or sets as AAMCO approves. Franchisees are required to attend a training program, and $2500 of the initial license (franchise) fees of $17,500 is allocated toward payment of that training session. Among other things, the franchise agreement requires the licensee to devote full-time to the dealership; he must use AAMCO's promotional material, and buy such printed matter, sales and reporting forms as AAMCO requires; he is obliged to share in local and national advertising costs with the content, type, and placement of national advertising solely within AAMCO's control; and he must attend any further training sessions or conferences that AAMCO shall make available. Under the agreement, AAMCO is not required to provide further training or any of the consulting or promotional services which, in fact, it does make available to its franchisees.

At oral argument counsel for AAMCO agreed that the franchise is considered a leasing arrangement, but argued that AAMCO owns in New Mexico only intangible assets consisting of a federally registered trademark and service mark. It is, it claims, the right to use these marks which the Department referred to as "the intangible bundle of rights," and classified as the property taxable by the State.

We think AAMCO overlooks the plain language of the statutes which we have referred to above. Franchises are specifically enumerated as "property" under our taxing laws. Included in the gross receipts definition is income received from leasing property. But the trademark, which indeed may have its *situs* in Pennsylvania, is not the entirety of the intangible property owned by AAMCO in New Mexico. It has a substantial monetary interest in the good will and economic health of its franchisees' businesses, and those businesses are protected and benefited by laws of New Mexico. In addition, it leases tangible property, its signs.

A determination that AAMCO is engaged in business in New Mexico must necessarily overlap to some degree in the determination of nexus raised in appellant's due process argument. Putting that question to the side for a moment, however, we are impressed with the test presented in *Besser Co. v. Bureau of Revenue*, 74 N.M. 377, 383, 394 P.2d 141, 146 (1964), which stated that to decide whether one's activity constituted "engaging in business" in New Mexico, "[t]he real question is whether the sale or lease is in line with the business for which the seller or lessor was organized and in which it engages."

AAMCO is in the business of selling franchises, providing some technical assistance and advice by telephone and brochures to its franchisees, developing and marketing AAMCO parts, creating and distributing advertising copy, and training new franchisees. Its primary source of income, according to evidence given by the AAMCO executive officer at the hearing, is from sales of franchises and sale of transmission parts available only to its franchisees. The value of its enterprise depends upon the business success of its numerous franchisees throughout the various states. Their successes are, in large part, reliant upon the benefits and protections received from the states in which they operate. The leased trademarks and tradenames, and their businesses, are protected in accordance with all New Mexico laws and the functions of the State's governmental bodies. AAMCO receives a direct benefit from its franchisees' sustained operations through its monthly collection of 9% of its franchisees' gross receipts—an ongoing lease payment from the franchisees for the privilege of using AAMCO's trademark and tradename.

Applying the *Besser* yardstick, AAMCO's leases with New Mexico dealers are precisely "in line with the business for which [AAMCO] was organized and in which it engages."

Thus, if AAMCO is engaged in business in New Mexico—and we affirm the Department's finding in that regard—it cannot be engaged solely in interstate commerce as it contends. AAMCO urged, alternatively, that if its operations are not wholly interstate, then only an apportionment of the AAMCO receipts to those activities which are wholly intrastate is properly taxable. This argument, too, must fail because: (1) AAMCO had the burden of proving, if applicable, a proper apportionment, *Standard Pressed Steel Co. v. Department of Revenue of Washington*, 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975), which it did not do. Instead, it insisted at the hearing below that *all* of its business was interstate. (2) The tax applies evenly to in-state and out-of-state franchisors, *Alaska v. Arctic Maid*, 366 U.S. 199, 81 S.Ct. 929, 6 L.Ed.2d 227 (1961), and thus it does not discriminate so as to violate the Commerce Clause. (3) None of the fees upon which the tax is assessed relate to any of the alleged interstate services available from AAMCO to the franchisee but, rather, are tied directly and completely to the monthly lease payments computed on receipts earned from the day-to-day operation of the businesses under AAMCO's trademark and trade name in New Mexico.

We are asked to find that imposition of the tax offends the Due Process Clause by reason of insufficient connections or nexus between the State of New Mexico and AAMCO's Pennsylvania services and activities. As we have pointed out above, the franchises are operated in New Mexico; the monthly lease payment is calculated as a

percentage of income earned by New Mexico franchisees from their New Mexico businesses; and AAMCO has both tangible and intangible "property," as defined in the statute, within the state. These contacts provide that "definite link . . . [and] minimum connection" between AAMCO and New Mexico sufficient to establish nexus. *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 74 S.Ct. 535, 98 L.Ed. 744 (1954).

The Supreme Court observed, in *Curry v. McCanless*, 307 U.S. 357, 367–368, 59 S.Ct. 900, 906, 83 L.Ed. 1339, 1348 (1939), that:

> when the taxpayer extends his activities *with respect to his intangibles*, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains . . . . [I]ncome may be taxed both by the state where it is earned and by the state of the recipient's domicile. Protection, benefit, and power over the subject matter are not confined to either state. The taxpayer who is domiciled in one state but carries on business in another is subject to a tax there measured by the value of the intangibles used in his business. (Our emphasis.)

We are mindful, too, that the interstate commerce and due process arguments were pressed by the taxpayer in *Besser, supra.* The responses given in *Besser* apply with the same vigor to the facts of this case as they did when Justice Moise framed that opinion in 1964. Nothing that has been presented on this appeal persuades us that we should not adopt the identical rationale expressed in *Besser*, to affirm the Department's order:

> Under the facts of the instant case, with plaintiff's property [the franchise and its leased signs] situated in New Mexico and earning [a percentage of gross receipts] which [is] paid to plaintiff, that "Protection, opportunities and benefits" from the state have been enjoyed by plaintiff is manifest. The tax . . . is an entirely proper and reasonable exaction in return for that "protection" and those "opportunities" and "benefits". . . .

74 N.M. at 387, 394 P.2d at 148.

The decision and order of the Department should be affirmed.

IT IS SO ORDERED.

ANDREWS, J., concurs.

SUTIN, J., specially concurring.

SUTIN, Judge (specially concurring).

I specially concur.

I concur based upon my views expressed in *Baskin-Robbins Ice Cream Company v. Revenue Division, Department of Taxation and Revenue,* 93 N.M. 301, 599 P.2d 1098 (Ct.App.1979). In *Baskin-Robbins*, a franchise case, we held that a taxpayer was engaged in doing business in New Mexico and was not engaged in interstate commerce. The facts are not so dissimilar that a different result can be reached in AAMCO.

For the first time, we are confronted with *Indiana Dept. of St. Rev. v. Convenient Ind. of Am., Inc.*, 157 Ind.App. 179, 299 N.E.2d 641 (1973). The court held that the minimal activities in Indiana of taxpayer, a Kentucky Corporation, with respect to service fees and advertising fees paid to taxpayer by Indiana franchisees fell short of the degree of activity contemplated by the Gross Income Tax Act. With reference to the "franchise fee," the trial court found:

> 7. The franchise fee is income from the sale of an intangible. Plaintiff is a nonresident of the state of Indiana and such intangible does not have a situs in the state of Indiana, but rather has a situs in Louisville, Kentucky, the principal place from which the business of plaintiff was directed or managed.

The trial court concluded:

> 2. The Indiana gross income tax levied by the state of Indiana upon the receipts from the sale of the franchise was improper in that such receipts constituted receipts from an intangible asset having a situs in the state of Kentucky. [299 N.E.2d at 644.]

The State Department of Revenue did not appeal from the above finding and conclusion. Therefore, says Taxpayer:

> AAMCO's trademarks and service marks are intangible assets which have a *situs* in the State of Pennsylvania, and, as such, they cannot be taxed, nor can they be relied upon as property found within the State of New Mexico, for purposes of the New Mexico gross receipts tax.

Convenient was not subject to Indiana law because only one phrase in § 6–2–1–2, Ind.Code Ann. (Burns) was applicable:

> . . . and upon the receipt of gross income derived from activities or businesses or any other source within the state of Indiana, of all persons who are not residents of the state of Indiana . . . .

There is no resemblance between the Indiana and New Mexico statutes. AAMCO is engaged in business in New Mexico. *Baskin-Robbins, supra.* AAMCO did not challenge Finding No. 28. It reads in part:

> By specifically providing that licenses, franchises, patents, trade marks [sic] and copyrights are property . . . it is apparent that the legislature intended to impose a tax on the receipts from leasing such property employed in New Mexico.

This finding, unchallenged, is conclusive.

AAMCO assumes it is in interstate commerce and argues that taxation is a burden on commerce. The only contacts AAMCO has with New Mexico are a franchise granted to a licensee, together with the right of the licensee to use its trade name and trademark "AAMCO Transmissions," and AAMCO signs that are leased. No facts have been presented and none can be found that establishes any intercourse or traffic between Pennsylvania and New Mexico with reference to its franchise, trade name or trademark.

The only difference between AAMCO and *Baskin-Robbins* is that AAMCO conducts a six-week course in Pennsylvania for prospective franchisees. International Franchise Association, as Amicus Curiae, states:

The record reflects that Appellant furnishes services in the nature of training, operating manuals, consultation and continuing advice, advertising, research and development, and the maintenance and expansion of its franchise system and that such services are performed outside of New Mexico.

These facts establish that interstate commerce is absent.

Under the stringent statutory provisions of the Gross Receipts Tax Act, no franchise can escape payment of the tax. Relief can be obtained only in the legislature, not in the courts.

600 P.2d 846

STATE of New Mexico, Plaintiff-Appellee,

v.

Mark HADDENHAM, Defendant-Appellant.

No. 3951.

Court of Appeals of New Mexico.

July 26, 1979.

Tom Cherryhomes, Carlsbad, M. J. Collopy, Hobbs, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Sammy Lawrence Pacheco, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WALTERS, Judge.

Defendant, charged as an accessory, was convicted by a jury of residential burglary. He raises five issues on appeal. We will consider four of them: improper instruction and refusal to give two of defendant's requested instructions; denial of effective counsel resulting from the trial court's refusal to grant a continuance of the hearing for a new trial; denial of a new trial; and denial of due process because of fundamental error arising from the aforementioned alleged errors. We do not discuss the fifth contention, failure of the due process resulting from inadequate notice and denial of continuance of a later hearing on defendant's competency to stand trial, since it is the subject of the consolidated appeal, Nos. 3893/3894, determined adversely to appellant and, consequently, of no effect on the consideration of this appeal. The conviction and sentence in this case are affirmed.

1. Error in Instructions.

Defendant's tendered Instruction 1 would have instructed the jury that defendant

himself would have had to do the acts done by the principal in order to be found guilty of the crime of residential burglary. The accessory instruction, U.J.I. Crim. 28.30, was given; its Use Note requires that the essential elements of the crime must also be given. The trial court instructed regarding the elements of burglary committed by the principal, in accordance with U.J.I. Crim. 16.20.

There was no evidence to support the requested instruction, i. e., that defendant entered a dwelling house, without permission, with intent to commit a theft therein. There *is* evidence that defendant intended that the crime be committed; that it was committed; and that he helped, encouraged or caused the crime to be committed. The jury was properly instructed, and the court did not commit error in refusing the requested instruction. *See State v. Roque*, 91 N.M. 7, 569 P.2d 417 (Ct.App.1977).

2. Refusal to Allow Continuance.

Defendant says he was deprived unconstitutionally of effective assistance of counsel when the court refused, on the day defendant was scheduled for sentencing, to permit a continuance in order that counsel could prepare for an evidentiary hearing on a motion filed that day for a new trial.

Counsel recognizes in their brief that allowance of a continuance is discretionary with the trial court. Thus, the issue presented is whether the court abused its discretion rather than whether defendant was denied effective counsel. The record indicates that on the day of sentencing, present counsel entered their appearance on behalf of defendant. A continuance was requested before sentence was imposed upon grounds that counsel wished to "properly prepare and present to the court affidavits and testimony in support of" the motion for new trial.

The person charged as principal in the burglary, Davis, was the crucial witness in defendant's conviction, and the "newly discovered evidence" forming the basis for defendant's motion for new trial was Davis's recantation of his trial evidence. He was in the courtroom at the time the request for continuance was made. Defense counsel told the court that he also wanted to call an investigator from the district attorney's office who was on vacation but who had not been subpoenaed. The following colloquy between counsel and the court ensued:

Q. For what purpose would you want Mr. DeLouch?

A. To find out what he knows about Mr. Davis—

Q. What do you believe Mr. DeLouch knows; do you have any reason to believe he knows anything?

A. I would certainly like an opportunity to find out, Your Honor.

Q. Put Mr. Davis on.

Nothing in the foregoing exchange establishes an abuse of discretion in the trial court's refusal to grant a continuance so that defendant could examine Mr. DeLouch. Counsel made no showing that diligence had been exercised to assure Mr. DeLouch's presence. He did not suggest then or later that he be permitted to submit additional affidavits or evidence to supplement the testimony of Mr. Davis and the two other witnesses whom the court heard that day.

The record of the hearing does not support the claim on appeal that defendant was denied effective assistance of counsel. He was permitted to, and did, extensively examine the three witnesses in support of the motion; the fact that their presence had been obtained and that counsel's questioning of them exhibited his extensive awareness of the facts testified to at the earlier trial, negates the suggestion on appeal that counsel's effectiveness was minimized by reason of inadequate opportunity to prepare for the hearing.

The abuse of discretion case cited to us by defendant differs radically from the circumstances of this case. The sole basis for the new trial request was "that the testimony of the witness, Yancy Davis, who testified on behalf of the State and against the Defendant in that trial, was perjured." Defendant thoroughly explored that ground in examining Davis and the other witnesses.

State v. Billington, 86 N.M. 44, 519 P.2d 140 (Ct.App.1974), relied on by defendant, decided (with a dissenting opinion by Chief Judge Wood) that denial of a continuance to permit the defendant to adequately prepare for the cross-examination of a "critical" witness whose name was added to the State's list of witnesses on the date of trial, was an abuse of discretion. But here, defendant presented his critical witness in support of his motion, together with the testimony of two others, and was unable to express even the slightest hint that the additional desired witness had any evidence to offer on the question of Davis's perjury. We are only concerned with the facts of this case, and under its facts, defendant has not shown to us how he was prejudiced or injured by the trial court's decision to hear evidence on the day the motion for a new trial was filed. *See State v. Blea*, 88 N.M. 538, 543 P.2d 831 (Ct.App.1975). The action taken by the trial court was not capricious, arbitrary, or in disregard of defendant's fundamental rights. *State v. Kincheloe*, 87 N.M. 34, 528 P.2d 893 (Ct.App.1975).

3. Denial of a New Trial.

In the companion appeal referred to above, defendant contended that he should have been allowed to withdraw subsequent guilty pleas to other charges because he was not sufficiently competent to fully understand a Plea and Disposition Agreement entered into at that time. The pleas were made four days after the conviction with which this appeal is concerned, and more than a month before the sentencing and new trial proceedings were held. Defendant extrapolates the argument in the other appeal to a contention here that if he were incompetent to enter the guilty pleas, he was equally incompetent to stand trial earlier that same week.

The affirmance of the trial court's finding of competency in consolidated Nos. 3893/3894 disposes of this point in this appeal. The trial court did not err in denying a new trial.

4. Denial of Due Process by Accumulation of Error.

Defendant calls our attention to an order entered by the district court directing the district court clerk not to honor any notice of appeal because of counsel's failure to comply with certain procedural rules necessary to preserve an appeal. The entry of this order, together with the alleged errors discussed above, are claimed to constitute such fundamental error that defendant was denied a fair trial. We are exhorted: "[I]f fundamental error . . . is not deemed present in this Appeal, it would take pure and fanciful imagination run wild to present a case in which it would exist."

Having decided appellant's other alleged errors against him, only the last-cited instance remains to be considered in connection with this final point on appeal. We have some difficulty relating a post-trial, post-conviction, post-sentencing act of the trial judge with denial of a fair trial. The act itself, however, was erased by a subsequent order of the Supreme Court (in Cause No. 12289, on January 17, 1979) directing that a notice of appeal be accepted, and by the very fact that this appeal was submitted, briefed, and is now decided.

Bearing in mind Chief Judge Wood's observation that "[a]n accumulation of irregularities, each of which, in itself, might be deemed harmless, may, in the aggregate, show the absence of a fair trial," *State v. Vallejos*, 86 N.M. 39, 43, 519 P.2d 135, 139 (Ct.App.1974), it is nevertheless apparent that this case is not one in which an accumulation of irregularities exists. We have determined that the first three issues presented disclose no "irregularities." The last point raised occurred after trial and was rectified under the Supreme Court's superintending powers. Defendant was accorded the full protection of due process and fair trial.

As *Vallejos, supra*, demonstrates, flights of imagination and fancy need not be resorted to in order to strike down convictions obtained through the prejudicial impact of cumulative error. This is not such a case.

The judgment and sentence are affirmed.

IT IS SO ORDERED.

WOOD, C. J., concurs.

SUTIN, J., concurring in part and dissenting part.

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

I concur and dissent.

I concur in the points decided in Judge Walters' opinion. I dissent on defendant's Point III raised in this appeal which was not discussed. Defendant claims he was denied due process by reason of the court's failure to provide adequate and timely notice of the hearing on the competency of defendant, or to grant defendant's request for a continuance in order to present expert testimony on defendant's competency.

The record of the proceedings under which this point is raised appears in a companionate case entitled *State v. Haddenham*, No. 3893 in this appeal.

A competency hearing was held on November 10, 1978. Defendant was denied the right to a continuance to have his doctor present to testify as to defendant's competency. Nevertheless, no order was entered determining the competency of defendant.

This cause should be remanded for the purpose of conducting a fair hearing and a determination made of defendant's competency.

600 P.2d 850

ATLAS ASSURANCE COMPANY, LTD., and Pacific Coast Properties, Inc., a foreign corporation, Plaintiffs-Appellants,

v.

GENERAL BUILDERS, INC., a New Mexico Corporation, and Kenneth P. Thompson Company, Inc., a New Mexico Corporation, Defendants-Appellees.

No. 3737.

Court of Appeals of New Mexico.

Aug. 30, 1979.

Lawrence H. Hill, Civerolo, Hansen & Wolf, Albuquerque, for plaintiffs-appellants.

Terry D. Farmer, Nordhaus, Moses & Dunn, Albuquerque, for General Builders.

Roy F. Miller, Jr., Miller & Melton, Albuquerque, for Kenneth P. Thompson Co.

Michael P. Watkins, Oldaker & Oldaker, Albuquerque, for Kenneth P. Thompson Co.

OPINION

LOPEZ, Judge.

Plaintiff-appellant, Atlas Assurance Company, Ltd., (Atlas), brought this subrogation action in the District Court of Bernalillo County against defendants-appellees, General Builders, Inc. (General Builders) and Kenneth P. Thompson Company, Inc. (Thompson), for monies paid to plaintiff-appellant, Pacific Coast Properties, Inc. (PCP). These monies were paid pursuant to an insurance policy issued by Atlas to PCP. Appellees' motion for summary judgment was granted and appellants appeal. We reverse and remand.

On December 21, 1973, PCP entered into a contract with General Builders for the construction of a shopping center in Portales, New Mexico. PCP was the owner of the project. Atlas issued an insurance policy to PCP on January 14, 1974, to cover property damage to the project. On May 3, 1974, another contract was executed between General Builders and PCP for the construction of an addition to the shopping center. On March 21, 1974, Thompson entered into a subcontract with General Builders for the masonry work on the project. During June of that year, winds blew down portions of the masonry walls on three occasions. Subsequently, PCP submitted proof of loss to Atlas, and Atlas paid PCP for the losses sustained. Thompson rebuilt the walls and was paid out of the insurance proceeds for the repair work.

On May 12, 1977, Atlas filed a complaint against General Builders and Thompson. Atlas's complaint alleged that the damage done to the masonry walls was caused by appellees' negligence, and it further claimed that Atlas, as insurer, was entitled to subrogation rights under the policy issued to PCP. Appellees answered alleging that they were co-insureds under the policy and that, consequently, Atlas could not subrogate against them. In granting appellees' motion for summary judgment, the trial court agreed with appellees' allegations. The issue on appeal is whether the court properly granted appellees' motion. In order to determine this issue, the question of whether appellees are co-insureds under the Atlas policy must be decided.

To decide this latter question, we must interpret those policy provisions which are pertinent to this issue. Accordingly, we are guided by the following principles of insurance law. An insurance policy is a contract and is generally governed by the law of contracts. The rights and duties of the parties are measured by what they intended, what they mutually agreed to and what their minds met upon. *Vargas v. Pacific National Life Assurance Company*, 79 N.M. 152, 441 P.2d 50 (1968); *Thompson v. Occidental Life Ins. Co. of Cal.*, 90 N.M. 620, 567 P.2d 62 (Ct.App.), *cert. denied*, 91 N.M. 4, 569 P.2d 414 (1977). If it can be accomplished, the meaning of the contract must be ascertained from a consideration of the written policy itself. Extrinsic evidence is not admissible to determine the intent of the parties unless there is an uncertainty and ambiguity in the contract. *Hoge v. Farmers Market & Supply Co. of Las Cruces*, 61 N.M. 138, 296 P.2d 476 (1956); *see McKinney v. Davis*, 84 N.M. 352, 503 P.2d 332 (1972).

In determining whether an uncertainty or ambiguity exists, the policy must be considered as a whole. *See Ivy Nelson Grain Co. v. Commercial U. Ins. Co. of N.Y.*, 80 N.M. 224, 453 P.2d 587 (1969). A single sentence or paragraph may not be selected as support for either the decision that a contract is clear and plain as to its meaning, or that it is uncertain, indefinite and ambiguous. *Hoge v. Farmers Market & Supply Co. of Las Cruces, supra.* In addition, words and terms must be read in the usual and ordinary sense, unless some different meaning is required. *Cain v. National Old Line Insurance Company*, 85 N.M. 697, 516 P.2d 668 (1973). Whether an ambiguity exists is a question of law to be decided by the court. *Thompson v. Occidental Life Ins. Co. of Cal., supra.* In determining this question, the test to be used is whether the policy provision is fairly susceptible of two different constructions by reasonably intelligent men. *Alvarez v. Southwestern Life*

Insurance Co. Inc., 86 N.M. 300, 523 P.2d 544 (1974). However, resort will not be made to a strained construction for the purpose of creating an ambiguity when no ambiguity in fact exists. *Safeco Ins. Co. of America, Inc. v. McKenna*, 90 N.M. 516, 565 P.2d 1033 (1977).

If an ambiguity exists in the policy, the general rule is that a liberal construction favorable to the insured should be adopted. *See Vargas v. Pacific National Life Assurance Company, supra; Thompson v. Occidental Life Ins. Co. of Cal., supra.* This general rule, however, operates only after the insured has been determined. It does not operate in deciding whether a certain entity belongs to the insured class described in the policy. Accordingly, a third person who is not a party to a contract of insurance usually is not entitled to a construction in his favor in determining whether that third person is an insured under the policy. *McBroome-Bennett Plumbing, Inc. v. Villa France, Inc.*, 515 S.W.2d 32 (Tex. Civ.App.1974); 44 C.J.S. *Insurance* § 308, at 1226 (1945).

The insurance policy between Atlas and PCP contains the following provisions which are relevant in determining whether appellees are insureds under the policy:

(1) INSURED: Pacific Coast Properties, Inc. and/or any subsidiary and/or affiliated and/or associated entities as are now or may hereafter be constituted for account of whom it may concern. Loss, if any, to be adjusted with and payable as directed by NAMED INSURED.

(2) *PROPERTY COVERED*

. . . . .

INDUSTRIAL & COMMERCIAL BUILDINGS

all of above while in course of construction, all materials while in transit and/or storage from points within the continental United States to the job site, and all when completed as provided herein, including foundations, additions, attachments and all other permanent fixtures belonging to and constituting part of or used in the service of said buildings or structures and all the property of the insured or for which the insured has assumed responsibility or is legally liable . . .

(3) *PERILS INSURED*

This policy insures against all risks of direct Physical Loss of or Damage to the insured property, except as hereinafter excluded.

(4) *EXTENSIONS OF COVERAGE*

. . . . .

MATERIALS, EQUIPMENT AND SUPPLIES AND TEMPORARY STRUCTURES OF ALL KINDS INCIDENTAL TO THE CONSTRUCTION OF BUILDINGS AND STRUCTURES, AND SIMILAR PROPERTIES BELONGING TO OTHERS FOR WHICH THE INSURED IS LIABLE:

All while at the described location and forming part of or contained in said buildings or temporary structures or while in cars at the described location or within three hundred feet (300′) thereof, or while in the open at such location, or when adjacent thereto on sidewalks, streets, or alleys.

(5) *PROPERTY NOT COVERED*—This policy does not insure: Contractor's [sic] or Sub-contractors' Tools and Equipment

Appellants interpret the above provisions to exclude appellees as insureds. More specifically, appellants contend *inter alia* that provision (4) covers only property owned by PCP and property for which PCP is liable. They claim that this provision is evidence that Atlas and PCP did not intend to extend coverage but intended instead to restrict coverage. Put another way, appellants assert that the phrase, "for which the insured is liable," applies both to the term "similar properties" and to the terms "materials, equipment and supplies and temporary structures." Appellants argue that any other interpretation would render pro-

vision (5) inoperative since contractor's or subcontractors' tools and equipment would not be excluded if the phrase, "for which the insured is liable," applied only to the term "similar properties." In addition, appellants argue that provision (5) is evidence that Atlas and PCP did not intend to include appellees as co-insureds.

Appellees interpret the above provisions to include themselves as insureds under the policy. They claim, among other things, that the terms in provision (1), "and/or any subsidiary and/or affiliated and/or associated entities," are broad enough under the present facts to include them as insureds. Additionally, they assert that the phrase, "loss, if any, to be adjusted with and payable as directed by named insured," contemplates more than one insured. Appellees further interpret provision (2) as providing coverage for one hundred percent of the property included in the various construction agreements between the parties. Based on this interpretation, appellees conclude that they are insureds under the policy. Appellees also contend that provision (5), since it clearly excludes only contractors' or subcontractors' tools and equipment, creates the implication that other property owned by such entities are included in the policy's coverage. Finally, appellees argue that the phrase, "for which the insured is liable," in provision (4) applies only to the term "similar properties" and that, consequently, the terms "materials, equipment and supplies and temporary structures" include appellees' property. Accordingly, appellees assert that they are insureds under the Atlas policy. Both appellants and appellees present other interpretations not only of the above provisions but also of other policy provisions to support their positions.

We do not agree that any ambiguity results from provision (4). This provision does no more than complement the coverage of provision (2). Provision (4) covers property of the insured not covered by provision (2) and covers similar properties of others for which the insured is liable. Consistent with these provisions, even if the insured is liable for property of others, there is no coverage for tools and equipment of contractors and subcontractors under provision (5). The distinction between the insured's property and property of others for which the insured is liable is borne out by other policy provisions dealing with valuation and adjustment of losses. Considering the policy as a whole, provision (4) is not a "general coverage" provision, and, therefore, *Transamerica Ins. Co. v. Gage Plumbing and Heating Co.*, 433 F.2d 1051 (10th Cir. 1970), is not applicable. There is no ambiguity in the coverage provisions which permits the introduction of extrinsic evidence to determine the intent of the parties concerning coverage.

However, there is an ambiguity in provision (1) as to the meaning of insured. What did the parties, i. e. Atlas and PCP, intend by the reference to subsidiary or affiliated and associated entities? Such an entity is an insured, and its property and property of others for which the entity is liable is covered under the policy for all risks of physical loss. In addition, this coverage, under the provision entitled Commencement and Duration of Risk, attaches "from the moment the insured property becomes at the risk of the insured . . ." Atlas has charged a premium for insuring PCP and any such entities. Because provision (1) shows an intent to insure entities in addition to PCP and because this provision is ambiguous, we rule that extrinsic evidence is admissible to show the identity of the intended additional insureds.

General Builders submitted, in support of its motion for summary judgment, the affidavit of Roger H. Smith, President of General Builders. In this affidavit, Smith stated that he knew the terms of the constructions agreements between PCP and General Builders and the intent of the parties to these agreements. Smith further stated that the intent of the parties was "to share insurance costs and together to fully insure the project described in the Construction Agreement." The affidavit concludes with the assertion that, if it were not for the agreement to share insurance costs, General

Builders "would have obtained additional insurance to fully protect their involvment [sic] in the project as is its usual business custom."

Based upon this affidavit and the construction agreements before the court, General Builders contends that appellees presented a prima facie showing that they were entitled to summary judgment and that appellants failed to carry their burden of showing that a genuine issue of material fact remained. Accordingly, General Builders asserts that the trial court properly granted appellees' motion. We agree that appellees made a prima facie showing; however, the affidavit submitted by appellants raised a factual issue requiring trial.

In his affidavit, Smith relies upon Section D, entitled Insurance, of the Permanent Terms and Provisions of the construction agreements between PCP and General Builders to support his statement that the parties intended to share insurance costs and to insure together the entire Portales project. Section D requires that General Builders obtain liability insurance, workmen's compensation insurance and insurance to cover contractual liability assumed by General Builders under the agreements. The section also imposes upon General Builders the obligation to include PCP as an additional insured under these policies. It further requires PCP to obtain fire, extended coverage, vandalism and malicious mischief insurance upon the entire structure contemplated under the agreements to one hundred percent of its value. The section ends with the provision that "[t]he loss, if any, is to be made adjustable with and payable to PCP as trustee for the insureds as their interests may appear. . . . ."

The requirement that PCP obtain extended coverage upon the "entire structure" to one hundred percent of the insurable value with losses payable to insureds as their interests may appear is unambiguous. PCP was to provide builders' risk insurance for the benefit of General Builders. Appellants contend other provisions of the construction agreements make this provision ambiguous. We disagree. Appellants rely on provisions concerning "performance and guaranty of work" and "repairs and replacement." These provisions have nothing to do with contract provisions concerning insurance. Appellants also rely on contract provisions concerning liability insurance and indemnification. These provisions concern third-party claims; they raise no ambiguity concerning builders' risk insurance.

The construction agreements and the Smith affidavit made a prima facie showing that General Builders was intended to be included as an insured under the Atlas policy. Thompson also comes within this prima facie showing through provisions in its contract with General Builders which provide that to the extent General Builders was insured for builders' risk, Thompson would have an interest in such insurance. However, appellants submitted an affidavit of an employee of the general agents for Atlas. This affidavit states that there was no agreement by Atlas to "allow" General Builders and Thompson "as an additional insured under the policy." Appellees state that this affidavit "is of no evidentiary value." We disagree. The asserted lack of agreement concerning General Builders' and Thompson's status as insureds is relevant to what Atlas and PCP intended. In this situation, we hold that there was a genuine factual issue which made summary judgment improper. *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972).

The summary judgment is reversed. The cause is remanded for a factual determination, by the trier of the facts, concerning the asserted intent that General Builders and Thompson be insureds under the Atlas policy. *Walters v. Hastings*, 84 N.M. 101, 500 P.2d 186 (1972).

IT IS SO ORDERED.

WOOD, C. J., concurs.

ANDREWS, J., specially concurring.

ANDREWS, Judge (specially concurring).

While I agree that the summary judgment granted herein should be reviewed and the case remanded, my reasons for such

a conclusion differ from those of the majority.

As stated in the majority opinion, in determining whether an uncertainty or ambiguity exists the policy must be considered as a whole. *See Ivy Nelson Grain Co. v. Commercial U. Ins. Co. of N.Y.*, 80 N.M. 224, 453 P.2d 587 (1969). In my opinion, the policy, when reviewed in its entirety, is ambiguous. *Thompson v. Occidental Life Ins. Co. of Cal.*, 90 N.M. 620, 567 P.2d 62 (Ct.App.) *cert. denied*, 91 N.M. 4, 569 P.2d 414 (1977). Consequently, there is no need to find provision (1) ambiguous in itself, and to do so is to ignore the rule established in *Hoge v. Farmers Market & Supply Co. of Las Cruces*, 61 N.M. 138, 296 P.2d 476 (1956), that a single sentence or paragraph may not be selected as support either for the decision that a contract is clear and plain as to its meaning, or for the decision that it is uncertain, indefinite and ambiguous.

Furthermore, even if the majority were correct in determining the ambiguity of the contract by reference to one provision, I would be unable to find ambiguity in provision (1). The phrase "affiliated and/or associated entities" refers to an entity which has an intimate business relationship in which significant aspects of financial and managerial control of the insured and the affiliate or associate are integrated. *Travelers Indem. Co. v. United States*, 543 F.2d 71 (9th Cir. 1976). As stated in *Travelers:*

> [e]xpressed in terms of doctrines of interpretation we believe we should employ *ejusdem generis* in interpreting the terms "affiliated" and "associated". Thus, these terms will be interpreted so as to make them applicable to persons, things, or entities of the same general nature or class as those specifically enumerated, *viz.* corporations, firms, individuals or other entities, parents or subsidiaries, of, or owned or controlled by [the insured]. 543 F.2d at 76.

Thus, while there may be a question of fact as to whether some slightly connected entities are "associated and/or affiliated" within the meaning of the clause, to expand this language to include contractors and subcontractors is entirely unwarranted. As the majority suggests, we must not resort to a strained construction for the purpose of creating an ambiguity where no ambiguity in fact exists. *Safeco Ins. Co. of America, Inc. v. McKenna*, 90 N.M. 516, 565 P.2d 1033 (1977).

Thus, while I agree that this case should be remanded to the trial court for a determination of the intent of the parties, I do not agree that this intent can be determined by admitting extrinsic evidence of the meaning of policy provision (1), which is, in this context, clear and unambiguous.

600 P.2d 1195

Beverly Ann HENDERSON,
Plaintiff-Appellant,

v.

Samuel David HENDERSON,
Defendant-Appellee.

No. 12140.

Supreme Court of New Mexico.

Oct. 2, 1979.

McAtee & Associates, W. Peter McAtee, Albuquerque, for plaintiff-appellant.

Schuelke, Wolf & Rich, Joseph L. Rich, Gallup, for defendant-appellee.

OPINION

EASLEY, Justice.

In this child custody dispute, the trial court awarded custody to the father for two months during the summer. The mother appealed. We affirm.

The issues are:

1. whether a finding that the mother was in contempt is appealable;

2. whether the trial court should have modified a previous judgment for delinquent child support payments to include interest;

3. whether there was substantial evidence to support two challenged findings; and

4. whether the trial court abused its discretion in awarding custody to the father for two months during the summer.

Prior proceedings had awarded custody to the mother subject to the visitation rights of the father. Visitation was in Gallup, the mother's home, on alternate weekends. On the remaining weekends the mother was required to transport the child to Albuquerque for visitation at the father's home. Prior proceedings also produced a judgment against the father for $2,350.00 in delinquent child support payments. The father moved to Bloomfield and asked that the child be brought there for weekend visitations. The mother refused. Visitation was terminated. The mother has since moved to Tucson.

In the present proceeding, the mother claimed that the father had molested the child, and that she had discontinued visitation on the advice of her physician and her attorney because the child was afraid of her father. The mother requested the trial court to discontinue the father's visitation privileges on this basis. She also sought to have the prior judgment for support arrearages modified to include interest. The father petitioned the trial court to enforce his visitation privileges.

The trial court awarded the father custody for two months during the summer and allowed visitation during other vacation periods. The court found that there were changed circumstances. The trial court declined to modify the prior judgment to include interest on child support arrearages.

Contempt

The trial court found that Mrs. Henderson was in contempt, but deferred the matter "for the time being". Appeal of contempt findings is governed by § 39–3–15(A), N.M.S.A.1978, which provides for appeal from a *judgment* of a civil contempt or a *conviction* of criminal contempt. In *Zellers v. Huff*, 57 N.M. 609, 261 P.2d 643 (1953), this Court held that where there is a finding of contempt but no sentence is imposed, no appeal is available. "The sentence is the judgment. (Citations omitted.)" *Id.* at 611, 261 P.2d at 644.

No sentence was imposed on Mrs. Henderson; thus no appeal is available on this issue. The contempt finding, of itself, is not subject to appeal. N.M.R.Civ.App. 3(a)(2), N.M.S.A.1978. *See also* Annot., 33 A.L.R.3d 448, § 24(a)(1970).

Interest on Prior Judgment

In the prior proceeding, the mother had alleged that the father was $2,350 in arrears in child support payments and peti-

tioned the court to find him in contempt. The trial court agreed and ordered the father to pay to the mother $25.00 a month, in addition to the original child support payments, until the arrearage was made up. Because the mother's petition in the prior proceeding sought a finding of contempt, the trial court had discretion under its equity powers to fashion the remedy it did. *Corliss v. Corliss*, 89 N.M. 235, 549 P.2d 1070 (1976). The trial court's order in the prior proceeding was filed May 26, 1977. The record shows no appeal from that order.

In this proceeding, the mother alleged that the original judgment did not allow interest and should be accordingly modified. She did not raise the question of interest in that proceeding and did not appeal the decision. It cannot be raised at this late date.

Substantial Evidence

The mother challenges for lack of substantial evidence the trial court's finding that the father did not in any way molest his daughter. Within this argument, the mother asserts that the trial court erred in admitting polygraph evidence. The thrust of the mother's argument appears to be that, in the absence of the polygraph evidence, there is no substantial evidence to support the finding.

The mother and maternal grandmother both testified that the child had told them that her father had molested her. A doctor who had examined the child approximately one week after the alleged incident testified that he found no evidence that the child had been molested and that; because of the time lapse between the alleged incident and the examination, the alleged molestation was probably not medically provable.

The father categorically denied that he molested his daughter in any way. A polygrapher testified, over objection, that he had administered a polygraph test to the father and that his results were conclusive that the father's denial was truthful.

The record indicates that the mother did not object to the qualifications of the polygrapher as an expert. The testimony of the polygrapher established the reliability of the testing procedure and the validity of the tests made on the subject. The record shows that there was a proper foundation for the admission of the polygraph evidence under *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (1975).

The mother contends that the polygraph evidence should have been excluded because she lacked notice that the exam was going to be given. No such notice is required under any New Mexico rule. The mother argues that the element of surprise is presented if such notice is not given. However, the surprise could have been eliminated through discovery techniques, such as depositions and interrogatories. N.M.R. Civ.P. 26 & 31, N.M.S.A.1978.

We hold that the trial court properly admitted the polygraph evidence and that there was substantial evidence to support the trial court's finding that the father had not molested his daughter.

The mother claims there is no substantial evidence to support the trial court's finding that the mother and maternal grandmother were responsible for the child's agitated state, and that the mother failed to adequately prepare the child for visitation with the father.

In her brief the mother referred to sections of the transcript where evidence could be found which was contrary to this finding. However, she did not comply with N.M.R.Civ.App. 9(d), N.M.S.A.1978, which provides that *all* "evidence bearing upon the proposition, with proper references to the transcript" should be set out in the brief. She did not set out all the evidence. Therefore, this issue will not be entertained.

Custody

The trial court awarded custody to the father for two months during the summer. The mother attacked the award as an abuse of discretion. Since the original order, the father has moved to Bloomfield, New Mexico and the mother has moved to Tucson, Arizona. A psychiatrist recommended

longer periods of visitation two or three times a year, rather than the alternate weekends as provided for in the original decree.

The trial court has broad discretion in determining child custody arrangements. Its judgment will not be overturned unless there is no substantial evidence to support it, or there has been a manifest abuse of discretion. *Stone v. Stone*, 79 N.M. 351, 443 P.2d 741 (1968); *Kotrola v. Kotrola*, 79 N.M. 258, 442 P.2d 570 (1968).

The evidence is substantial that a change in circumstances has occurred that warrants the decision of the trial court. We affirm.

IT IS SO ORDERED.

FEDERICI and FELTER, JJ., concur.

600 P.2d 1198

Jose Manuel TORRES and Tomasita Torres, his wife, Plaintiffs-Appellants,

v.

PIGGLY WIGGLY SHOP RITE FOODS, INC., Defendant-Appellee.

No. 3416.

Court of Appeals of New Mexico.

July 24, 1979.

Rehearing Denied Aug. 8, 1979.

Charles G. Berry, Marchiondo & Berry, P.A., Albuquerque, for plaintiffs-appellants.

Douglas A. Barr, Daniel Coit Lill, P.A., Albuquerque, for defendant-appellee.

OPINION

ANDREWS, Judge.

Tomasita Torres (Torres) and her spouse filed an action against Piggly Wiggly Shop Rite Foods, Inc. (variously referred to as Shop Rite or Tenant), alleging bodily injury as a result of an alleged slip and fall on a slick grease area on the paved parking lot near the entry and exit point of the Shop Rite store located at a shopping center in Albuquerque, New Mexico. Shop Rite moved for, and was granted, summary judgment. Torres appeals.

The first issue raised by Torres is whether the Tenant was obligated by the terms of the lease and other agreements to maintain the parking lot in a safe condition. By a Lease Agreement dated January 18, 1956, Shop Rite leased a tract of land from Louisa B. Steinmann (Landlord) to build and operate a Shop Rite store which Shop Rite constructed on a portion of the tract in accordance with the Lease. At the time the store was constructed, it was the first and only store in what was later to become a shopping center. The accident occurred on the tract of land leased to Shop Rite.

The only provision in the record relating to repair, upkeep and maintenance of this portion of property was the Lease which provided in material part:

> The Landlord agrees that she will, during the time of this lease, make all structural repairs on said building. Landlord further agrees to be responsible for the installation and maintenance of all public utility facilities such as gas, water, electricity, telephone and sewage line [sic] up to the walls of the building, and Tenant agrees to be responsible for the installation and maintenance of all such public utility facilities within the building and within the walls of said building, and Tenant shall keep the plumbing, electric wiring, fixtures and plate glass in a state of repair and keep the interior painted during the term of this lease.

While there were several supplemental lease agreements entered into between the Landlord and Shop Rite over the years, two agreements are relevant. First, an Agreement dated August 29, 1958 provided in material part:

> That the parking area designated on Sheet No. 2 [which includes the parking area on the demised premises] of the proposed Shopping Center . . . shall be reserved for parking purposes for use, in common, by all persons owning or renting, now or in the future, store facilities upon any of the land . . ., as shown in Sheet No. 2 of the proposed Shopping Center, and for the use in common of the employees, customers, and business invitees of such persons.

The second, a Supplemental Lease Agreement dated March 4, 1970, required the Tenant to pay any increases in ad valorem taxes levied on the "real property leased to it." The Agreement defined "real property leased" to mean:

> [O]nly the premises exclusively leased to the Tenant [Shop Rite] and not the aforesaid released area or any common area.

The Lease and other applicable agreements did not expressly provide whether the Landlord or the Tenant had the responsibility to maintain the parking lot in a safe condition.

The common law rule is well settled that where a landlord fully parts with the possession of the premises and retains no control or right of control over them, and does not thereafter assume control, he is under no duty to inspect their condition while a tenant remains in possession, and is not chargeable with liability for defects not made by him or under his direction for failure to make repairs. *Mitchell v. C & H Transp. Co., Inc.*, 90 N.M. 471, 565 P.2d 342 (1977); relying on *City of Dalton v. Anderson*, 72 Ga.App. 109, 33 S.E.2d 115 (1945). There is an exception to this rule where the landlord has reserved the right to enter to make repairs, even in cases where he has not covenanted to make any repairs. In that situation, the landlord's liability continues after the leasing of the premises. *Mitchell v. C & H Transp. Co., supra*; *Hogsett v. Hanna*, 41 N.M. 22, 63 P.2d 540 (1936). In addition, a further exception makes the landlord responsible for areas expressly or impliedly reserved "for the use in common of different tenants." *Hogsett v. Hanna, supra.* The necessary corollary to this rule is that a tenant in complete and sole control of leased premises is liable for any defects in those premises or for the failure to make repairs in them, absent a reservation by the landlord for common use of several tenants or a reservation by the landlord of the right to enter and make repairs.

The terms of the August 29, 1958, Agreement expressly reserved the parking area for the use, in common, of all the tenants in the shopping center. Therefore, the provisions in the Lease Agreement are such that, unless it is shown that in spite of the provisions, Shop Rite exercised control over the parking lot, the summary judgment must be affirmed. *Accord, Lommori v. Milner Hotels*, 63 N.M. 342, 319 P.2d 949 (1959); Annot. 48 A.L.R.3d 1163 (1973).

As her second issue, Torres argues that there exists a substantial issue of fact as to who actually had assumed the duty of maintaining the parking lot in a safe condition. Unquestionably, the burden was on Shop Rite to show the absence of a genuine issue of material fact. *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972). However, once Shop Rite had made a prima facie showing that it was entitled to summary judgment, the burden was on Torres to show that there was a genuine fact issue. In our opinion, Shop Rite made a prima facie showing that there was no genuine issue of fact that it had a responsibility to maintain the parking area in a safe condition. While there is some contradictory evidence to rebut the showing made by Shop Rite, such evidence does not create reasonable doubt as to whether a genuine issue exists.

> Though it has been said that summary judgment should not be granted if there is the "slightest doubt" as to the facts, such statements are a rather misleading gloss on a rule which speaks in terms of "genuine issue as to any material fact," and would, if taken literally, mean that there could hardly ever be a summary judgment, for at least a slight doubt can be developed as to practically all things human. A better formulation would be that the party opposing the motion is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists. If there are such reasonable doubts, summary judgment should be denied. A substantial dispute as to a material fact forecloses summary judgment." *Goodman v. Brock*, 83 N.M. at 792, 498 P.2d at 679.

In regard to the issue of control, Torres cites an exchange in a deposition of a sacker for Shop Rite as follows:

Q. Had there been oil spots there in the past?

A. I had seen oil spots, yes.

* * * * * *

Q. Are you aware of anybody ever doing anything to put sand on this oil spot or anything like that?

A. They are supposed to. It is not my job.

Q. Who is supposed to do that?

A. I couldn't tell you. The sacker.

Q. Did you ever see them do that?

A. No sir, I never worked when it was supposed to be done.

Q. Do you know what people, the names of the people in your store that had that duty?

A. No, sir. Sackers come and go.

Shop Rite cites contradictory evidence in the deposition of Mr. Steinmann, who provided management assistance to the Landlord:

Q. Who has actually done the work of cleaning the parking area and keeping it clean and maintaining it?

A. A gentleman by the name of Mr. Hoehne.

Q. Who hires Mr. Hoehne?

A. We hire Mr. Hoehne.

Q. You do hire Mr. Hoehne?

A. Yes.

* * * * * *

Q. Outside of the inspections that you do make on the property, do the tenants call in complaints about holes in the parking surface, if there are any, to you to be repaired?

A. There could have been, yes.

* * * * * *

Q. Do you know who did the repair of the shopping center parking surface, if it has ever been?

A. We have had several people.

Q. You just call a local contractor or something?

A. Yes.

Likewise, Mrs. Steinmann, the Landlord, testified:

Q. You agree with your husband that since 1970 you have been the ones that have maintained the parking lot for the center?

A. To the best of our ability because of our integrity.

Q. Mr. Hoehne has been the man that does that?

A. Yes.

Q. And he has done it under your supervision?

A. Yes.

Thus, the facts clearly demonstrate that Shop Rite had not assumed such control over the common area as to become responsible for its maintenance and repair. The manager of the Shop Rite store, the director of real estate for Shop Rite stores, and the Landlord and her husband all testified by either affidavit or deposition that the Landlord, not the Tenant, employs people to care for the parking lot; that the Tenant exercises no control over the parking lot; and that the Landlord has cared for the parking lot for a number of years without assessing this Tenant or other tenants for any of these caretaking expenses.

As stated above, the Lease Agreements do not require that the Tenant care for the parking lot, and there is no showing Shop Rite exercised control over the parking lot. Torres's assertion that a "substantial issue of fact exists as to who actually had control or had assumed control and the responsibility of maintaining the premises in a safe condition" is unsupported by the record.

The trial court was apparently presented with two forms of Order, one granting the defendant's motion to dismiss with prejudice and one granting plaintiffs' motion to file their first amended complaint. The trial court correctly granted the defendant's summary judgment motion which, of course, left the plaintiffs free to file a separate law suit against the Landlord and owner of the property. We affirm.

IT IS SO ORDERED.

WOOD, C. J., and WALTERS, J., concur.

600 P.2d 1202

Francisco C. ARANDA,
Plaintiff-Appellant,

v.

MISSISSIPPI CHEMICAL CORPORATION, Employer and United States Fidelity and Guaranty Insurance Company, Insurer, Defendants-Appellees.

No. 3686.

Court of Appeals of New Mexico.

Aug. 7, 1979.

M. Jane Shuler, M. Rosenberg, Carlsbad, for plaintiff-appellant.

B. R. Baldock, Michael T. Worley, Sanders, Bruin & Baldock, Roswell, for defendants-appellees.

OPINION

SUTIN, Judge.

Workmen's compensation benefits were denied plaintiff and he appeals. We reverse.

The trial court made extensive findings. Reduced in length, the findings may first be partially summarized as follows:

Plaintiff, now 30 years of age with the equivalent of a high school education, plus some college level training and experience in welding, suffered a fractured ischium (a bone on which you sit) and a lumbosacral sprain. On July 2, 1976, he was crushed between a jeep and grease wagon while working underground as a mechanic on production.

From July 2, 1976 to October 12, 1976, plaintiff was paid all workmen's compensation benefits. *From October 12, 1976 to May 15, 1977, plaintiff was put to work temporarily as a welder in an underground mechanic shop and was able to perform all duties required of him.*

21. At the end of the shut-down period on or about May 15, 1977, *the Plaintiff was directed to return to his former job on production, working as a mechanic* with a crew tunneling into the ore body in the actual mining process.

22. His regular job as a mechanic on production routinely required him to work alone and in a stooped-over position, drag heavy tools, and to work with and on heavy equipment. He was also required in his regular duties to twist and turn and work from awkward positions.

23. *The Plaintiff's injury prevents him from doing the heavy lifting required in the job he was performing at the time he was injured.*

* * * * * *

26. *Plaintiff terminated his employment voluntarily* . . . on or about May 15, 1977. [All emphasis added.]

Plaintiff had secured employment at Southwestern Investment Company (S.I.C.) on the date that he terminated his employment and worked continuously as credit manager and wholly performed his work which was work that he was qualified to do by reason of age, education, training, general physical and mental capacity and previous work experience from May 15, 1977 to the date of the trial on April 17, 1978.

The court concluded that "Plaintiff's injury has not disabled him from employment for which he is fitted by age, education, training, general physical and mental capacity and previous work experience."

To state the findings succinctly:

(1) Plaintiff was unable to perform his work in production as a mechanic in the mine;

(2) Plaintiff was able to perform his lighter, temporary work as a welder in the shop;

(3) When *directed to return* to his former job in production, work which he was *unable* to perform, plaintiff *voluntarily* quit; and

(4) Plaintiff secured employment with S.I.C. as credit manager for which he was qualified and this work was wholly performed.

Therefore, plaintiff was not disabled.

The court relied upon *Medina v. Zia Company,* 88 N.M. 615, 544 P.2d 1180 (Ct. App.1975) which contains the two-prong test. To be entitled to workmen's compensation benefits, a workman must be totally or partially unable to perform work he was doing at *the time of injury*, and, wholly or partially unable to perform work *for which he was fitted.*

The trial court found that plaintiff was unable to perform the work he was doing at *the time of the injury.* In this appeal, we are not involved with the *Medina first test.* We are faced with *the second test.*

Under the *Medina* second test, if (1) plaintiff *voluntarily* left his work as a *welder,* work for which he was fitted, or (2) if plaintiff secured employment as a credit manager, work for which he was fitted, then plaintiff was not entitled to workmen's compensation benefits.

A. *Plaintiff did not voluntarily leave his work as a welder.*

"If a claimant, through voluntary conduct *unconnected with his injury,* takes himself out of the labor market, there is no compensable disability. If an employee, after injury, resumes employment and is fired for misconduct, his impairment playing no part in the discharge, there is no compensable disability. Total disability benefits have been denied *when a partially disabled claimant has made no bona fide effort to obtain suitable work when such work is available.*" [Emphasis added.] *Vetter v. Alaska Workmen's Compensation Board,* 524 P.2d 264, 266–67 (Alaska 1974); 2 Larson's Workmen's Compensation Law, § 57.-64 (1976).

"When we say, 'He left his work voluntarily', we commonly mean, he left of his own motion; he was not discharged. It is the opposite of discharge, dismissal or layoff by the employer or other action by the employer severing relations with his employes, to provide against which the act was mainly designed." *Department of Labor, Etc. v. Unemployment C. Bd. of R.,* 133 Pa.Super. 518, 3 A.2d 211, 213 (1938); Black's Law Dictionary at 1746 (Rev. 4th Ed. 1968). "Voluntarily" means done "of one's own free will." *Allen v. Core Target City Youth Program,* 275 Md. 69, 338 A.2d 237, 243 (1975). See, *LeMon v. Employment Security Commission,* 89 N.M. 549, 555 P.2d 372 (1976).

In *Medina,* plaintiff was injured and returned to work performing light duty on lawns. Later, he underwent corrective surgery. When discharged from the hospital, he left his job, went home and did not return to work. *Light duty work was available to him.* He was wholly able to perform the light work for which he was fitted *but refused to return to work.* It is obvious that Medina did not comply with the second test. The *Medina* case falls within the "capacity to work" rule. As he could return to work without any loss of earnings, he was not entitled to any such benefits. 2 Larson's Workmen's Compensation Law, § 57.66 (1976).

At this point, we leave the *Medina* case. "At the end of the shut down period on or about May 15, 1977, *the plaintiff was directed to return to his former job on production,* working as a mechanic with a crew tunneling into the ore body in the actual mining process." In response to a question of why he sought other work, plaintiff said:

> Because I knew I couldn't work in the panel, I wouldn't make it, I just couldn't get around underground walking and stooping over and the toolboxes, like I said, you have to load them and carry them to the faces to work, and I knew I wasn't going to be able to do it, I was just barely making it.

Plaintiff did not leave his job, go home and fail to return to work as Medina did. Plaintiff left his light duty job as a welder, a temporary job, because he was directed to return to his former job.

Defendants rely upon the following testimony of plaintiff:

Q. The work they had you do, Mr. Aranda, you were capable of doing it?

A. Yes, sir.

Q. And, that you quit, they did not discharge you?

A. That's right.

Q. And that was in May of 1977?

A. Yes, sir.

This testimony proves that plaintiff quit. It does not establish that he voluntarily left his employment. His disability or inability to perform his former job on production induced or caused plaintiff to quit.

His change of work was not of his own making. Plaintiff advised his employer that he was terminating his employment because he wanted an easier job "for less lifting and all of that." He wanted to work, not to play the part of Rip Van Winkle, a characteristic that deserves commendation, not punishment.

We hold that plaintiff did not voluntarily leave his employment. The trial court erred in holding contrariwise.

B. *Plaintiff was partially disabled in his full-time employment with S.I.C.*

Plaintiff went to work as a credit manager for S.I.C. on May 15, 1977. Some nine months prior thereto, the ischium had completely healed. Plaintiff was then fitted with a corset, instructed in calisthenics and warned against sitting all of the time as long as he had back sprain.

At S.I.C., plaintiff's work pace was slow. He handled payments and arranged loans. Eighty percent of his time or more was spent in sitting at a phone and at his desk. He stopped wearing the corset because he did not have to do any heavy lifting such as that during the repossession of furniture. This work had not been assigned to him. He stopped doing calisthenics because of the pain it caused in his back. He does have pain sitting down, but he did the best he could to keep his job in order to support his family. His employer knew of his physical condition. He worked continuously every working day and received a wage increase.

On March 27, 1978, *21 days before trial,* an orthopedic physician who had treated Aranda, examined him for the last time and presented a written report. His examination and cross-examination at trial consisted in good part of quotations from his report. When asked his opinion of plaintiff's condition as of March 27, 1978, he stated:

> Well, my last summary paragraph of my report points out that *he has a chronic lumbosacral sprain,* which I recognized at the time of his discharge from my care. *And I recommended to him at the time of his discharge, that he wear the corset and that he continue his calisthenics. . .* I felt that the discomfort that he was experiencing, was to a varying degree persisting *from six to nine months even in the face of the support and calisthenics. Now, it is my informal understanding, that the support was discarded and the calisthenics were not engaged in, and the symptoms have correspondingly continued.* I think this is an unfortunate phenomenon if he would choose to return to formally recommended routine. [Emphasis added.]

In the conclusion of his report he stated that plaintiff "is substantially disabled from heavy activities and *has perhaps five to ten percent partial disability in sedentary activities.*" [Emphasis added.] When asked:

> Q. *Is that your opinion, sir?*
>
> A. *Yes, sir.* [Emphasis added.]

In his report he also stated:

> In fact, after quitting his job as a underground mechanic in May, he took his present employment which is one-hundred percent sitting job working as a collecting agent for a finance company. Principally involved in making telephone calls to delinquent accounts.

This fact is why he cautioned plaintiff about sitting a hundred percent of the time. In the concluding paragraph, the physician stated:

> *Obviously, the patient regarded his symptoms of his lumbosacral sprain as serious enough to warrant quitting a highly lucrative job for one much less rewarding* and it is a shame that he did not pursue some attempt to get recurrent medical management from me or others *before he terminated his employment. Certainly the sitting job he now has will give him nothing but increasing grief in years to come, unless a program of rehabilitation as outlined is followed.* [Emphasis added.]

Yet, in his physical condition, the physician said, plaintiff was able to perform his work as a credit manager and the physician did not give plaintiff a temporary, partial disability.

The evidence is undisputed that plaintiff was partially disabled. Even if plaintiff had continued with use of his corset and calisthenics exercise, adequately explained by plaintiff, the physician felt that plaintiff's "discomfort" would persist from six to nine months after March 27, 1978.

In *Medina v. Wicked Wick Candle Co.*, 91 N.M. 522, 577 P.2d 420 (Ct.App.1977), plaintiff, disabled as a waitress, retrained herself to become a clerk typist for the State, engaged in full-time employment. She was held to be partially disabled, not totally disabled. In the course of the opinion, the court said:

> . . . "Training" is included in the second test of total disability. *The reason for including the element of "training" is to encourage a workman to seek other employment and to work despite disability that results from an accidental injury.* The Workmen's Compensation Act does not condone the conduct of those employees who desire to sleep as Rip Van Winkle did in the fable of the 19th century. *In addition to compensation received for gainful employment, plaintiff is also entitled to compensation benefits for partial disability.* [Emphasis added.] [91 N.M. at 525–26, 577 P.2d at 423–424.]

To set the guidelines for proving total or partial disability, *see, Marez v. Kerr-McGee Nuclear Corporation*, 93 N.M. 9, 595 P.2d 1204 (Ct.App.1978), Sutin, J., specially concurring. Unfortunately, publication of this opinion was delayed. A misconception exists on the meaning of the phrase in the definition of disability which uses the language: "wholly unable to perform ANY work," or "unable to some percentage extent to perform ANY work."

"ANY work" for an engineer, plant foreman, department head or mine employee who labors in production does not mean such sedentary work or activity such as that of a janitor, filling station attendant, raker of leaves, one who can sell pencils or 25 other sedentary jobs. "ANY work" means a workman's ordinary employment, or such other employment, if any, approximating the same livelihood the workman might be expected to follow in view of his circumstances and capabilities. To conclude that an electrical engineer is partially disabled because he is capable of raking leaves or performing janitorial services destroys the spirit of the Workmen's Compensation Act. He has no other skills or training to draw upon. Total disability does not mean that a workman must be a helpless invalid.

In addition, "ANY work" must be available. Total disability must not be an inducement to malingering. A workman must make reasonable efforts to obtain work with the employer within work capabilities. If not available, such reasonable efforts must be made elsewhere. The employer should also make reasonable efforts to retain the employee in such jobs that are comparable or similar to the workman's skills and training. If not available, the employer should make reasonable efforts to assist the workman in obtaining comparable available employment elsewhere.

The primary purpose of the Workmen's Compensation Act is to keep an injured workman and his family at least minimally secure financially. Public policy demands it. *See, Lane v. Levi Strauss & Co.*, 92 N.M. 504, 590 P.2d 652 (Ct.App.1979). The trial court found that plaintiff's earnings at S.I.C. were approximately 60% of his earnings at defendants' mine.

In *Marez*, Marez was employed as a first class operator in the boiler room of the acid plant of his employer. After his injury, he was transferred from the acid plant to the rubber plant. This work required bending, lifting and squatting. His back injury was aggravated, resulting in much pain and limping. A laminectomy was performed. His pain returned. He continued to work, but he was compelled to quit because he could not perform his duties. *Marez sought to do lighter work along with his pain and disability but nothing was available.* Even though Marez could do lighter work, the court held Marez totally disabled. The fact that an expert testified that the workman could then perform 26 sedentary jobs did not reduce total disability to partial disability.

In the instant case, plaintiff was not totally disabled because he searched for and obtained lighter work.

We hold that plaintiff was partially disabled from May 15, 1977 to the date of judgment in the trial court. Plaintiff is entitled to compensation benefits as provided by law for partial disability, and to a reasonable attorney fee for services rendered in the trial, taking into consideration the services rendered in this appeal.

This cause is reversed and remanded to the trial court to vacate its judgment, determine the percentage of plaintiff's partial disability at the time of trial, and enter judgment based thereon.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HERNANDEZ, J., dissenting.

HERNANDEZ, Judge (dissenting).

I respectfully dissent.

Section 52–1–25 of our Workmen's Compensation Act provides:

"As used in the Workmen's Compensation Act, 'partial disability' means a condition whereby a workman, by reason of injury arising out of and in the course of his employment, is unable to some percentage-extent to perform the usual tasks in the work he was performing at the time of his injury *and is unable to some percentage-extent to perform any work for which he is fitted by age, education, training, general physical and mental capacity and previous work experience.*" [Emphasis added.]

The trial court made the following findings of fact, among others:

29. Plaintiff has worked continuously as Credit Manager at SIC since May 15, 1977.

30. Plaintiff has wholly performed the work as Credit Manager at SIC which was work he was qualified to do by reason of age, education, training, general physical and mental capacity, and previous work experience at SIC from May 15, 1977, to the date of trial on April 17, 1978.

31. Plaintiff is able to perform the work available to him at SIC as Credit Manager, based upon his age, education, training, general physical and mental capacity, and previous work experience.

The trial court made the following conclusion of law, among others:

3. The Plaintiff's injury has not disabled him from employment for which he is fitted by age, education, training, general physical and mental capacity and previous work experience.

Dr. A. E. Luckett testified in part as follows:

"Q. Does Mr. Aranda's condition, as you found him on March 27, 1978, interfere with his capacity to work as a SIC Credit Manager?

"A. No.

"Q. You are not giving this man a temporary, partial disability from his capacity to work at SIC at this time, are you?

"A. No, sir."

This testimony, in my opinion, sustains the trial court's findings and conclusion cited above.

I would affirm the trial court's judgment.

600 P.2d 1207

Eva Mae BRAZFIELD, Executrix of the Estate of Blain Brazfield, Decedent, Plaintiff-Appellant,

v.

MOUNTAIN STATES MUTUAL CASUALTY COMPANY, Defendant-Appellee.

No. 3997.

Court of Appeals of New Mexico.

Aug. 14, 1979.

Jon T. Kwako, Albuquerque, for plaintiff-appellant.

Douglas A. Baker, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for defendant-appellee.

OPINION

WALTERS, Judge.

Summary judgments were entered on plaintiff-widow's two-count complaint. Her appeal from judgment on Count I was untimely. Judgment was entered in August 1978, the trial court determining there was no reason to delay a final judgment on that count, R.Civ.P. 54(b)(1), and her notice of appeal was filed more than thirty days later, in January 1979. Rule 3(a), N.M.R. App.R., Civil. When the notice of appeal is not timely filed, the court has no jurisdiction to consider the merits of the issue raised. *See Mabrey v. Mobil Oil Corp.*, 84 N.M. 272, 502 P.2d 297 (Ct.App.1972). Thus the summary judgment entered on Count I is affirmed.

On January 22, 1979, Mountain States Mutual Casualty Company was awarded summary judgment on Count II. In that count plaintiff alleged that a settlement agreement had been reached between the workman's attorney and the compensation carrier for a lump-sum amount to be paid in lieu of weekly payments of total permanent disability compensation. It appears from the depositions taken in the matter that the workman died from an unrelated disease during negotiations, before the alleged agreement was reached. The matter of an attorney's fee remained to be settled. Mountain States denied that a lump-sum agreement had been made but argued successfully below that, nevertheless, the attorney's authority to contract on behalf of the workman was revoked by the workman's death; that an agreement, if any, had not been reached prior to the death of the workman; and that its obligation to

pay compensation benefits, in any event, terminated upon the workman's death. Section 52–1–47(C), N.M.S.A.1978.

It is plaintiff's position that the general rule, i. e., that agency is terminated by death of the principal, should not apply in the instant case because neither the agent (Brazfield's attorney) nor the adjuster were aware of Brazfield's death at the time the settlement allegedly was negotiated.

Defendant cites cases holding to the contrary. None of the cases to which we are referred speak to the agency of an attorney in a workmen's compensation suit or in connection with New Mexico's statutory scheme governing the special procedures, rights and remedies inherent in such suits.

This case is not one in which the plaintiff seeks a widow's entitlement for death caused by the injury for which her husband had been receiving compensation. The record is clear that Mr. Brazfield died of an unrelated physical condition. The only issue to be resolved is whether the attorney's agency terminated with Brazfield's death. If it did, the summary judgment on Count II must also be affirmed. If it did not, the matter must be returned to the trial court to determine whether a compromise lump-sum settlement had been agreed upon by the agent and the insurer which will enure to the workman's estate.

On the question of termination of agency by death, no New Mexico cases were cited to us by the parties and we have been able to find only one. *In re Ward's Estate*, 47 N.M. 55, 134 P.2d 539 (1943), which discussed the question. In that case, a broker had been engaged to sell property for his principal. Noting that at the time of the principal's death the agent had not been successful in obtaining a sale or furnishing a ready buyer, "and his power to sell not being coupled with an interest," the court held the agency revoked by reason of the principal's death.

Thus, although some jurisdictions have applied a rule that if one deals with an agent in good faith and in ignorance of the principal's death, revocation of agency by death takes effect only from the time the agent has notice of this principal's death,[1] it is implied in *Ward's Estate* that New Mexico requires the agency to be coupled with an interest to create an irrevocable agency. Professor Williston says, at § 280 in his treatise, 2 Williston on Contracts, 3d ed., (edited by Professor Jaeger):

> The great weight of authority recognizes this exception to the rule that the death of the principal revokes the authority of the agent appointed by him.

See also Annot., *What constitutes power coupled with interest within rule as to termination of agency*, 28 A.L.R.2d 1243, et seq.

In workmen's compensation suits, attorneys fees awarded for successful representation of injured claimants are recoverable *against the employer* as a separate and distinct award, apart from the workman's award. Section 52–1–54(B), (C), (D) and (E), N.M.S.A.1978. The attorney's interest, therefore, is not given for a debt owed by the workman; nor is his interest strictly in the subject matter of the power, i. e., the right to sue or settle on behalf of his client for a work-related injury. But it is solidly fused to the exercise of that right by the principal. The interest certainly is not an interest in the proceeds to be received by his principal; it is a statutorily-created interest peculiarly personal to the attorney, and separate from the workman's award.

In this case, the depositions disclose that the parties were negotiating for a separate payment of attorney's fees; that client and attorney had agreed to a fee equal to 10% of any amount Brazfield received, or whatever larger amount the court might award if a claim for lump-sum settlement were litigated. No case we have found dealing with the agent's interest has been concerned with "split" proceeds—two discrete recoveries. Obviously, in New Mexico, the

1. E. g., *Catlin v. Reed*, 141 Okla. 14, 283 P. 549 (1930); *Meinhardt v. Neuman*, 71 Neb. 532, 99 N.W. 261 (1904); *DeWeese v. Muff*, 57 Neb. 17, 77 N.W. 361 (1898); *Moore v. Hall*, 48 Mich. 143, 11 N.W. 844 (1882).

lawyer's role in workman's compensation cases is a unique form of agency insofar as his personal interest in the subject matter is concerned. It is through his status as an agent that he obtains the interest granted by statute, his fee; he cannot assert that interest unless the principal pursues his rights in the subject matter, in which the agent has no personal entitlement. The lawyer's interest, *a fortiori*, is inextricably tied to and a part of the subject matter for which the relationship of principal and agent is entered into.

The protection given to this vested and peculiar interest of the workman's attorney was most recently reinforced by our Supreme Court in *Herndon v. Albuquerque Public Schools*, 92 N.M. 287, 587 P.2d 434 (1978), wherein the trial court was ordered to award attorney fees as an assurance for avoiding the "chilling effect upon the ability of an injured party to obtain adequate representation" which would result from denial of such fees.

Nevertheless, there is no avoiding the clear language of the statute which terminates disability compensation benefits upon the death of the injured workman. If there were no benefits available to Mr. Brazfield's estate after his death, there could be no separate fee recovery available to his attorney. Section 52–1–54, N.M.S.A. 1978. In such circumstances there is no interest distinct from the attorney's power to settle which survives the workman's death.

Holding, therefore, that the attorney's power was not coupled with an interest, the summary judgment on Count II is affirmed.

IT IS SO ORDERED.

WOOD, C. J., specially concurs.

SUTIN, J., concurs in part and dissents in part.

WOOD, Chief Judge (specially concurring).

I agree that the appeal as to Count I was untimely; I agree that the summary judgment was proper as to Count II. However, I do not join in Judge Walters' discussion of the nature of the attorney fee interest in a workman's compensation claim, being of the opinion that such discussion is unnecessary.

The attorney had authority to reach a settlement of the workman's compensation claim. Under *In re Ward's Estate*, 47 N.M. 55, 134 P.2d 539, 146 A.L.R. 826 (1943), that authority was revoked by the workman's death unless the attorney's agency was irrevocable. For the authority to be irrevocable, the attorney must have had a power coupled with an interest.

"In order that a power may be irrevocable because it is coupled with an interest, it is necessary that the interest be in the subject matter of the power and not in the proceeds which will arise from the exercise of the power . . . ." Williston on Contracts (3rd ed. 1959), § 280 at page 300. Annot., 28 A.L.R.2d 1243 at 1250.

The depositions are to the effect that the attorney had authority to settle and would have not more than a 10 percent interest in the proceeds once a settlement was reached. Section 52–1–54(A), N.M.S.A.1978. Death occurred before the alleged settlement was reached. As "interest" is used in "power coupled with an interest," the attorney had no interest in the subject matter (the workman's claim) prior to a settlement being reached. The attorney not having a power coupled with an interest at the time death occurred, the attorney's authority to settle was revoked by the death.

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

I concur as to affirmance of partial summary judgment but dissent as to affirmance of summary judgment.

Plaintiff filed a claim for relief in two counts: (1) for continued payment of workmen's compensation benefits for disability after death of a workman whose death resulted from unrelated causes and (2) for breach of a settlement agreement entered into between decedent's attorney and defendant subsequent to decedent's death. The trial court granted defendant partial

summary judgment under Count I and summary judgment under Count II.

A. *Compensation payments ceased upon death of decedent.*

On August 12, 1974, decedent suffered an accidental injury within the course and scope of his employment. Following this injury and to the date of his death on April 17, 1977, defendant paid decedent all workmen's compensation benefits to which he was entitled. Death resulted from causes unrelated to the accidental injury and defendant ceased making any further payments.

Plaintiff contends that the Workmen's Compensation Act is a "support" statute inasmuch as § 52–1–46, N.M.S.A.1978 provides for detailed distribution of compensation benefits to dependents. Therefore, the family is entitled to compensation. The Act is a "support" statute when the workman's death is related to his employment. It is not a welfare statute enacted for the benefit of a family whose breadwinner dies from unrelated causes.

Section 52–1–47(C) states that:

> [I]n no case shall compensation benefits for disability continue after the disability ends or after the death of the injured workman;

Plaintiff's argument flows all around this section but never mentions it. Silence on this provision never won a victory on appeal.

"After the death of the injured workman" does need interpretation. Compensation benefits for an injured workman continue after death "if an accidental injury sustained by a workman proximately results in his death." Section 52–1–46. To give effect to subsection (C), logic dictates that compensation benefits shall not continue after the death of an injured workman "if the death results from unrelated causes."

Under a former statute, it was said that the question was not free from doubt. *Cranford v. Farnsworth & Chambers Company*, 261 F.2d 8 (10th Cir. 1958). The following year, the section of the Act that raised the doubt was repealed and the present statute enacted. To seek relief for the continuation of benefits after death that results from unrelated causes, the workman must look to the legislature. The Act must be amended to directly award compensation benefits to dependents of an injured workman "if death results from unrelated causes."

Partial summary judgment was properly granted defendant.

B. *The authority of an attorney to act continues after decedent's death if the attorney acts in good faith without knowledge of death.*

On or about April 1, 1977, decedent authorized his attorney to settle decedent's compensation benefits. For purposes of appeal only, defendant concedes that a genuine issue of material fact exists on whether a settlement was reached.

Decedent died April 17, 1977. An oral settlement took place on April 19 or 20, 1977. Neither decedent's attorney nor defendant knew of decedent's death prior to the agreement reached.

The trial court granted summary judgment on the theory that the authority of decedent's attorney to agree to a settlement had been revoked by operation of law on April 17, 1977, prior to the time the settlement was effective.

This problem is a matter of first impression in New Mexico. The question to decide is whether the harsh common law rule should be followed, or whether an exception should be made in workmen's compensation cases.

"The general rule is that the death of the client revokes his attorney's authority to act for him." *Hamilton v. Hughey*, 284 Or. 739, 588 P.2d 38, 40 (1978). This rule has been applied to a settlement effected a day after a client's death in an action for damages arising out of an automobile accident. *Pautz v. American Insurance Company*, 268 Minn. 241, 128 N.W.2d 731 (1964). Similarly, decedent's attorney cannot accept an

offer of settlement made by a defendant in a motor vehicle collision case when the acceptance is made after decedent's death. *Mubi v. Broomfield*, 108 Ariz. 39, 492 P.2d 700 (1972). An attorney has no authority to take any steps unless and until authorized by the personal representative of the deceased, duly qualified. *State v. Terte*, 293 S.W.2d 6 (Mo.App.1956). So, it has been held that an attorney has no authority in a compensation case to take an appeal after claimant's death. *Switkes v. John McShain, Inc.*, 202 Md. 340, 96 A.2d 617 (1953).

The attorney-client relationship ceases because the power of an attorney to act is dependent upon the control and direction of the client, which has been withdrawn by death. When applied methodically in every case, the rule is harsh and unfair. Note, *Powers of an Agent After the Death of the Principle*, 44 Harvard L.Rev. 265 (1930–31). Each case must be carefully scrutinized to determine whether the effect of the rule is fair and equitable under the circumstances. Otherwise dependent families or estates may suffer unusual harm even though decedent's attorney acted in good faith and without knowledge of decedent's death.

The Civil Law adopted the same general rule, but with an exception, namely, where an agent performed some act within the scope of his authority, in good faith and without knowledge of the principle's death, the authority would not be terminated. Comments, *Death of Principle as Terminating Agent's Power to Act*, 12 Mo.L.Rev. 50 (1947); *Simms v. Braren*, 252 So.2d 459 (La.App.1971); *Catlin v. Reed*, 141 Okla. 14, 283 P. 549 (1930). *Catlin* and other non-Civil Law states adopted this rule as an additional exception to the general rule.

As a matter of public policy, this exception to the general rule should be adopted in cases involving workmen. The Workmen's Compensation Act is in derogation of the common law. It should not be burdened with common law rules. Over a half century ago, Justice Bratton set the spirit of the Act in *Gonzales v. Chino Copper Co.*, 29 N.M. 228, 222 P. 903 (1924). He pointed out that it was designed "to avoid the application of certain well-established rules of law which oftentimes worked seeming harsh results . . . ." [id. 232, 222 P. 905.] We should continue in that spirit today.

In the instant case, whether decedent's attorney's authority terminated at decedent's death depends upon whether the attorney acted in good faith and without knowledge of decedent's death. This conduct is a genuine issue of material fact.

Summary judgment on Count II should be reversed.

600 P.2d 1212

CITIZENS BANK, Plaintiff-Appellee,

v.

C & H CONSTRUCTION & PAVING COMPANY, INC., et al., Defendants-Appellants,

v.

FIDELITY NATIONAL BANK, Intervenor,

v.

James C. DAVIS, Third-Party-Defendant, Appellant.

No. 3623.

Court of Appeals of New Mexico.

Aug. 28, 1979.

Writ of Certiorari Denied.

Joseph Goldberg, David A. Freedman, Freedman, Boyd & Daniels, Albuquerque, for defendants-appellants.

John S. Catron, Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

This proceeding arises from a controversy surrounding the distribution of the judgment in *Citizens Bank v. C & H Const. & Paving Co., Inc.*, 89 N.M. 360, 552 P.2d 796 (Ct.App.1976) as modified in 90 N.M. 208, 561 P.2d 481 (1977).

In this proceeding, James C. Davis, C. R. Davis and Alice Davis (Davises) represented by Thomas Horn, their attorney recovered judgment against Citizens Bank in the sum of $349,998.04. Thomas Horn claimed a contingent fee of $116,666.01 plus interest and sought by motion to establish and enforce a lien on Davises' judgment. The Davises moved to cancel Horn's lien. After an evidentiary hearing, the district court granted Horn's motion and denied Davises' motion.

Horn was awarded judgment in the sum of $116,666.01 plus interest of $15,665.43 for a total of $132,331.44 as of March 25, 1978, and the motion to enforce the lien was granted. The judgment also denied Davises' motion to cancel the lien. The Davises appeal. We affirm.

The trial court found in part that the original fee agreement required the Davises to pay $35.00 per hour on a monthly basis, and the Davises did not comply; that the original fee agreement did not contemplate an appeal. On June 2, 1975, Horn and the Davises, by mutual consent, modified the fee agreement and entered into a contingent fee contract whereby Horn agreed to represent the Davises on appeal for one third of the amount of the recovery by the Davises against Citizens Bank; that Horn did not agree to "kick-back" or "refund" any portion of his fees; that the contingency fee agreement was not unreasonable or unconscionable and was a reasonable fee agreement under the circumstances.

The trial court concluded that the contingency fee contract was reasonable and valid and entitled Horn to a one-third fee plus accrued interest upon the gross amount of the recovery, not subject to a set-off in favor of Citizens Bank; that the contract was enforceable by an attorney's charging lien, superior to all other claimants, effective from the time of commencement of Horn's services.

No challenge was made to the court's findings 7 and 10:

> 7. On June 2, 1975, Horn and the Davises, *by mutual consent,* modified the fee agreement to provide for attorney fees of one-third of the amount of the recovery by the Davises against Citizens Bank, for Horn to continue to represent the Davises throughout the appellate process, and for crediting all amounts paid by the Davises against the amount of the contingency fee if the verdict were upheld on appeal.
>
> 10. C. R. Davis and James C. Davis are sophisticated business persons. *C. R. Davis has dealt with lawyers repeatedly over the years and was well aware of the terms of the attorney fee contract* executed by himself and James C. Davis on behalf of themselves and Alice Davis. [Emphasis added.]

In February, 1975, prior to trial, the Davises agreed to pay Horn a trial fee based upon an hourly rate, payable monthly. After trial, on May 26, 1975, the amount of the fee due and owing was $4,194.07. The Davises were unable to pay.

The jury returned a verdict of approximately $350,000.00 in favor of the Davises. From the moment the large verdict was returned, it was certain that an appeal would be taken by Citizens Bank. In the discussion that took place, C. R. Davis disclosed the unfortunate financial condition of the Davises, a matter of grave concern. The Davises were unable to pay the attorney fees to date or to pay substantial monthly billings during the appeal. After discussion with a district judge, Horn asked C. R. Davis if he would want to modify the agreement and proceed on a contingency basis, one that Davis had first suggested at the inception of the attorney-client relationship.

Davis "was very anxious to do that. He wanted to do that." Davis said, "I am generous and I have no objection to your making money on that." "You did a hell of a job in this case. You are the fifth lawyer we have had on the case, and you have had to fight everybody and you got a third of a million-dollar judgment."

Horn then discussed this fee arrangement with his law partner and after strong disagreement, Horn presented to the Davises his partner's proposition that the current attorney fees then due, be paid; that the appeal be handled on a contingency fee basis, and, if successful on appeal, the contingency fee would be credited with the amount paid for services in the trial of the case. The Davises agreed. On June 2, 1975, two days after the jury verdict, by mutual consent, the agreement was executed in writing and constituted a modification of the former agreement.

Four months thereafter, as agreed, the Davises paid the balance due on the original fee arrangement. The Davises claim "the findings of the district court that the Davises did not comply with the fee arrangement for trial is wholly unsupported." We disagree. The trial court found:

> 5. The Davises did not comply with the fee arrangement *as agreed* and did not pay hourly billings on a monthly basis. [Emphasis added.]

The billings were delinquent at the time of trial and not paid in full for several months after the delinquency first occurred. These facts may disclose good intentions but not compliance with payment as agreed, nor payment on a monthly basis.

The finding of the trial court was merely an introduction to reasonableness of the contingent fee arrangement.

The Davises state their position succinctly as follows:

> . . . It is the contention of the Davises that the amount of the fee *exacted* by Horn from the Davises—measured either in dollars or as a percentage of the

recovery—was *so disproportionate to any reasonable value of the work he was to be compensated for* as to establish that the fee was unreasonably excessive and hence invalid as unconscionable.

* * * * * *

. . . It is the contention of the Davises that this Court should hold, *as a matter of law*, that one hundred sixteen thousand dollars is grossly excessive as a fee for defending a judgment on appeal. [Emphasis added.]

We read these contentions to mean:

(1) That Horn, with much effort, obtained from the unwilling Davises a contingency fee contract.

(2) That the fee was excessive because it was not in balance with what Horn should have earned for work done on the appeal; that the amount of the attorney fee was unconscionable as a matter of law.

The Davises carefully omit all facts which dispute their position. Horn did not "exact" the fee arrangement from the Davises. "Exaction" unfairly describes the circumstances under which the parties negotiated. The Davises freely and fragrantly as phlox contracted for the contingency fee arrangement with full knowledge and understanding. The Davises do not dispute the fact that they were sophisticated business persons; that C. R. Davis had dealt with lawyers repeatedly over the years and was well aware of the terms of the contingency fee contract. The contract contained the following:

NOTE: This is your contract. It protects both you and your attorneys and will prevent misunderstanding. If you do not understand it or if it does not contain all the agreements you discussed, please call it to our attention.

This language is plain and clear. It requires no interpretation. The terms of the contract were never questioned. The Davises at all times knew and understood its contents. There was no misunderstanding.

The war began *after* the affirmance of the judgment on appeal, not before. The attack made on the large attorney fee earned was "hindsight," a view that cannot be countenanced. The Davises' only concern was affirmance on appeal of an exciting third of a million dollar judgment and it was affirmed.

Horn did not "exact" the contingency fee arrangement from the Davises.

We turn now to the question of whether the fee was unreasonably excessive as a matter of law for defending a case on appeal.

The Davises do not attack contingent fee contracts generally; nor do they argue that in all cases is a one-third contingent fee or a $130,000.00 fee unconscionable. Indeed, the Davises do not argue that in all cases is a one-third contingent fee unconscionable solely for appellate work. Rather, the Davises argue that in the peculiar and unusual circumstances in which this fee arose, the fee is unconscionably excessive; that the amount of the percentage should be reduced to that which would be an equivalent of the reasonable value of the work for which he was to be compensated. In effect, this is a return to the hourly rate. We disagree because the Davises view the amount of the attorney fee with disdain after affirmance of the Davises' judgment on appeal. It may be said with equanimity that but for Horn's success in sustaining an extraordinary judgment on appeal, the Davises would have plunged into economic despair, and Horn would have walked away empty handed.

What was the risk taken in the appeal?

The large judgment entered in favor of the Davises was not placed upon a strong and healthy pedestal. It appeared to be weak and sick and subject to an easy reversal.

Charles D. Olmsted, a trial and appellate attorney of note, was employed by Citizens Bank to carry the proceedings forward after the mandate was issued. He studied the case intensely. In complicated proceedings before the Supreme Court he strongly urged the court to exercise its power of "superintending control" to review the case

and reverse. When asked his opinion about the difficulty of the appeal, he said:

> "I would not have wanted to take on . . . the appellees' [Davises] side of the appeal. My view in getting . . . the judgment reversed, with respect to the counterclaims and cross-claims of the Davises against Citizens Bank, would have been about as difficult as shooting fish in a barrel."

It was his opinion that it would have been "very easy" to reverse the case.

Raymond W. Schowers, then Horn's partner, discussed the contingency agreement with Horn on June 2, 1975. He objected violently with respect to modifying the original hourly rate agreement and said:

> [I]t was my opinion, even after trial, that the chances of it being sustained on appeal were minimal and that we would probably end up with nothing again. . .

Russell Moore, another lawyer of renown in trial and appellate work, was familiar with this case. He represented Citizens Bank in a companionate case. In his opinion, the case would be reversed.

Olmsted, Moore and William H. Carpenter, also an attorney experienced in trial and appellate work, all testified that the contingency fee arrangement was reasonable and proper. Carpenter testified that a 50% contingency fee arrangement would be excessive, not 33⅓%; that the contract should be honored when the Davises knew and understood the modification of the hourly-rate contract and consented thereto.

There is a distinct difference in risk between having an appeal sustained if the judgment rests on solid factual grounds dealing with well-accepted legal principles in which the risk is minimal, and having an appeal sustained in which the converse is true and the risk is maximum. Horn felt that this appeal was a "long shot" and Schowers thought it was a "dog."

The risk involved was immense.

In addition to the risk involved, the Davises and Horn dealt at "arm's length" from the inception of the attorney-client relationship forward.

Before an attorney undertakes the business of a client, the parties deal with each other at "arm's length." No confidential relationship then exists. A person with business acumen and experience cannot claim ignorance or incompetency to negotiate a contract at "arm's length" with an attorney. *Pocius v. Halvorsen,* 40 Ill. App.2d 162, 189 N.E.2d 358 (1963), reversed on other grounds, 30 Ill.2d 73, 195 N.E.2d 137 (1964), 13 A.L.R.3d 662 (1967); *Lee v. Gump,* 14 Cal.App.2d 729, 58 P.2d 941 (1936); *Hansel v. Norblad,* 78 Or. 33, 151 P. 962 (1915). In the instant case, the original hourly-rate fee contract resulted.

After the attorney-client relationship was born, the position of the Davises and Horn did not change. The parties modified the attorney fee contract with "mutual consent." "Mutual consent" means that a meeting of the minds of the parties existed and that the agreement in its written form expressed what was really intended by the parties. Indeed, the Davises had requested at the inception of the relationship that Horn take the case on a contingent fee basis. C. R. Davis was an above average intelligent person in the business field, one who understood the negotiations regarding the contingency fee. He had dealt with many lawyers over the years and was aware of and understood the terms of the contract. The Davises and Horn were each in position to negotiate a fee arrangement in good faith, to present and discuss proposals for the purpose of persuading or being persuaded by logic and reason. In fact, the Davises and present appellate lawyers entered into a contingency fee-hourly rate arrangement dependent upon the outcome of this appeal.

The Davises did not need independent advice. They knew every circumstance affecting the contingency fee arrangement. They knew the nature and the amount of the attorney fee. They were intelligent men able to comprehend the nature, quality and consequences of the contract. There was nothing for Horn to disclose. The Davises were competent contracting parties

who knew and understood the fee arrangement and all the circumstances surrounding it. The Davises stood in no different relationship with Horn than they would with any other party. Horn did not exercise undue influence, mislead the Davises or practice deceit. He negotiated the contract fairly with his cards face up on the table. *Hansel, supra,* says:

> . . . Even after the confidential relation is established the authorities agree that, if all the facts were known to the client, and he was fully advised of the situation, if no attempt was made to mislead or deceive him to his hurt, *and if he knowingly and understandingly entered into the agreement, it is as binding upon attorney and client as it is upon any other individuals competent to contract.* . . . [Emphasis added.] [151 P. 965.]

The Davises say: (1) Horn failed to disclose that he would have represented the Davises on appeal under virtually any fee arrangement and (2) that in becoming a substantial claimant against the judgment, Horn would be placed in an inevitable conflict with the Davises in settlement negotiations with creditors. This matter is foreign to this appeal and unrelated to the contingency fee arrangement.

Nevertheless, to argue that C. R. Davis was ignorant of these facts, facts essentially immaterial in the formation of the contract, is to reduce his intelligence to a state of incompetency. C. R. Davis knew every available alternative fee arrangement and did not suggest or request any other type of payment for services rendered in the appeal. With reference to any "inevitable conflict with the Davises in settlement negotiations," C. R. Davis was as knowledgeable as Horn.

The parties were dealing at "arms length."

We are not involved with a transaction between attorney and client in which an attorney acquires property from a client. In this situation, the attorney must show that he made a full and frank disclosure of all relevant information that he had and that the client had independent advice. Such contracts will be closely scrutinized by the courts. When a client challenges the fairness of such contract, the attorney has the burden of showing not only that he used no undue influence but that in every particular he acted honestly and in good faith. *Van Orman v. Nelson,* 78 N.M. 11, 427 P.2d 896 (1967).

■ In independent commercial transactions between attorney and client, we strongly emphasize that an attorney owes a high degree of fidelity, complete unselfishness and inflexible loyalty to the interest of his client. This duty stems from human fraility when confronted with conflicting interests, evidenced by the centuries-old scriptural passage: "No man can serve two masters." We emphasize that this duty is something stricter than the morals of the marketplace. There is no shadowy borderline or twilight zone. Only by this uncompromising rigidity has the rule of undivided loyalty been maintained. As a result, the "arm's length rule" applicable in ordinary business transactions is totally inapplicable in business dealings between attorney and client.

■ But we must not say that the fiduciary rule is applicable to a fee contract absent the requirements of trust, confidence, and a duty of disclosure.

■ Furthermore, in New Mexico, a standardized, unambiguous contingency fee contract is not subject to alteration or amendment by a court. In any event, there should not be trial court contract fee fixing. The amount of the contract fee would vary with every judge. It is the function of the court to enforce the contract as made. Where the intent of the parties is to pay an attorney one-third of all money and property recovered by the client, judgment must be entered for the attorney. *In Re Will of Carson,* 87 N.M. 43, 529 P.2d 269 (1974). This rule stands unchallenged in this appeal. In *Walters v. Hastings,* 84 N.M. 101, 500 P.2d 186 (1972), a contingency fee contract was interpreted favorably to protect the lawyer. A client claimed justification for discharge of the lawyer to avoid pay-

ment of a fee and the court said that to prevail the burden was on the client to prove some shortcomings in the attorney's professional activities by testimony of a lawyer. The court quoted the following with approval from the case of *Dolph v. Speckart,* 94 Or. 550, 186 P. 32 (1920):

> ". . . Where one employs an attorney and makes an express valid contract, stipulating for the compensation which the attorney is to receive for his services, such contract is generally speaking, conclusive as to an amount of such compensation. . . ." [84 N.M. at 108.]

We hold that a contingency fee arrangement of 33⅓% of recovery is not excessively unreasonable or unconscionable in taking an appeal when the parties deal at arm's length, the risk is great, the fee arrangement is clear and unambiguous and supported by expert testimony that the percentage is reasonable.

We agree with the Davises that the rule stated in *Randolph v. Schuyler,* 284 N.C. 496, 201 S.E.2d 833, 837 (1974), is generally accepted:

> . . . The generally accepted view appears to be that a contract made between an attorney and his client, during the existence of the relationship, concerning the fee to be charged for the attorney's services, will be upheld if, but only if, it is shown to be reasonable and to have been fairly and freely made, with full knowledge by the client of its effect and of all the material circumstances relating to the reasonableness of the fee. The burden of proof is upon the attorney to show the reasonableness and the fairness of the contract, not upon the client to show the contrary. . . .

See, Annot., *Validity and effect of contract for attorneys compensation made after inception of attorney-client relationship,* 13 A.L.R.3d 701 (1967).

This rule applies to contingency or hourly-rate fees charged a client. In the instant case, the burden imposed on Horn was successfully lifted. The *Randolph* Rule does not relate reasonableness to the reasonable value of work to be performed on appeal by the attorney.

The Davises rely on *Budagher v. Sunnyland Enterprises, Inc.,* 90 N.M. 365, 563 P.2d 1158 (1977), Justice Sosa, dissenting. A real estate mortgage note provided for payment "with 10 per cent (10%) additional on amount unpaid should this note be placed in the hands of an attorney for collection." The court held that one who seeks a personal judgment is only entitled to collect, in addition, a reasonable attorney fee based upon the evidence presented. The court said:

> . . . Since such a clause is generally considered an indemnification provision, the payee is only entitled to a reasonable fee for the legal services rendered. [90 N.M. at 367.]

A mortgage note contract has no indicia that resembles an attorney-client contingency fee contract.

The Davises seek to change the law of New Mexico. They seek the establishment of a rule of law that if the amount of the fee arrangement is so disproportionate as to any reasonable value of the work to be compensated for, the fee is unreasonably excessive. *Gair v. Peck,* 6 N.Y.2d 97, 188 N.Y.S.2d 491, 160 N.E.2d 43, 77 A.L.R.2d 390 (1959) and *Anderson v. Kenelly,* 37 Colo. App. 217, 547 P.2d 260 (1976).

Gair held that the appellate division had the power to adopt a rule limiting contingent fees in claims and actions for personal injury and wrongful death ranging from 50 to 25 percent, depending upon the amount received, and further providing that the court would make special allowance for larger compensation in cases involving extraordinary circumstances. In the course of its opinion, the court said:

> . . . Contingent fees may be disallowed as between attorney and client in spite of contingent fee retainer agreements, where the amount becomes large enough to be out of all proportion to the value of the professional services rendered. . . . [188 N.Y.S.2d at 497, 160 N.E.2d at 48.]

This statement may be applicable under the New York Rule. The New York Rule

adopted did not fix fees but rather served to allocate the burden of proof. Any fee below the stated limits is presumed reasonable without the necessity of proof, whereas fees in excess of the limits must be justified by the attorney. *Gair's* isolated statement bears no relationship to the law of New Mexico.

In *Anderson,* the trial court exercised its inherent power to reduce an attorney fee where the contingency fee arrangement under the circumstances was obviously unfair. The work of the attorney required little skill or effort in obtaining the correct date of enlistment of an insured in the military service. This information resolved the dispute over payment of proceeds under an employee's group life policy affording coverage for accidental death. We have no quarrel with *Anderson,* but to compare it with the instant case, is to compare "lightning bug with lightning." We do think it important to state the deep respect of the Colorado court for the contingency fee contract. It said:

> Defendant argues at length that if we uphold the action of the trial court, we are sounding the death-knell of contingent fee arrangements between attorney and clients. We disagree. While the uninformed frequently cast aspersions on contingent fee contracts, nevertheless, such fee arrangements are frequently the only way in which people of modest means may secure legal representation in certain types of litigation. *Often it is the best fee arrangement for any litigant where recovery is truly in doubt. See Code of Professional Responsibility* EC2–20. Rather than destroying the contingent fee contract, curtailing abuses thereof, as the trial court did here, will serve to answer critics and will help assure its continued use in proper cases to the benefit of litigants, the bar, and the ends of justice. [Emphasis added.] [547 P.2d at 261.]

See, Rules 2–106 and 5–103 of the New Mexico Code of Professional Responsibility.

Extensive authority has been cited which hold that the review by an appellate court is an independent review; that appellate judges have expert knowledge as to the reasonable value of legal services. *Herro, McAndrews & Porter, S.C. v. Gerhart,* 62 Wis.2d 179, 214 N.W.2d 401 (1974). This is an exception to the general rule related to our respect for the trial court's findings. Even if we adopted this rule, we would unhesitatingly say that under the facts and circumstances of this case, the contingency fee contract was fair and reasonable.

We hold that the contingency fee arrangement was not unconscionable or unreasonable.

The Davises take the position that the conclusion of the district court that the contingent fee arrangement was not procured through fraud is erroneous; that it is contrary to law and unsupported by substantial evidence.

We have examined the conclusions of the district court and Davises' Brief-In-Chief. We find no such conclusion reached, and none have been referred to. The only finding pertinent to this issue is finding No. 9:

> 9. At no time did Mr. Horn agree to "kickback" or "refund" any protion [sic] of his fees to his clients.

This finding was not challenged. Fraud is not an issue in this appeal. Furthermore, any conclusion reached in the decision of the trial court must find support in the findings of fact. If such a conclusion were made, it is so supported.

The Davises contend that: "The District Court was clearly in error in refusing to find that Horn failed to disclose material facts and in refusing to rule that Horn procured the contingent fee agreement through fraud." We do note that the Davises requested a finding and conclusion on this subject matter. The failure to make the finding is a finding against the Davises. We have heretofore held that the "disclosures" not made were not relevant or material to reasonableness of the contingency fee contract. The same ruling is made on the subject of fraud.

The contingent fee arrangement was not procured through fraud.

The Davises claim that the gross amount of the recovery was subject to a set-off in favor of Citizens Bank.

The trial court found and concluded:

> 14. Citizens Bank obtained judgment and attorney fees in this action against C. R. Davis and Alice Davis in the sum of $63,396.04, and said amount is entitled to be set-off against the Davises' judgment.
>
> * * * * * *
>
> 3. The contingency contract entitled Horn to a one-third fee upon the gross amount of the recovery, and the amount of one-third of the gross recovery representing Horn's attorney fee is not subject to the set-off in favor of Citizens Bank.

The Davises claim that Horn's fee should be limited to one-third of the net judgment; that the conclusion of the trial court was contrary to law.

The contingent fee arrangement granted to Horn a fee of "Thirty-Three and One-Third Percent (33⅓%) of any settlement, *verdict,* or recovery." [Emphasis added.]

The jury returned verdicts totalling $349,998.04. This was the "gross amount" of the recovery.

The Davises argue that the set-off in favor of Citizens Bank was known to the parties at the time the contingent fee agreement was executed. Therefore, the language of the contract should be construed to mean a one-third contingency on *net* recovery. The logic and reason of this argument is faulty. With knowledge of the set-off, the parties agreed with no misunderstanding that *the verdict of the jury* was a basis for fixing the attorney fee. "Recovery" was an alternative, and "net recovery" a useless appendage raised for the first time on appeal. One-third of "any verdict" is unambiguous. We need not refer to those cases cited which construe ambiguous provisions in a contract in favor of the client.

"A contingent fee contract is based on the recovery, not the amount of the verdict (unless it specifically so provides)." *Cox v. Cooper,* 510 S.W.2d 530, 538 (Ky.1974). In Pennsylvania, contingency fee agreements are subject to supervision by the courts. In exercising control over legal fees, the amount of the contingent fee must be computed upon the assessment of actual recovery and not on the amount of the verdict rendered. *National Bank of Topton,* 190 Pa.Super. 501, 154 A.2d 252 (1959); *Almi, Inc. v. Dick Corp.,* 375 A.2d 1343 (Pa.1977). The origin of the Pennsylvania rule came from a rule stated in 6 C.J. *Attorney and Client,* § 322:

> The percentage coming to the attorney is usually reckoned on the amount actually recovered, and not the amount of the judgment rendered, *unless the language of the contract is such as to justify such an interpretation.* . . . [Emphasis added.]

See *Diggs v. Taylor & Co.,* 329 Pa. 385, 198 A. 51 (1938), and *Wooldridge v. Bradbury,* 185 Ky. 587, 215 S.W. 406 (1919) cited therein. Of course, if the percentage is based on the amount actually recovered, it means net recovery, money actually received. It does not mean "gross recovery." Pennsylvania has translated "net recovery" to mean the "net amount of the verdict" rendered. A "verdict" rendered does not have the same connotation as "judgment" rendered. It contemplates a larger sum than a judgment rendered with a set-off. Had it been the intention of the parties to limit Horn to 33⅓% of the "net recovery" or "net amount of the verdict" rendered, it was a simple matter to so express it. Placing ourselves as nearly as possible in the position they occupied when the contract was made for the purpose of ascertaining what they meant by what they said, we are disposed to think the parties intended that 33⅓% of the gross amount recovered from the Citizens Bank should be paid to Horn. This was the construction placed upon the contract, and we hold it was right. *Funk v. Mohr,* 185 Ill. 395, 57 N.E. 2 (1900).

The attorney who tried and appealed this case is now a member of this Court. To dispel any misgivings about the result arrived at, we took a route independent of the Answer Brief filed. It is not the intention of this opinion to deflate the inexorable

duties of an attorney or the rights of a client. We did not view the Davises' position with antagonistic eyes. "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 (1968). Our duty is to respect the views of a trial judge who looked with favor upon the success of a lawyer. We should not look askance at the work of a lawyer because he is a member of our profession. The function of this Court is to see that justice is done according to law and to give authoritative expression to the developing body of the law in order to elevate the dignity of the judiciary and the legal profession in the public eye. This we believe we have done.

Affirmed.

IT IS SO ORDERED.

HERNANDEZ, J., concurring in result.

ANDREWS, J., dissenting.

ANDREWS, Judge (dissenting).

I dissent.

The trial court has concluded (1) that "[t]he contingency fee contract between the Davises and Horn is reasonable and valid;" (2) that "[t]he contingency contract entitled Horn to a one-third fee upon the gross amount of the recovery, and the amount of one-third of the gross recovery representing Horn's attorney fee is not subject to the set-off in favor of Citizen's Bank;" (3) that "[t]he attorney's charging lien is superior to and has first priority over all other claimants, relating back and taking effect from the time of commencement of Horn's services;" and (4) that "Horn shall recover one-third of $349,998.04 plus interest earned thereon as his attorney's fees herein," or $116,666.01. I disagree.

Budagher v. Sunnyland Enterprises, Inc., 90 N.M. 365, 563 P.2d 1158 (1977), interpreting a mortgage note contract, establishes that, in New Mexico, when the reasonableness of attorneys' fees is challenged, it is incumbent upon the court to determine the *value of the services rendered.* In this case, the trial court found that the contingency fee agreement was not unreasonable nor unconscionable but "was a reasonable fee agreement under the circumstances." Apparently this finding refers to the fact that, since the Davises had not complied with the fee arrangement for the trial and had not paid hourly billings on a monthly basis, where the original fee agreement did not contemplate an appeal, the modification of the agreement after the judgment created unique "circumstances" justifying this arrangement. I agree that a contract for attorneys' compensation made during the existence of the attorney-client relationship is unique; but in my opinion such uniqueness qualifies the transaction for closer scrutiny by the courts, and is valid and enforceable only if fair and equitable. *See* Anno. "Validity and Effect of Contract for Attorney's Compensation Made After Inception of Attorney-client Relationship." 13 A.L.R.3d 701.

In the instant case the trial court found that the fee was reasonable. The issue on appeal, then, is whether such finding is supported by substantial evidence. This issue alone should be discussed,[1] with a decision as to whether the standard in *Randolph v. Schuyler,* 284 N.C. 496, 201 S.E.2d 833 (1974) should be followed. To flatly denounce the "Randolph" rule and announce that reasonableness and the reasonable value of work to to be performed are distinguishable concepts is to avoid the issue presented by this appeal, and is contrary to *Budagher.* Following the "Randolph" rule, my review of this evidence leads me to conclude that the attorney did not meet his burden in showing that the attorney fee is unreasonably excessive.

The position of the Davises and Horn *did* change "[a]fter the attorney client relationship was born," and the Davises do stand in a different relationship with their attorney

1. We should not as appellants suggest, make an independent review of the reasonableness of the fee.

than they do with any other party. This contingent fee contract was entered into *after* the trial, while the client, an appellee, was deeply indebted to the lawyer. This fact presents an element of coercion which colors the entire transaction. The trial court found that in "his defense of the judgment on appeal, Horn filed all necessary pleadings including a thirty-nine page brief in the Court of Appeals." This finding alone suggests an upper limit on the reasonable value of services rendered, which, in my opinion, does not support an award of $116,000 in attorneys' fees.

I agree that there is substantial evidence in the record to suggest that the chances for a successful defense of the judgment on appeal were small, and that this is a factor which is to be considered in determining whether the fees charged were reasonable. *Schafer v. Knuth,* 309 Mich. 133, 14 N.W.2d 809 (1933), *Oxborough v. S. T. Martin,* 169 Minn. 72, 201 N.W. 809 (1926). However, the probability of success in any legal action is not subject to precise quantification; and since the attorney bears the burden of showing that the fee is reasonable, such uncertainty must be resolved in favor of the client. An award of fees which is many times greater than the reasonable value of the services performed cannot be supported by any subjective evaluation of the case as being a "long shot" or a "dog."

As to the set-off issue, *Forrest Currell Lumber Company v. Thomas,* 82 N.M. 789, 487 P.2d 491 (1971), contains the basic rule for an attorney's charging lien and its priority:

> The lien of an attorney for services rendered in an action *relates back to, and takes effect from, the time of the commencement of the services,* when it attaches to a judgment, it is superior to the claim of a creditor in whose favor execution has been levied, or to a subsequent attachement, garnishment, or trustee process, or other liens on the money or property involved, *subsequent in point of time.* [Quoting *Hannah Paint Mfg. Co. v. Rodey, Dickason, Sloan, Akin & Robb,* 298 F.2d 371 (10th Cir. 1962).] [Emphasis added.]

Applying the rule of the *Thomas* case here, we have a situation in which the original verdict and the bank's set-off are prior in time to the fee agreement on which the attorney is suing. If the charging lien relates back in time to the commencement of the services, this lien goes back only to the time of the appeal since only the appellant services are covered by the agreement under which Horn is seeking his charging lien. Therefore, the set-off can be said to have attached to the judgment prior to the origination of any claim by the attorney and is therefore superior to it. *See Fidelity National Bank v. Great American Insurance Co.,* No. 76–2125–26 (10th Cir. June 19, 1978).

Whether the test is one of reasonableness or reasonable value of services rendered, this contract should fail. As stated by the Texas Supreme Court in *Archer v. Griffith,* 390 S.W.2d 735, 739 (Tex.1964):

> The relation between an attorney and his client is highly fiduciary in nature, and their dealings with each other are subject to the same scrutiny, intendments and imputations as a transaction between an ordinary trustee and his cestui que trust. "The burden of establishing its perfect fairness, adequacy, and equity, is thrown upon the attorney, upon the general rule, that he who bargains in a matter of advantage with a person, placing a confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying equally to all persons standing in confidential relations with each other." Story, Equity Jurisprudence, 7th ed. 1857, § 311.

601 P.2d 66

Beneranda JARAMILLO, Plaintiff-Appellant,

v.

Ann Wilcox HOOD, Defendant-Appellee.

No. 12485.

Supreme Court of New Mexico.

Sept. 5, 1979.

Rehearing Denied Sept. 24, 1979.

Toulouse, Krehbiel & DeLayo, Narciso Garcia, Jr., Albuquerque, for plaintiff-appellant.

Shaffer, Butt, Jones, Thornton & Dines, Jim Dines, Albuquerque, for defendant-appellee.

OPINION

FEDERICI, Justice.

This case was certified to the Supreme Court pursuant to § 34–5–14(C)(2), N.M.S.A.1978 since it involved an issue of substantial public interest and the panel of the Court of Appeals to which the case had been assigned could not agree on a result. Three proposed opinions were submitted for review, adoption or modification. We adopt the result reached in the dissenting opinion written by Judge Sutin.

On May 20, 1977, plaintiff (appellant) sued defendant (appellee) for legal malpractice alleging that appellee was negligent in drafting a will for decedent as well as in seeing to its proper execution. Appellee moved to dismiss with prejudice and to strike allegations of the complaint. The trial court entered summary judgment for appellee on the ground that the action was barred by the applicable statute of limitations, § 37–1–4, N.M.S.A.1978. We affirm.

The following facts are undisputed. On April 28, 1967, appellee was employed by decedent to prepare a will in which appellant was named as a beneficiary. Appellant was also named executrix of decedent's estate in the will. Decedent died on October 6, 1967, and the will was admitted to probate on November 22, 1967. In the probate proceeding, another attorney entered his appearance, as co-counsel with appellee, on behalf of appellant on January 22, 1968. On March 26, 1969, appellee withdrew as counsel for appellant and another law firm entered its appearance as counsel for appellant. The order admitting the will to probate was set aside *nunc pro tunc* on April 14, 1969. On August 2, 1971, still another law firm entered an appearance on behalf of appellant. The will was denied probate on May 28, 1974.

Appellant filed her complaint in the malpractice action on May 20, 1977. In entering summary judgment for appellee the court stated: "The matters set forth in the complaint were ascertainable and discoverable and should have been ascertained and discovered prior to May 19, 1973, therefore the statute of limitations had run prior to filing of the complaint."

Appellant argues on appeal that her cause of action did not accrue until the will was denied probate on May 28, 1974, and therefore the four-year statute of limitations under § 37–1–4 had not run when she filed her action in May 1977. Appellee contends that the matters set forth in appellant's complaint were ascertainable and discoverable and therefore appellant's cause of action accrued more than four years prior to its filing.

The question of when a cause of action accrues against an attorney for malpractice is one of first impression in this jurisdiction. For cases discussing the question as to other professions *see Spurlin v. Paul Brown Agency, Inc.*, 80 N.M. 306, 454 P.2d 963 (1969); *Chisholm v. Scott*, 86 N.M. 707, 526 P.2d 1300 (Ct.App.1974).

The authorities from other jurisdictions and statements by authors and commentators sustain the rule that the cause of action accrues when actual loss or damage results; that is, the occurrence of damage or loss marks the beginning of the period when the statute of limitations begins to run. *Budd v. Nixen*, 6 Cal.3d 195, 98 Cal.Rptr. 849, 491 P.2d 433 (1971); W. Prosser, Law of Torts, § 30 at 143 (4th ed. 1971); *Developments in the Law—Statutes of Limitations*, 63 Harv. L.Rev. 1177, 1200–01 (1950).

There is also authority for the rule or damage results, the statute of limitations does not begin to run until the matters complained of are ascertainable and discoverable by the injured persons. *See Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal.3d 176, 98 Cal.Rptr. 837, 491 P.2d 421 (1971).

The harm or damage in this case arose at the time the testatrix died. However, the cause of action did not accrue until the harm or damage was ascertainable or discoverable. In this case appellant was in a position to ascertain or discover the harm or damage to her as a result of the alleged defect in the execution of the decedent's will each time she changed attorneys, and also at the time the court set aside the order admitting the will to probate. On January 22, 1968, an attorney entered an appearance as co-counsel, with appellee, for appellant. On March 26, 1969, appellant again changed attorneys in the probate proceeding. On April 14, 1969, the order admitting the will to probate was set aside. On August 2, 1971, another law firm entered an appearance in the probate proceeding.

If appellant had a cause of action against appellee it was ascertainable or discoverable more than four years before she filed her complaint in this action. Therefore, the four year statute of limitations provided for in § 37–1–4 had elapsed and appellant's complaint was properly dismissed.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

SOSA, C. J., and FELTER, J., concur.

EASLEY and PAYNE, JJ., dissenting.

601 P.2d 67

STATE of New Mexico, Plaintiff-Appellant,

v.

Willie James STEVENS, Defendant-Appellee.

No. 3848.

Court of Appeals of New Mexico.

April 17, 1979.

Rehearing Denied April 27, 1979.

Jeff Bingaman, Atty. Gen., Charlotte Hetherington Roosen, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

William D. Teel, Albuquerque, for defendant-appellee.

OPINION

WOOD, Chief Judge.

In an earlier case against the defendant, the trial court suppressed an oral statement made by defendant to a detective. The indictment involving this earlier charge was quashed; we do not know why. The case was again presented to the grand jury, which again indicted defendant. In the trial court, the parties stipulated that the prosecutor's presentation to the grand jury, which resulted in the last indictment, included testimony concerning the statement which had been suppressed in the earlier case. The trial court granted the motion to quash the last indictment. The State appeals. We do not rule on defendant's motion to strike the State's argument, in its brief, concerning the propriety of the suppression order in the earlier case. Nor do we rule on the propriety of suppressing the statement because there is no ruling in this case suppressing the statement. N.M.Crim. App. 308. The issue before the trial court, and in this appeal is the propriety of quashing the indictment because the prosecutor presented testimony concerning the statement, to the grand jury, after the trial court had suppressed the statement.

The trial court was of the view that presenting the suppressed statement to the grand jury violated § 31–6–11(A), N.M.S.A. 1978. This section states that "[a]ll evidence [before the grand jury] must be such as would be legally admissible upon trial."

Counsel did not call the trial court's attention to *State v. Chance,* 29 N.M. 34, 221 P. 183, 31 A.L.R. 1466 (1923), or the several decisions applying *Chance. State v. Chance,* supra, states that a grand jury

> . . . is a judicial tribunal with inquisitorial powers, and, unless there is some clear statutory authority to do so, we think the courts are without power to review its action to determine whether or not it had sufficient or insufficient, legal or illegal, competent or incompetent evidence upon which to return an indictment. . . . We think the statutes referred to, governing the kind, character, and degree of evidence which should be produced before a grand jury in order to warrant the returning of an indictment, are directory and are for the guidance of the grand jury. . . . [W]e think the findings of such grand jury, when made by and through an indictment, duly returned into court, and regular upon its face, are, with respect to the kind and degree of evidence upon which it was returned, conclusive, and that the courts are without power or jurisdiction to inquire into the subject and review the testimony submitted to the grand jury to determine whether or not the required kind or degree of evidence was submitted.

See *State v. Ergenbright,* 84 N.M. 662, 506 P.2d 1209 (1973); *State v. Herrera,* 90 N.M. 306, 563 P.2d 100 (Ct.App.1977); *State v. McGill,* 89 N.M. 631, 556 P.2d 39 (Ct.App. 1976); *State v. Elam,* 86 N.M. 595, 526 P.2d 189 (Ct.App.1974); *State v. Paul,* 82 N.M.

619, 485 P.2d 375 (Ct.App.1971). The decision in *State v. Chance,* supra, was applied to the current wording of § 31–6–11(A), supra, in *State v. Paul,* supra. There is no due process claim in this case similar to the claim made in *State v. Reese,* 91 N.M. 76, 570 P.2d 614 (Ct.App.1977) or *State v. McGill,* supra.

Defendant contends the trial court did not proceed contrary to *State v. Chance,* supra, because the trial court did not review the evidence presented to the grand jury. Because the parties stipulated to the evidence that was presented to the grand jury, defendant contends the trial court proceeded properly. This argument is casuistic. The trial court quashed the indictment on the basis that improper evidence was presented to the grand jury. Whether the trial court was informed of the evidence by reviewing the grand jury transcript or by stipulation as to the evidence presented, the trial court necessarily reviewed the propriety of that evidence. It had no authority to do so under *State v. Chance,* supra.

Defendant asserts other decisions involving grand jury proceedings have modified *State v. Chance,* supra. The decisions relied on are *Baird v. State,* 90 N.M. 667, 568 P.2d 193 (1977), *Davis v. Traub,* 90 N.M. 498, 565 P.2d 1015 (1977), and *State v. Hill,* 88 N.M. 216, 539 P.2d 236 (Ct.App.1975). None of these decisions involved evidence presented to the grand jury. These decisions did not modify *State v. Chance,* supra.

The order quashing the indictment is reversed. The cause is remanded with instructions to reinstate the indictment.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

601 P.2d 69

STATE of New Mexico, Plaintiff-Appellee,

v.

Manuel MONTANO, Defendant-Appellant.

Nos. 3809, 3810.

Court of Appeals of New Mexico.

Aug. 14, 1979.

John B. Bigelow, Chief Public Defender, Santa Fe, Dennis Manzanares, Asst. Public Defender, Mark Shapiro, Asst. Appellate Defender, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Sammy Lawrence Pacheco, Janice M. Ahern, James F. Blackmer, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

In No. 3810, defendant was convicted of trafficking in heroin. In No. 3809, defendant was convicted of a variety of crimes. The two appeals are hereby consolidated. Issues listed in the docketing statements, but not briefed, were abandoned. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct.App. 1977). One of the five issues briefed is an attack on the legal sufficiency of U.J.I. Crim. 16.00 which states the elements of larceny. This Court has no authority to review instructions approved by the Supreme Court. *State v. King*, 90 N.M. 377, 563 P.2d 1170 (Ct.App.1977); *State v. Scott*, 90 N.M. 256, 561 P.2d 1349 (Ct.App.1977). The four issues discussed involve: (1) venue; (2) competency; (3) severance; and (4) the meaning of "passing title" in § 66–3–505, N.M.S.A.1978.

Venue

In both cases, which were tried separately, defendant filed a motion that venue be changed to a county other than Bernalillo. The motions were supported by affidavit of counsel. The affidavit asserted that defendant could not get a fair trial in either Bernalillo or Sante Fe Counties because of "public excitement and/or local prejudices . . . ." The asserted inability to obtain a fair trial was based on stories in newspapers and on television shows which referred to several of defendant's crimes, the "storefront" operation in No. 3809, defendant "walking away" from a medical center, and defendant being featured as the "Crimestopper of the Week."

The motion for a change of venue was denied in both cases; defendant asserts this was error in both cases. The venue question is not properly before us in No. 3809; no venue issue was raised in the docketing statement filed September 27, 1978. N.M. Crim.App. 205. Defendant obtained several extensions of time in which to file the brief-in-chief. Not until March 12, 1979, on the day the brief-in-chief was filed, did defendant seek permission to supplement the docketing statement in No. 3809 in order to add the venue question. The motion was properly denied because untimely. *State v. Jacobs*, 91 N.M. 445, 575 P.2d 954 (Ct.App. 1978).

However, on the merits, the trial court did not err in denying the change of venue motions. Defendant asserts that a change of venue was mandatory because of an absence of an evidentiary hearing on the motions. Section 38–3–3(A), N.M.S.A.1978; *State v. Turner*, 90 N.M. 79, 559 P.2d 1206 (Ct.App.1976). This contention disregards what transpired. The trial court denied the motion "at this point," stated that it was necessary to inquire of the prospective jurors concerning their knowledge of the publicity and determine whether "as a result of that exposure," the defendant could get a fair trial. The trial court reserved ruling on the motions until "the presentation of specific questions to the jury panel."

The answers of prospective jurors to questions on voir dire was evidence to be considered in deciding the venue motions. *State v. Sierra*, 90 N.M. 680, 568 P.2d 206 (Ct.App.1977). This answer evidence moved the venue question out of the mandatory provisions of § 38–3–3(A), supra, and into the discretionary provisions of § 38–3–5, N.M.S.A.1978. *State v. Lunn*, 88 N.M. 64, 537 P.2d 672 (Ct.App.1975). The answer

evidence was such that there was no abuse of discretion in denying the motions to change venue. *State v. Sierra*, supra.

Competency

Defendant asserts the trial court erred in its application of *State v. Noble*, 90 N.M. 360, 563 P.2d 1153 (1977) in deciding his competency. The competency issue arose prior to the amendment of Rule of Crim.Proc. 35(b), effective July 1, 1978; the amended rule is not applicable to this case.

The competency issue applies to three stages of the proceedings in No. 3809—pretrial, during trial and sentencing. The competency issue applies to two stages of the proceedings in No. 3810—pretrial and sentencing.

A competency hearing was held in December, 1977 after which the trial court ruled there was no reasonable doubt that defendant was competent to be tried. There is no claim that this ruling was erroneous. However, the trial court ordered that defendant "continue to be seen" and stated that a further hearing would be held.

Subsequently, defendant made an apparent suicide attempt while being held in the county jail. He was taken to a medical center, from which he escaped. The second pretrial competency hearing was delayed until defendant was captured.

The second pretrial competency hearing was held on February 8 and 9, 1978. At that hearing, there was evidence that defendant was competent, that he was a malingerer in that he made a conscious effort to produce the symptoms of schizophrenia and that the apparent suicide attempt in the county jail was part of defendant's plan to be taken for medical treatment in order to escape. However, there was conflicting evidence. Defendant relies on this conflicting evidence.

State v. Noble, supra, states that "the Court may decide that there is no reasonable doubt as to the defendant's competency to stand trial, in which case there is no question for a jury to decide. Such a determination is only subject to review for abuse of discretion."

Defendant claims that because the evidence of competency was conflicting, the trial court could not properly rule there was no reasonable doubt and, thus, the ruling was an abuse of discretion. This argument overlooks *State v. Lopez*, 91 N.M. 779, 581 P.2d 872 (1978). There was conflicting evidence in *Lopez*, supra; a psychiatrist testified that Lopez was a borderline competent and there was lay testimony of incompetency. This Court held the failure to submit competency to the jury was an abuse of discretion. The Supreme Court reversed, pointing out: 1. the appellate court only reviews the evidence to determine whether the trial court's "no reasonable doubt" ruling was an abuse of discretion; 2. that the appellate court cannot substitute its judgment for that of the trial court; and 3. the evidence is to be reviewed "in the light most favorable to the trial court's decision . . . ."

In this case the conflicting evidence could be properly viewed by the trial court as weak. The expert testimony concerning incompetency was that defendant met two of the three tests for competency stated in U.J.I.Crim. 41.01, but did not meet the third test, that of being able to assist in his own defense. This incompetency was because of a latent type schizophrenia. The latency was "sometimes referred to . . . as a borderline condition" brought on by a certain kind of stress. There was evidence that the defendant's stress involved having to go to court, having to be tried and being in jail. According to this expert, defendant's "anxiety rests on the possible outcome of going to the penitentiary." " 'To the extent that he can, he [defendant] will attempt to remain in a "safe" environment.' " The expert opined that defendant "was becoming competent," but that his condition would worsen if jailed for any length of time.

From the above evidence, the expert evidence of competency and malingering, and the evidence that defendant cut himself while in jail in order to be transferred to a medical facility from which he escaped, the trial court concluded there was no reasona-

ble doubt as to competency. Applying *State v. Lopez*, supra, by viewing the evidence in the light most favorable to the trial court's decision, we cannot hold that the trial court abused its discretion in ruling there was no reasonable doubt as to competency at the second pretrial hearing.

Trial in No. 3810 was on February 20 and 21, 1978. No competency issue arose during this trial. Trial in No. 3809 began on February 21, 1978 and concluded on March 1, 1978. On February 27, 1978, defendant slashed his wrists in the courtroom. The trial court ordered another evaluation of defendant before proceeding further with the trial. An oral evaluation was received and the trial continued on February 28, 1978. Based on the evidence presented at a subsequent hearing, the trial court ruled there was no reasonable doubt as to defendant's competency on February 27, 1978. Defendant does not claim the trial court abused its discretion by so ruling.

No issue is raised as to defendant's competency to be sentenced. See *State v. Sena*, 92 N.M. 676, 594 P.2d 336 (Ct.App.1979).

Severance

This issue concerns the 65-count indictment in No. 3809. Several government agencies operated an undercover project in Albuquerque. This "storefront" operation purchased stolen property. Defendant was a regular customer from March 3, 1977 through July 7, 1977. A large number of defendant's transactions were either taped or videotaped. There is no claim on appeal that the evidence was insufficient to sustain the resulting convictions.

There was a pattern to most of the counts. For most of the victims there was a charge of burglary, either vehicular or residential, a charge of larceny based on items taken in the burglary, and a charge of disposing of stolen property which almost always involved the storefront operation. The 65-count indictment involved 23 separate victims. The prosecution was unable to locate 5 of the victims; this resulted in a nolle prosequi of 14 counts. Thus the severance issue involves 18 separate victims.

The indictment was filed September 29, 1977. Defendant's motion for severance was filed November 23, 1977 and was heard on February 10, 1978. At the time of the hearing, the trial court was concerned that if severance were granted, the six-month provision for commencing trial would be violated. See Rule of Crim.Proc. 37(b), for that, and other reasons, the motion for severance was denied. Defendant asserts this was error; we disagree.

No claim was made that the 65 counts were improperly joined. Rule of Crim.Proc. 10. The motion to sever was based on Rule of Crim.Proc. 34(a), which authorizes severance, in the discretion of the trial court, upon a showing of prejudice. *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. Schifani*, 92 N.M. 127, 584 P.2d 174 (Ct.App.1978).

The motion, as filed, sought severance of all counts. Defendant did not seek an "all count" severance at the hearing; rather, defendant asked that the 65 counts be severed into three trials on the basis of the months in which the offenses were committed. The reasons urged for severance, and our answers, follow:

(a) Defendant wished to testify as to some counts, but not as to others. This does not provide a basis for severance. *State v. Blakley*, 90 N.M. 744, 568 P.2d 270 (Ct.App.1977). In addition, this contention ignores the prosecutor's offer not to cross-examine defendant "as to anything he does not testify to."

(b) The motion to sever contended that defendant might be prejudiced through the admission of evidence which fails to meet the "other crimes" test. We understand this to be a claim that trial on all the counts would be prejudicial because, in proving a particular count, evidence would be admitted which, under Evidence Rule 404(b), would be inadmissible in connection with some other count. If this was the contention in the trial court, our answer is that, on appeal, no attempt has been made to demonstrate a violation of Evidence Rule

404(b). The appellate claim is that trial of all counts necessarily involves a violation of Evidence Rule 403 which requires a balancing of the probative value of evidence against the danger of unfair prejudice. See *State v. Day*, 91 N.M. 570, 577 P.2d 878 (Ct.App.1978). We answer this contention under paragraph (e), infra.

(c) Because of the number of counts "the jury is going to be confused and confounded as to what it is we're actually talking about." The record shows to the contrary. The evidence was presented on the basis of specified victims on specified dates. After the nolle prosequi, 51 counts remained. The trial court directed a verdict in defendant's favor as to one count. Fifty counts were submitted to the jury. There were 43 guilty verdicts and 7 non-guilty verdicts. As to two of the victims, defendant was convicted of the vehicular burglary involved, but acquitted of the related larceny and "disposing" charges. There was an acquittal of the disposing charge involving another victim, and an acquittal of the larceny and disposing charges involving still another victim. This record does not show that the jury was confused, but that it carefully applied the evidence to both the offense and victim. See *State v. Schifani*, supra, and cases therein cited.

(d) Because the trial lasted for seven trial days and because defendant slashed his wrists in the courtroom, during the trial, the argument is that there is "a very serious question about whether the strain had precipitated a psychosis. This is a very serious and unusual type of prejudice . . . ." We assume that defendant is contending that if severance had been granted, the trial would not have lasted so long and defendant would not have slashed his writs. A seven-day trial on 50 counts cannot be considered a long trial. The medical evidence is that the courtroom wrist slashing was "motivated by extreme fear of being convicted and sentenced to the Penitentiary." If any prejudice resulted from the wrist slashing, the prejudice was based on defendant's conduct and not on the lack of severance.

(e) Defendant contended in the trial court that the "very number" of counts being tried was prejudicial. It is this "very number" on which defendant bases his Evidence Rule 403 argument on appeal. The argument is that the number of counts demonstrates prejudice and requires severance. *State v. McGill*, 89 N.M. 631, 556 P.2d 39 (Ct.App.1976) rejected a similar argument, pointing out that evidence as to certain charges was admissible on other charges and that the acquittals on certain charges was an indication that the jury had followed the evidence as to the different charges. Of importance in *McGill*, supra, and in this case, is that severance was a discretionary ruling, and the appellate issue is abuse of discretion. The admissibility of items of evidence on more than one charge and the jury's verdicts are not the only factors to be considered. The strength or quality of the evidence is another factor, a circumstance to be considered. See *State v. Brewer*, 56 N.M. 226, 242 P.2d 996 (1952). The strength and quality of the evidence on the various counts convinces us that defendant was not prejudiced by the failure to sever the 50 counts submitted to the jury.

The Meaning of Passing Title

Section 66–3–505, supra, states:

> Any person who, with intent to procure or *pass title* to a vehicle or motor vehicle which he knows or has reason to believe has been stolen or unlawfully taken, receives, or transfers possession of the same from or to another . . . is guilty . . . ." (Our emphasis.)

Defendant was convicted of violating this statute. He does not challenge the sufficiency of the evidence which shows that defendant, knowing that a pickup was stolen, transferred possession of the pickup to a detective.

Nor does defendant challenge the sufficiency of the evidence to meet that part of the jury instruction which required proof that:

> At the time he transferred possession of the vehicle, the Defendant intended to permanently transfer the vehicle to another person[.]

Section 66–3–505, supra, refers to an "intent to . . . pass title . . . ." The jury instruction did not expressly refer to such an intent; the instruction required an "intent to permanently transfer." Defendant asserts the statutory requirement of intent to pass title was not met by an instruction which required an intent to permanently transfer. On this basis, defendant contends the jury was not instructed on the elements of the offense and his conviction of violating § 66–3–505, supra, must be reversed. We disagree.

Defendant asserts that the thrust of the prosecution's case "was that Mr. Montano had no title to pass." " . . . Mr. Montano gave no title or keys and did not even indicate the truck was his." "Because Mr. Montano's alleged activity posed no threat to the wheels of traffic in documents of title, it did not meet the statutory definition . . . ."

Defendant would give "title" a restricted meaning. As used in § 66–3–505, supra, "title" has a broad meaning which includes the transfer of whatever title the transferor possesses.

The essence of what is now compiled as § 66–3–505, supra, was enacted by Laws 1953, ch. 138, § 90. This 1953 law was a comprehensive statute relating to motor vehicles; it contained nine articles. Article III dealt with registration and certificates of title. Article IV dealt with transfers of title and included a provision for assigning title by endorsement upon the certificate of title. Section 90 was not a part of either Article III or IV; Section 90 was a part of Article IX, entitled "SPECIAL ANTI-THEFT LAWS." Section 90 was compiled as § 64–9–5, N.M.S.A.1953. Section 64–9–5, supra, was repealed by Laws 1978, ch. 35, § 554. Laws 1978, ch. 35, § 92 re-enacted § 64–9–5, supra, as § 64–9–5, supra, was worded after an amendment in 1975.

The legislative history shows that § 66–3–505, supra, is a part of the anti-theft provisions of the Motor Vehicle Code and that "title" in § 66–3–505, supra, is not limited to the "certificate of title" or "transfer of title" referred to in other provisions of the code. Accordingly, we reject defendant's claim that § 66–3–505, supra, "was primarily concerned with establishing documentary safeguards of title and protecting their authenticity and use." The primary concern of the portion of § 66–3–505, supra, involved in this case, was to prevent the transfer of stolen vehicles.

"Title" to a vehicle may be transferred, or passed, even though there is a failure to comply with code provisions concerning the certificate of title. *Knotts v. Safeco Insurance Company of America*, 78 N.M. 395, 432 P.2d 106 (1967); see *Forsythe v. Central Mutual Insurance Co. of N. Y.*, 84 N.M. 461, 505 P.2d 56 (1973).

A thief does not have legal title to (or ownership of) the stolen vehicle, and neither does the purchaser from a thief. See *Bustin v. Craven*, 57 N.M. 724, 263 P.2d 392 (1953). Yet, § 66–3–505, supra, was intended to prevent such a transfer. What, then, does "title" mean? We note that the statute does not refer to legal title or legal ownership; all that is required is a title that may be passed.

In determining the meaning of "title," defendant urges us to apply its ordinary meaning. See *State v. Hernandez*, 89 N.M. 698, 556 P.2d 1174 (1976). We do so. A common meaning of title in Webster's Third New International Dictionary (1966) is "the union of all the elements constituting legal ownership and being divided in common law into possession, right of possession, and right of property . . . ." Defendant had neither right of possession nor right of property. The only aspect of "title" in defendant was possession.

In *Roberts v. Wentworth*, 59 Mass. (5 Cush.) 192 (1849), plaintiff was required to show that he had title to the property at the time of the trespass. The decision points out that "title" is a word of indefinite meaning, and states:

> A party may have a title to property although he is not the absolute owner. If he has the actual or constructive possession of property or the right of possession, he has a title thereto, although an-

> other party may be the owner. But if the plaintiff had not the possession, nor the right of possession, nor the right of property, he certainly could not maintain his action.

Bell v. Dennis, 43 N.M. 350, 93 P.2d 1003 (1939) is consistent with *Roberts v. Wentworth*, supra, when it refers to possession as a badge of ownership.

The "title" requirement of § 66–3–505, supra, may be met by proof that the defendant intended to pass whatever form of title that he had. Defendant had a form of title by his possession, he met the requirement of passing title by intentionally transferring possession of the pickup that he knew was stolen. This interpretation does not result in a redundancy. Defendant must have transferred possession. He must also have had the intent to transfer any title that he possessed.

The State does not urge such a broad meaning of title; it would restrict title to an intent to permanently transfer the vehicle. The concept of "permanent" was rejected as an element of § 66–3–504, N.M.S.A.1978 which is a part of the same special anti-theft laws as is § 66–3–505, supra. *State v. Austin*, 80 N.M. 748, 461 P.2d 230 (Ct.App.1969). Neither the wording nor the intent of § 66–3–505, supra, require a concept of "permanency." Any intentional passing of the transferor's title meets the statutory requirement; thus, the requirement of passing title is met where the title is possession and there is an intentional transfer, whether a sale or a loan. This accords with the statutory purpose of preventing the transfer of stolen vehicles.

The instruction in this case was incorrect because the instruction required a permanent transfer. Defendant was not harmed by this error because the error added to the prosecution's burden of proof. The issue, however, is whether the instruction omitted an element of the statutory crime. There was no omission because the instruction stated that defendant must have intended to part with his possession. Since, in this case, defendant's title was his possession, the title element of the statute was met.

Until such time as an uniform instruction is adopted, we suggest that the instruction refer to the "intent to pass title" with an explanation of what is sufficient title under the statute.

The judgments and sentences are affirmed.

IT IS SO ORDERED.

HENDLEY and ANDREWS, JJ., concur.

601 P.2d 75

STATE of New Mexico, Plaintiff-Appellant,

v.

Joann Bertha HERRERA, Defendant-Appellee.

No. 3962.

Court of Appeals of New Mexico.

Aug. 21, 1979.

Jeff Bingaman, Atty. Gen., Eric Scott Jeffries, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Roderick A. Dorr, Terrazas & Dorr, Santa Fe, for defendant-appellee.

OPINION

WOOD, Chief Judge.

The trial court dismissed the indictment on the basis that the prosecutor who presented the matter to the grand jury had withheld exculpatory evidence. The State appeals; we affirm the dismissal.

Defendant, the mother of the deceased child, was charged with permitting child abuse which resulted in the death of the child. Baker, the mother's live-in boyfriend, was charged with committing the child abuse which resulted in the death. This appeal involves only the charge against defendant.

Defendant moved to dismiss the indictment; the motion alleged that the prosecutor withheld exculpatory evidence from the grand jury. This motion was granted, without prejudice to the matter being again presented to the grand jury.

It is not disputed that evidence was knowingly withheld. That evidence, in the possession of the prosecutor at the time the matter was presented to the grand jury, consisted of (a) statements that defendant was not present when the fatal injuries occurred; (b) evidence, from the treating physician, that prior broken bones were not the result of child abuse; and (c) state-

ments that defendant was not present when two prior acts of abuse were committed by Baker.

Was this evidence exculpatory? Items (a) and (c) were clearly exculpatory; accordingly, we do not consider item (b). When the trial court asked the prosecutor the meaning of exculpatory evidence, the reply was: "That it would indicate that she is not guilty of the crime." We agree with this reply. The California Court of Appeal, in *Johnson v. Superior Ct. of Cal., Cty. of Joaquin, Dept. 6,* 38 Cal.App.3d 977, 113 Cal.Rptr. 740 (1974), refers to evidence "which tends to negate guilt." The California Supreme Court, in the same case, 15 Cal.3d 248, 124 Cal.Rptr. 32, 34, 539 P.2d 792, 794 (1975) refers to "evidence reasonably tending to negate guilt * * *."

In *State v. McGill,* 89 N.M. 631, 556 P.2d 39 (Ct.App.1976) we assumed that a defendant could be denied due process by a prosecutor withholding exculpatory evidence from a grand jury. We now expressly so hold when exculpatory evidence is knowingly withheld. The basis for the assumption in *McGill,* supra, was that the grand jury has a duty to protect a citizen against unfounded accusations and only specified persons are authorized to present matters to the grand jury. If the prosecutor is not obligated to present evidence tending to negate guilt, the grand jury hears only what the prosecutor wants it to hear, with the result that the grand jury becomes a tool of the prosecutor and is no longer independently making the probable cause determination required by the statute. Section 31–6–10, N.M.S.A.1978. A knowing withholding of evidence tending to negate guilt is fundamentally unfair and violates due process. *State v. McGill,* supra.

The State contends that the evidence it withheld was not exculpatory because it conflicted with evidence that was inculpatory. The fact that the evidence in the State's possession is conflicting does not change the fact that a portion of that evidence tended to negate guilt and was therefore exculpatory. The State's argument is based on a misreading of *State v. McGill,* supra. In that case the conflicting evidence was presented to the grand jury, and not withheld as was the exculpatory evidence in this case.

Our holding, that due process requires the presentation of evidence to the grand jury which tends to negate guilt, is consistent with the ABA Standards Relating to the Administration of Criminal Justice. Standard 3.6(b) of "The Prosecution Function" states: "The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt." Why? The Commentary states: "The obligation to present evidence which tends to negate the guilt of the accused flows from the basic duty of the prosecutor to seek a just result." Compare *State v. Reese,* 91 N.M. 76, 570 P.2d 614 (Ct.App.1977). In so holding, we have not considered the amendment to § 31–6–11(B), N.M.S.A.1978 enacted by Laws 1979, ch. 337, § 8, because the amendment is not applicable to defendant's case.

The State contends the trial court erred in reviewing evidence presented to the grand jury to determine if it was exculpatory. Defendant presented evidence at the hearing which had not been presented to the grand jury. During the hearing, a tape of the grand jury proceedings was admitted into evidence, in support of the claim that exculpatory evidence had been withheld. The trial court commented that in light of the grand jury evidence, which was marginally inculpatory, the withheld exculpatory evidence highlighted the due process violation. The trial court did not err in considering the tape of the grand jury proceedings on the question of whether exculpatory evidence had been withheld.

The State also contends that if the prosecutor reasonably believes the evidence is not exculpatory he has no obligation to present such evidence to the grand jury. Our first answer to this contention is that if the prosecutor believed that items (a) and (c) were not exculpatory, that belief was not reasonable. Our second answer is that the due process requirement of presenting

evidence tending to negate guilt is not to be determined on the basis of the prosecutor's subjective belief; rather, the claim is to be determined by objectively analyzing the withheld evidence to determine whether, in fact, it tended to negate guilt.

The order dismissing the indictment is affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

601 P.2d 78

STATE of New Mexico, Plaintiff-Appellee,

v.

Anthony D. GONZALES, Defendant-Appellant.

No. 3949.

Court of Appeals of New Mexico.

Aug. 30, 1979.

John B. Bigelow, Chief Public Defender, Santa Fe, Mark H. Shapiro, Asst. Appellate Defender, Dennis Manzanares, Asst. Public Defender, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Arthur Encinias, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

We reverse defendant's conviction of armed robbery because of improperly admitted evidence.

The prosecution proposed to introduce evidence that defendant's brother made certain remarks to the principal witness for the State and also administered a beating to this witness. The trial court permitted the witness to testify that the beating occurred and to identify the persons administering the beating, but would not allow testimony as to what was stated by the assailants. On cross-examination, the defendant brought out that the assailants were defendant's brother and a boyfriend of the witness's sister.

The prosecution's theory of admissibility was that the beating was evidence of tampering with a witness, which showed consciousness of guilt by defendant. The admissibility of such evidence is proper only when there is evidence which connects the defendant with the tampering.

Saunders v. State, 28 Md.App. 455, 346 A.2d 448 (1975) states that such evidence is not admissible, however, where there is no evidence to connect the accused there-

> with. In order to make admissible evidence of attempts by a third person to influence a witness not to testify or to testify falsely, it must be established that such attempts were done by the authorization of the accused.
>
> * * * * * *
>
> Although the authorization by the accused may be proved by direct or circumstantial evidence . . . and an inference may be sufficient to connect the accused . . . the fact that the third party and the accused are related has not been held to be adequate proof, by itself, of the necessary authorization. . . . [A]n accused is not bound by the efforts of relatives or friends to suppress evidence unless his connection with the third party is clearly shown.

See Annot., 79 A.L.R.3d 1156 (1977); *United States v. Culotta*, 413 F.2d 1343 (2d Cir. 1969); *People v. Perez*, 169 Cal.App.2d 473, 337 P.2d 539 (1959); *People v. Caruso*, 174 Cal.App.2d 624, 345 P.2d 282 (1959); *Steele v. Commonwealth*, 262 Ky. 206, 90 S.W.2d 8 (1936); *State v. Graves*, 301 So.2d 864 (La. 1974); *State v. Kosanke*, 23 Wash.2d 211, 160 P.2d 541 (1945). Compare *State v. Ancheta*, 20 N.M. 19, 145 P. 1086 (1915).

The "beating" testimony was improperly admitted because of the absence of evidence connecting defendant with the beating.

The State asserts the error was harmless. We disagree. The case for the prosecution depended largely on the credibility of the witness who was beaten. The defense theory, consistent with the evidence, was that the witness and another person committed the armed robbery. In these circumstances, we cannot say the evidence of guilt was so overwhelming that there is no reasonable probability that the improperly admitted evidence contributed to the conviction. See *State v. Day*, 91 N.M. 570, 577 P.2d 878 (Ct.App.1978).

The conviction is reversed; the cause is remanded for a new trial.

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

SUTIN, J., specially concurring.

SUTIN, Judge (specially concurring).

I concur.

I agree that "[t]he 'beating' testimony was improperly admitted because of the absence of evidence connecting defendant with the beating." Defendant is entitled to a new trial.

Defendant raised a second point on appeal that should be answered because it may arise at the second trial.

During trial, the testimony put defendant in the home of a sister of the State's main witness soon after the robbery. She was not called as a witness. During closing argument, defendant asked why the State had not called her to testify. In rebuttal, the State turned the tables and asked why defendant had not called her. Defendant objected, and the objection was overruled. The State explained to the jury that if defendant thought she had anything to offer which would help the defendant or hurt the prosecution, she would have been present as a witness. A motion for a mistrial was denied.

This case does not involve the propriety of the comment by the district attorney on the failure of defendant to call a witness on his behalf. *State v. Martin*, 32 N.M. 48, 250 P. 842 (1926). It involves a response by the district attorney to defendant's argument with reference to the State's failure to produce a witness. This response falls within the category of retaliatory statements.

> The general rule is that remarks of the district attorney, which ordinarily would be improper, are not ground for reversal if they are provoked by defendant's counsel, and are in reply to his acts or statements, unless such remarks go beyond a pertinent reply and bring before the jury extraneous matters touching important issues. *State v. Parks*, 25 N.M. 395, 403, 183 P. 433 (1919).

When defendant "opened the door," he effectively waived any right he might have to claim error because of the prosecutor's comments. *State v. Paris*, 76 N.M. 291, 414

P.2d 512 (1966). The State's comments were within the realm of a reasonable reply to arguments made by defendant's counsel. *State v. Ergenbright*, 84 N.M. 662, 506 P.2d 1209 (1973).

The strategy of the State and defendant is unknown. I assume that the absent witness was available, and that her knowledge of defendant's presence or absence in her home was known to the State and defendant. Perhaps she was without knowledge. Nevertheless, her testimony was crucial to prove defendant's innocence, but it was merely corroborative of the testimony of the main witness, her brother. Her absence was a mystery that did influence the jury. The failure of defendant to call the witness was the death knell of the defense, and the mention thereof in closing argument was its interment. Perhaps this mystery will be resolved if this case proceeds to trial again.

601 P.2d 80

Ellen McCLURE, Plaintiff-Appellant,

v.

TOWN OF MESILLA, Willis E. Umholtz, Jose Luis Yguado d/b/a Yguado Association, and Burn Construction Company, Inc., Defendants-Appellees.

No. 3852.

Court of Appeals of New Mexico.

Sept. 11, 1979.

Anthony F. Avallone, Las Cruces, for plaintiff-appellant.

James R. Crouch, Larry Ramirez, Crouch, Parr & Valentine, P. C., Las Cruces, for defendants-appellees.

OPINION

SUTIN, Judge.

In a one count complaint plaintiff sued the Town of Mesilla, a New Mexico Corporation and others, for the negligent installation of a length of underground drainpipe that ended abruptly under an intersection. As a result of several rains, water emptied in the soil under the intersection and the plaintiff's nearby premises. As a proximate result of defendants' negligence,

plaintiff's premises were damaged. Plaintiff also alleged that notice was given the Town as provided in § 41–4–16, N.M.S.A. 1978 of the Tort Claims Act.

The Town filed a motion to dismiss for failure to state a cause of action. The motion was sustained and plaintiff's complaint dismissed with prejudice. Plaintiff appeals. We affirm, but we reverse for plaintiff the right to file a claim for "inverse condemnation."

On appeal, plaintiff changed her position. In a skimpy two-page brief, plaintiff claims (1) that the facts pleaded state a claim for inverse condemnation under Article II, Section 20 of the New Mexico Constitution and § 42–1–23, N.M.S.A.1978, and (2) that the Tort Claims Act waives immunity for damages caused by negligence in the operation of a liquid waste disposal system, and this includes storm drains.

Plaintiff may have a valid claim for damages by way of inverse condemnation, but plaintiff's complaint does not state such a claim. It is an afterthought raised for the first time on appeal. Inverse condemnation is not a common law tort based upon the negligence of the Town. It is a statutory remedy under § 42–1–23. Under this section, a municipality, authorized by the Constitution and laws of the State to exercise the right of eminent domain, is liable to the owner whose private property is taken or damaged for public use without making just compensation.

A municipality has the power and right of condemnation of private property for public use for the purpose of constructing, maintaining and operating storm drains. Section 3–18–10(A)(2), N.M.S.A.1978.

The Constitution gives to a person, whose property is damaged for public use, the right to compensation, and § 42–1–23 clearly indicates that it was intended to confer the remedy by inverse condemnation in a situation such as here presented. *Garver v. Public Service Company of New Mexico,* 77 N.M. 262, 421 P.2d 788 (1966). A municipality was included as a party in inverse condemnation when § 42–1–23 was amended in 1965. Laws 1965, ch. 305, § 1. Even prior thereto, where a county admitted it was subject to liability, the constitutional right to compensation for damaging private property could be enforced against the party liable therefore. *Summerford v. Board,* 35 N.M. 374, 298 P. 410 (1931); *Wheeler v. Board of County Com'rs of San Juan County,* 74 N.M. 165, 391 P.2d 664 (1964).

A motion to dismiss is properly granted when it appears that plaintiff cannot recover under any state of facts provable under the claim. *C & H Constr. & Pav., Inc. v. Foundation Reserve Ins. Co.,* 85 N.M. 374, 512 P.2d 947 (1973). As a result, the appeal must be affirmed. However, this rule does not disallow the plaintiff the right to file an independent claim for relief based upon a different theory of recovery such as that of "inverse condemnation." The three-year limitation set forth in § 37–1–24, N.M.S.A.1978 applies to an "inverse condemnation" action against a municipality. *Buresh v. City of Las Cruces,* 81 N.M. 89, 463 P.2d 513 (1969). The limitation period has not run on plaintiff's claim.

The Town claims that the Tort Claims Act constitutes plaintiff's exclusive remedy. We disagree. Liability for acts or omissions of the Tort Claims Act are based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty. Section 41–4–2(B). It is under this tort concept that a governmental entity is granted immunity except as provided in the Act. Section 41–4–4(A). As shown above, inverse condemnation is not a common law tort action, and the Tort Claims Act is not an exclusive remedy.

Plaintiff also claims that her complaint states a claim for relief under the Tort Claims Act because § 41–4–8(A) grants immunity for property damages resulting from "liquid waste collection or disposal," and that § 41–4–8(B)(2), which defeats plaintiff's position, is unconstitutional. This inane contention merits no response.

Occasions do arise where justice demands that appellate courts as well as district

courts should seek to protect the rights of litigants who have been led down the one way street in the wrong direction.

We affirm the judgment of dismissal of plaintiff's claim against the Town of Mesilla. However, plaintiff is allowed to file an amended complaint, if she desires, to state a claim for relief against the Town of Mesilla for inverse condemnation in one count, and a tort claim against other defendants in a second count. In the alternative, plaintiff may file an independent claim for inverse condemnation against the Town of Mesilla.

IT IS SO ORDERED.

ANDREWS, J., specially concurs.

HERNANDEZ, J., dissents.

ANDREWS, Judge (specially concurring).

Although I concur with the result, only two issues warrant discussion in this opinion. The first, whether inverse condemnation is an appropriate remedy, is aptly discussed and decided in *Wheeler v. Board of County Comr's of San Juan County,* 74 N.M. 165, 391 P.2d 664 (1964) and *Garver v. Public Service Company of New Mexico,* 77 N.M. 262, 421 P.2d 788 (1966). The second, whether and in what manner, plaintiff can amend her complaint or file a new action is discussed and decided in *Malone v. Swift Fresh Meats Co.,* 91 N.M. 359, 574 P.2d 283 (1978), where the Supreme Court held that "[a] new cause of action may be alleged in an amended complaint, provided it is founded on facts not wholly foreign to the facts originally pleaded." 91 N.M. 359, at 362, 574 P.2d 283, at 286.

The opinion need say little else.

HERNANDEZ, Judge (dissenting).

I respectfully dissent. In my opinion the trial court erred in granting the defendant's (Town of Mesilla) motion to dismiss for failure to state a cause of action.

The pertinent parts of the plaintiff's complaint are the following:

"5. During the summer of 1977, the defendant, Town of Mesilla, through its agents, servants and employees did extensive work on the Mesilla Plaza. In connection with that work, the defendant installed a surface water drainage system and underground drains to move the water away from the plaza.

. . . . .

8. The plaintiff owns premises at the northeast corner of Calle Principal and Calle Guadalupe, improved with an adobe residence.

9. The defendants' negligently installed a length of underground drain pipe, ending abruptly under the intersection of Calle Principal and Calle Guadalupe.

10. The drainage system became operative in several rains that hit the area and water emptied in the soil under Calle Principal, Calle Guadalupe and the plaintiff's premises.

11. Soils in the Mesilla area are mixtures of clay and sand and an excess of water drastically changes soil characteristics and the soil bearing capacity.

12. As a proximate result of the defendants' negligence as aforesaid, the soil on plaintiff's premises has acquired an excess of water, the soil has changed, the residence premises are being destroyed and rendered uninhabitable, all to her damage in the amount of $120,000.

13. The defendants knew, or should have known, that abruptly ending the underground drainage as aforesaid would cause excess water to enter the soil and change soil characteristics, and they permitted the drainage line to abruptly end where it does, with full awareness of the damage that would be done to the plaintiff's premises.

. . . . .

16. The occurrence described above was latent from the time of the installation in the summer of 1977, the several rains that occurred in 1977 until plaintiff learned on February 8, 1978, from an engineer that there was proximate relationship between those acts and events and the property damage sustained by the plaintiff. The Town of Mesilla had actual notice of the occurrence and also

was given written notice of the time, place and circumstances of the loss and injury to the plaintiff by means of the complaint filed herein and served on the Town Clerk of Mesilla on the 2nd day of March, 1978, which complaint was presented to the Mayor of the Town of Mesilla, fully in accord with Section 5–14–14.1, NMSA [sic]."

"A motion to dismiss a complaint is properly granted only when it appears that under no state of facts provable under the claim could plaintiff recover or be entitled to relief." *Gonzales v. Gackle Drilling Company,* 70 N.M. 131, 371 P.2d 605 (1962).

"In considering whether a complaint states a claim upon which relief can be granted we assume as true all facts well pleaded." *Hall v. Budagher,* 76 N.M. 591, 417 P.2d 71 (1966).

It is my opinion that the plaintiff, under the allegations of her complaint, could possibly prove facts which would allow recovery under the theory of inverse condemnation.

Article II, § 20 of the Constitution of New Mexico provides: "Private property shall not be taken or *damaged* for public use without just compensation." [Emphasis added.] The codification of this section is Section 42–1–23, N.M.S.A.1978:

"Notwithstanding the provisions of the Relocation Assistance Act [42–3–1 to 42–3–15 NMSA 1978], the state of New Mexico or any agency or political subdivision thereof, including the state highway commission and any person, firm or corporation authorized by the constitution or laws of this state to exercise the right of eminent domain who has heretofore taken or damaged or who may hereafter take or damage any private property for public use without making just compensation therefor or without instituting and prosecuting to final judgment in a court of competent jurisdiction any proceeding for condemnation thereof, shall be liable to the owner of such property, or any subsequent grantee thereof, for the value thereof or the damage thereto, at the time such property is or was taken or damaged, with legal interest, to the date such just compensation shall be made, in an action to be brought under and governed by the Rules of Civil Procedure for the District Courts of this state. Actions under this section shall be brought in the county where the land or any portion thereof is located."

" 'Inverse condemnation' is the name generally ascribed to the remedy which a property owner is permitted to prosecute to obtain the just compensation which the Constitution assures him when his property, without prior payment therefor, has been taken or damaged for public use." *Sheffet v. County of Los Angeles,* 3 Cal. App.3d 720, 84 Cal.Rptr. 11 (Cal.App. 1970).

See *Garver v. Public Service Company of New Mexico,* 77 N.M. 262, 421 P.2d 788 (1966) and *Kaiser Steel Corporation v. W. S. Ranch Company,* 81 N.M. 414, 467 P.2d 986 (1970).

I would reverse the order of the trial court and remand with instructions to vacate it and proceed with the trial of this matter.

601 P.2d 83

STATE of New Mexico, Plaintiff-Appellee,

v.

Mike SANDERS, Defendant-Appellant.

No. 3944.

Court of Appeals of New Mexico.

Sept. 13, 1979.

Narciso Garcia, Jr., Toulouse, Krehbiel & DeLayo, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Arthur Encinias, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

We reverse defendant's conviction of child abuse because of the trial court's refusal to give defendant's requested instruction limiting the jury's consideration of certain evidence. None of the other issues briefed by defendant amount to reversible error and, thus, are not discussed.

The child abuse offense, § 30–6–1(C), N.M.S.A.1978, was submitted to the jury on the basis that defendant knowingly or intentionally, and without justifiable cause, caused or permitted the child to be tortured or cruelly punished.

The prosecution introduced evidence of two incidents of alleged child abuse prior to the incident in question. This evidence was introduced, under Evidence Rule 404(b), to prove the incident in question was not an accident.

U.J.I. Crim. 40.28 is an approved instruction which limits the jury's consideration of evidence of other wrongs or offenses to the purpose for which the evidence was introduced.

Defendant's requested instruction, consistent with U.J.I. 40.28, would have limited jury consideration of the prior incidents to "absence of accident . . . ." This requested instruction was refused.

The Use Note to U.J.I. Crim. 40.28 states that upon request, this instruction shall be given at the time final instructions are given to the jury. This "use" is consistent with Evidence Rule 106. Refusal of the requested instruction was error.

In *State v. Traxler,* 91 N.M. 266, 572 P.2d 1274 (Ct.App.1977) we considered the consequence of a failure to give an instruction that U.J.I. Crim. states "shall" be given, and held that upon a showing of the slightest evidence of prejudice, the error would be reversible error. Compare *State v. Fuentes,* 91 N.M. 554, 577 P.2d 452 (Ct.App. 1978). Evidence as to defendant's responsibility for the child's injury was severely disputed, and defendant's credibility was crucial. See *State v. Day,* 91 N.M. 570, 577 P.2d 878 (Ct.App.1978). In this situation there is a sufficient showing of prejudice so that the failure to give the instruction based on U.J.I., Crim. 40.28 was reversible error.

The conviction is reversed and remanded with instructions to grant defendant a new trial.

IT IS SO ORDERED.

HENDLEY and WALTERS, JJ., concur.

601 P.2d 85

William F. MARLER and Dorothy L. Marler, his wife, Plaintiffs-Appellees,

v.

Joe ALLEN, Defendant-Appellant,

and

Farmers Insurance Group, Defendant.

No. 3668.

Court of Appeals of New Mexico.

Sept. 18, 1979.

Charles A. Pharris, Robert H. Clark, Keleher & McLeod, Albuquerque, for defendant-appellant.

Robert C. Resta, Albuquerque, for plaintiffs-appellees.

OPINION

WOOD, Chief Judge.

The appellate issue concerns the propriety of the punitive damage award.

Plaintiffs' residence was insured with State Farm. There is evidence that Allen, who sold insurance for the Farmers Insurance Group, sent a form to the company holding plaintiffs' mortgage. This form advised the mortgage holder that plaintiffs had ordered insurance coverage from Farmers. The form was purportedly signed by William Marler. The evidence is uncontradicted that Marler did not sign the form.

Plaintiffs were awarded compensatory damages from Allen and Farmers, and were awarded punitive damages from Allen. Farmers did not appeal. Allen's appeal does not challenge the award of compensatory damages; only the punitive damage award is involved in the appeal.

There is evidence that Allen prepared the form, and that Allen's wife forged Marler's name to the form; there is evidence that Mrs. Allen worked in Allen's insurance office. The evidence concerning the working arrangements between Mr. and Mrs. Allen permitted an inference that Allen either authorized or ratified use of the form bearing Marler's forged signature. This evidence was sufficient to raise a jury question concerning Allen's liability for punitive damages. See *Samedan Oil Corp. v. Neeld,* 91 N.M. 599, 577 P.2d 1245 (1978).

The jury verdict was for $462 compensatory damages and $20,625 punitive damages. The trial court ordered a remittitur of both damage items. Plaintiffs accepted the remittitur. Judgment was entered, pursuant to the remittitur, of $250 compensatory damages and $10,625 punitive damages. Allen contends the reduced award of punitive damages is excessive. We agree.

In reducing the award of compensatory damages, the trial court ruled the jury had made a mistake in that $250 "was the maximum amount supported by the evidence . . . ." We agree that the jury made a mistake in its compensatory damage award. That mistake, however, is an indication that the jury verdict was based on passion or prejudice. The only item of compensatory damage submitted to the jury was the "value of earnings lost during the time reasonably required to remove or alleviate problems caused by the incident in question." The maximum award under the evidence and the instruction was $250. Yet, the jury added an additional $212 as compensatory damages; this amount was the amount of the premium for the insurance policy in the preceding year, recovery for which was not sought in this lawsuit.

Another indication of passion or prejudice in the jury's damage award is a note received from the jury during its deliberation. The note read: "Can we the jury find Farmer Ins. Company for punitive damages"? No issue of punitive damages against Farmers was submitted to the jury.

What is the relationship between the jury's award of compensatory and punitive damages? Allen argues that the high ratio between the compensatory and punitive damage verdicts shows either no reasonable relationship, or alternatively, the size of the ratio shows passion or prejudice. We do not agree with the "ratio" argument because the amount of punitive damages depends on the circumstances of each case. However, it is long established New Mexico law that the amount of the punitive damage award must not be so unrelated to the *injury* and the *actual damages* proven as to manifest passion and prejudice. *Faubion v. Tucker,* 58 N.M. 303, 270 P.2d 713 (1954).

Punitive damages are imposed as punishment, because of the enormity of the offense. "Enormity" is determined by the nature of the wrong committed and the aggravating circumstances shown. *Sweitzer v. Sanchez,* 80 N.M. 408, 456 P.2d 882 (Ct.App.1969). This "enormity" is separate and distinct from the actual damages involved in the compensatory damage award. "Enormity" pertains to the "injury" referred to in *Faubion v. Tucker,* supra.

Although plaintiffs were outraged by the forgery, their maximum actual damage was $250. The wrong committed, the forgery, was also outrageous, but the circumstances simply were not aggravated. Marler confronted Allen upon discovery of the forgery; Allen offered to clear up the situation and have the premium refunded; Mar-

ler, in his outrage, declined. In these circumstances, we agree that the relationship of the jury's punitive damage award to the injury and actual damage is not reasonable, and that the size of the jury's punitive damage award is indicative of passion or prejudice on the part of the jury. Compare *Galindo v. Western States Collection Company,* 82 N.M. 149, 477 P.2d 325 (Ct.App. 1970).

We have itemized three indications of passion or prejudice—the jury's disregard of the instruction on compensatory damages, the jury's question concerning awarding punitive damages against Farmers when that was not an issue for the jury to decide, and the lack of a reasonable relationship between the compensatory and punitive damage verdicts. With these indications of passion and prejudice, what is the affect of the trial court's order of remittitur? In this case, the trial court's remittitur order does not affect our decision because that order was based on a finding that the punitive damage verdict was "not the product of passion or prejudice . . . ." That finding was incorrect.

Allen should be punished for his conduct, yet the current punishment in the form of a judgment for $10,625 for punitive damages has not effaced the passion or prejudice of the original jury verdict. The punitive damage judgment is still excessive by $7,625. If plaintiffs will, within ten days after this decision becomes final, file a remittitur in the sum of $7,625 from the judgment of $10,625 for punitive damages, the judgment for punitive damages is affirmed in the amount of $3,000 as of April 27, 1978, which is the date of filing of the district court judgment. If such remittitur is not filed, the judgment for punitive damages is reversed and the cause is remanded for a new trial limited to the issue of punitive damages. *Montoya v. Moore,* 77 N.M. 326, 422 P.2d 363 (1967).

IT IS SO ORDERED.

HERNANDEZ and ANDREWS, JJ., concur.

601 P.2d 425

Ramon J. MARTINEZ, Petitioner,

v.

UNIVERSITY OF CALIFORNIA, Employer, and Royal Glove Insurance Company, Insurer, Respondents.

No. 12463.

Supreme Court of New Mexico.

Sept. 26, 1979.

Rehearing Denied for Respondents Oct. 19, 1979.

Rehearing Granted for Petitioners Oct. 22, 1979.

Jones, Gallegos, Snead & Wertheim, J. E. Gallegos, Steven L. Tucker, Santa Fe, for petitioner.

Montgomery, Andrews & Hannahs, Frank Andrews, Walter J. Melendres, Santa Fe, for respondents.

OPINION

SOSA, Chief Justice.

Petitioner sought compensation benefits for total permanent disablement under the New Mexico Occupational Disease Disablement Law (hereinafter referred to as the

Act), §§ 52–3–1 to 59, N.M.S.A.1978. The district court concluded that petitioner's disablement was within the meaning of § 52–3–32 and entered judgment in petitioner's favor. Respondents appealed. The Court of Appeals reversed. We granted certiorari, and now reverse the Court of Appeals.

The question we address in this case is whether an employee, who is totally disabled by anxiety neurosis which manifests itself as a phobia that his continued exposure to radioactive materials will cause death, can recover for that disability under the Act. We hold that he can.

The facts of the case are as follows. Petitioner was employed as a foundry technician by the University of California at the Los Alamos Scientific Laboratories (hereinafter referred to as LASL) for approximately thirty years prior to his voluntary retirement. Petitioner's duties consisted primarily of cutting, molding, milling, shaping, and recovering objects made from radioactive materials. Because he was constantly exposed to such materials, petitioner was continually required to wear a film badge for detection of radiation. The articles worn by petitioner, which were designed to protect him from radioactive contamination, were often ineffective to avoid inhalation of vapors and direct contact between his skin and clothing and radioactive materials. Incidences of cancer, fatal illnesses of unknown origin, and blindness among employees in petitioner's division occurred during the years of his employment at LASL.

In February 1976, petitioner had a growth removed from his right eye. The growth was diagnosed as a "Bowen's lesion", which is a localized cancerous growth. Petitioner's treating physicians did not attribute petitioner's eye cancer to his exposure to radioactive materials. Petitioner believed otherwise, and he became severely worried that such cancer would spread throughout his body and cause his death.

When petitioner returned to work following his eye surgery, he began to suffer from headaches, excessive fatigue, dizziness, nausea, and feelings of extreme anxiousness and nervousness. He continued to be exposed to and come in contact with radioactive materials. Petitioner's illness increased to a point that he was totally unable to work. He terminated his employment with LASL in July 1976. Petitioner then sought compensation benefits under the Act.

The district court found that petitioner suffers from anxiety neurosis, an emotional disorder involving petitioner's inability to cope with continued exposure to or contact with radioactive materials. There is no organic cause of the symptoms. The court also found that petitioner's anxiety neurosis followed as a natural incident of his work with LASL, which entailed exposure to radioactive materials, and that such exposure could fairly be traced to the employment as a proximate cause. Finally, the court found that petitioner's inability to perform his job as a foundry technician is a permanent condition.

The court concluded that petitioner's neurosis is an occupational disease within the meaning of § 52–3–33, and that petitioner suffers from a disablement within the meaning of § 52–3–4(A). The court further concluded, by expert medical testimony, that a direct causal connection had been established as a matter of medical probability between the conditions under which petitioner performed his work and the occupational disease which he incurred.

The Court of Appeals concluded that petitioner's neurosis was not an occupational disease within the meaning of § 52–3–33. We reverse.

Section 52–3–33 provides that an 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 and includes any disease due to, or attributable to, exposure to or contact with any radioactive material by an employee in the course of his employment.

Whether petitioner's anxiety neurosis is an occupational disease "depends upon whether there is a recognizable link between the disease and some distinctive feature of" his job as a foundry technician. *Gaddis v. Rudy Patrick Seed Division*, 485 S.W.2d 636, 639 (Mo.App.1972).

There is no doubt that anxiety neurosis can be a work-connected injury compensable under the Workmen's Compensation Act, §§ 52–1–1 to 69, N.M.S.A.1978. *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). By analogy, petitioner's anxiety neurosis should be equally compensable under the Occupational Disease Disablement Law if it is established that his neurosis is peculiar to his occupation, is due to causes in excess of the ordinary hazards of employment as such, and is attributable to exposure to or contact with radioactive materials in the course of his employment. In addition, it must be established that there is a

> direct causal connection between the conditions under which [petitioner's] work is performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as the proximate cause.

§ 52–3–32.

Respondents argue that petitioner's neurosis is not "peculiar to" his occupation as a foundry technician at LASL because persons in other occupations also suffer from anxiety neurosis. We find that the term "peculiar to" in § 52–3–33 does not mean "exclusive to." The phrase "peculiar to" is not

> used in the sense that the disease must be one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather in the sense that the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations . . . . (Citation omitted.)

Glodenis v. American Brass Co., 118 Conn. 29, 170 A. 146, 150 (1934), quoted favorably in *Herrera v. Fluor Utah, Inc.*, 89 N.M. 245, 247, 550 P.2d 144, 146 (Ct.App.1976), *cert. denied*, 89 N.M. 321, 551 P.2d 1368 (1976). *See also Bowman v. Twin Falls Const. Co., Inc.*, 99 Idaho 312, 581 P.2d 770 (1978).

In *Gaddis, supra*, the Missouri Court of Appeals found that bronchiectasis was an occupational disease because it involved a "peculiar risk or hazard which inheres in the work conditions, and [is] a disease which follows as a natural result of exposure to such occupational risk, an exposure which is greater or different than affects the public generally . . . ." 485 S.W.2d at 639. In *Herrera, supra*, an afflicted painter was allowed to receive benefits under the Act, notwithstanding the fact that many persons who are not painters may also develop allergic disorders to paint.

We hold that petitioner is not required to show that anxiety neurosis is suffered exclusively by members of his occupation in order for him to qualify for benefits under the Act. To hold otherwise would impose an unreasonable burden on employees suffering from a disabling disease and would do injustice to beneficent legislation.

The record establishes that while employed by respondents, petitioner was afflicted with cancer. He was engaged in an occupation in which an excessive hazard of radiation existed. He was exposed to such radiation over his thirty years of employment at LASL. As a result of these circumstances, petitioner's disabling disease, anxiety neurosis, was triggered. We find that the highly toxic and dangerous materials petitioner worked with, coupled with the incidences of cancer, blindness, and fatal illness among petitioner's fellow workers, provides a "recognizable link" between his neurosis and his occupation as a foundry technician. *See Gaddis, supra.*

In conclusion, we quote the following language from Judge Walters' dissenting opinion.

> If the claimant is incapable, by reason of his inability to view rationally his disa-

bling condition and its genesis, how is he any less disabled than one who, in full possession of his reasoning powers, can see and perceive a severed limb or a mangled arm? Or one who can feel his life ebbing away from a known cancer induced by over-exposure to work-related radiation? We would make claimants with mental debilities more responsible for their psychic weaknesses which to them, at least, in their disordered mental states, are directly related to their work conditions, than those claimants who suffer encroachments of physical disease upon susceptible or weak body organs and musculo-skeletal structures as a result of *their* work environments. This is not logical; it is not humanitarian; it is not heedful of developments in medical science which recognize that some mental disorders are, indeed, diseases directly connected with and arising from the worker's perception of his occupational environment. The mental condition is itself a disease.

For the foregoing reasons, we hereby reverse the decision of the Court of Appeals. The district court's decision is affirmed.

IT IS SO ORDERED.

EASLEY, PAYNE and FELTER, JJ., concur.

FEDERICI, J., not participating.

601 P.2d 428

STATE of New Mexico,
Plaintiff-Appellee,

v.

Donald Gene STEPHENS,
Defendant-Appellant.

No. 12077.

Supreme Court of New Mexico.

Oct. 17, 1979.

Reginald J. Storment, App. Defender, Martha A. Daly, Asst. App. Defender, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Ralph W. Muxlow, II, and Janice M. Ahern, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

FELTER, Justice.

Donald Stephens was charged by criminal information with the crimes of murder and robbery in the following manner:

Count I On or about the 2nd day of September, 1977, Donald Stephens did

unlawfully kill George Daley with malice aforethought, Contrary to Section 40A–2–1, N.M.S.A. [§ 30–2–1, N.M.S.A.1978].

Count II On or about the 2nd day of September, 1977, Donald Stephens did take things of value from George Daley by use of force or violence while armed with a deadly weapon, to-wit: a firearm, Contrary to Section 40A–16–2, NMSA. [§ 30–16–2, N.M.S.A.1978].

Stephens entered a plea of not guilty to each count and was subsequently tried before a jury. The jury found Stephens guilty of felony murder and armed robbery. The court sentenced Stephens to life imprisonment on the felony murder conviction and ten to fifty years for the armed robbery and ordered the sentences to be served consecutively. Stephens appeals the convictions and the sentences, alleging five points of error: (1) the judge's communication with the jury outside the presence of the defendant; (2) instructing the jury on felony murder; (3) the failure to instruct the jury on second-degree murder; (4) the failure to instruct the jury on proximate cause; and (5) double punishment for the same offense. We reverse on two of the five points presented on appeal and will deal with each point separately.

Point I

Stephens argues that the trial court erred by communicating with the jury outside of his presence. We agree.

When the jury was deliberating on the charges in this cause, it sent a note to the court inquiring whether the moon was full on September 1, 1977. The judge told counsel that he had consulted the World Almanac, which stated that the moon was full on August 28, 1977, and fully dark on September 13, 1977 and that he planned to take judicial notice of those facts. Over defense counsel's objection, the bailiff submitted the information to the jury by a note. The note was not read in open court in the presence of defendant and counsel.

Stephens argues that he was prejudiced by the communication because the jury asked for and received factual information never covered in testimony from the witness stand. He contends that the facts submitted into evidence by the trial court were never subjected to the scrutiny generally afforded by confrontation and cross-examination. Specifically, the defendant argues that he had no opportunity to determine at what time the moon rose and set that night, whether there was cloud cover, whether the activities observed took place in the shade or out in the open, and other significant factors. The State's contention that the defendant was not prejudiced because the defense had already closely cross-examined the State's principal witness about what he was able to observe the night of the murder is without merit.

In New Mexico the law on this point is well settled. It is highly improper for the trial court to have any communication with the jury except in open court and in the presence of the accused and his counsel. *State v. Orona*, 92 N.M. 450, 589 P.2d 1041 (1979); *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. *State v. Brugger, supra.* Such a presumption of prejudice must have been intended to be guardian to the rights of confrontation and cross-examination, and therefore strong and compelling. The State has the burden of affirmatively showing that the defendant was not prejudiced by the communication between the court and the jury. *State v. Orona, supra; State v. Beal, supra.*

In our opinion the trial court, by submitting facts into evidence that were never subjected to the scrutiny generally afforded by confrontation and cross-examination, violated the mandate of both the state and federal constitutions which guarantees an accused the right to a fair trial, where he can confront the witnesses against him, before an impartial jury. *Parker v. Gladden*, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966).

Further, the record fails to show substantial evidence to the effect that the communication did not affect the verdict. The burden of establishing this fact resting with the State, and the State failing to meet this burden, the presumption of prejudicial error must prevail.

Therefore, we reverse the trial court on this ground.

Point II

Stephens contends that it was an error for the trial court to give an instruction on felony murder. He claims that the information did not give him notice that he was being charged with felony murder, and that it did not give him notice of the underlying felony. We disagree.

The purpose of a criminal information is to furnish the accused with such a description of the charge against him as will enable him to prepare a defense and to make his conviction or acquittal res judicata against a subsequent prosecution for the same offense. *State v. Our Chapel of Memories of New Mexico, Inc.*, 74 N.M. 201, 392 P.2d 347 (1964); *State v. Lott*, 73 N.M. 280, 387 P.2d 855 (1963). N.M.R.Crim.P. 5(c), N.M.S.A.1978 allows a prosecution to be commenced by the filing of an information "containing the essential facts, common name of the offense, and, if applicable, a specific section number of the New Mexico Statutes which defines the offense."

The information in this case contains an "open charge" of murder because it does not define the murder by type or degree. *See State v. King*, 90 N.M. 377, 563 P.2d 1170 (Ct.App.1977); *State v. Roy*, 40 N.M. 397, 60 P.2d 646 (1936). The information meets all the requirements of Rule 5. It contains the essential facts: "On or about the 2nd day of September, 1977, Donald Stephens did unlawfully kill George Daley with malice aforethought." *See State v. King, supra.* The information also refers to the common name of the offense and to the applicable statutory section. It should be noted that this Court has found that reference to the section of the statute creating a crime is sufficient to identify the crime charged. *State v. Lott, supra; State v. Cummings*, 63 N.M. 337, 319 P.2d 946 (1957).

Stephens argues that this Court's decision in *State v. DeSantos*, 89 N.M. 458, 553 P.2d 1265 (1976) requires all five subsections of § 30–2–1(A), N.M.S.A.1978 to be listed in an open charge of murder. We do not read *State v. DeSantos* this way. In addition, *State v. King, supra*, decided after *State v. DeSantos*, reaffirmed the use of an open murder charge similar in nature to the one before us. In *State v. King*, the Court indicated that an open charge of murder gave the defendant notice that he must defend against a charge of unlawfully taking a human life.

Stephens also argues that the information is defective because it did not give him notice of the felony underlying the felony murder charge. *State v. Hicks*, 89 N.M. 568, 555 P.2d 689 (1976), requires that when felony murder is charged, the name of the felony underlying the charge must be either contained in the information or furnished to the defendant in order to enable him to prepare his defense. In our opinion, the information in this case meets the requirement set forth in *State v. Hicks.* The underlying felony, armed robbery, is clearly stated on the information and provided Stephens sufficient notice to enable him to prepare a defense.

We find that the defendant was properly charged with felony murder, and that the trial court did not err in submitting the felony murder instruction to the jury.

Point III

Stephens argues that the trial court erred in refusing to give his requested instruction on second-degree murder. Stephens contends the instruction was proper because he was charged with second-degree murder and because the evidence introduced at trial was sufficient to support the giving of the lesser-included offense. We agree.

Stephens was entitled to an instruction on second-degree murder if there was some evidence in the record to support it. *State v. Manus*, 93 N.M. 95, 597 P.2d 280

(1979); *State v. Riggsbee*, 85 N.M. 668, 515 P.2d 964 (1973); *State v. Ulibarri*, 67 N.M. 336, 355 P.2d 275 (1960).

A review of the record indicates that a question of fact existed as to whether the murder was committed as part of the res gestae of the felony of robbery. If the murder was not, as a matter of fact, committed within the res gestae of the robbery, then in the circumstances of this case the jury could have found second-degree murder had they been instructed on it. This involves a question of fact, and as such should have been submitted to the jury.

Point IV

Stephens argues that the trial court's failure to give N.M.U.J.I.Crim. 2.50, N.M.S.A.1978 (Supp.1978) which explains the concept of proximate cause, constitutes fundamental error. We disagree.

The jury was given the "essential elements" instruction on felony murder, N.M.U.J.I.Crim. 2.04, N.M.S.A.1978 (Supp.1978) which stated in part:

> During the commission of armed robbery, the defendant caused the death of George Daley.

Use Note 3 requires that U.J.I. 2.50 be given whenever causation is in issue. The defendant did not request that Instruction 2.50 be given and, consequently, it was not given.

As a general rule, the failure to instruct the jury on an essential element of a crime is fundamental error that can be raised for the first time on appeal. *State v. Gunzelman*, 85 N.M. 295, 512 P.2d 55 (1973); *State v. Walsh*, 81 N.M. 65, 463 P.2d 41 (Ct.App.1969). However, the failure to instruct the jury on the definition or the amplification of the elements does not constitute error. *State v. Padilla*, 90 N.M. 481, 565 P.2d 352 (Ct.App.1977).

The defendant's argument in this case is the same as that made by the defendant in *State v. Padilla, supra.* In *State v. Padilla*, the defendant was charged with voluntary manslaughter. The Use Note to the voluntary manslaughter instruction required that Instruction 1.21, defining intent to kill or do bodily harm, also be given. The Court of Appeals held that the Use Note itself could not elevate Instruction 1.21 to the status of an element of the crime of voluntary manslaughter, and that the trial court's failure to give Instruction 1.21 did not constitute error. The same ruling applies here.

The felony murder instruction given to the jury parallels the language of the statute and contains all essential elements of the crime of felony murder. *See State v. Fuentes*, 85 N.M. 274, 511 P.2d 760 (Ct.App. 1973). The proximate cause instruction is only a definition or an amplification of the cause language, so the failure to give the unrequested instruction was not error.

Point V

Stephens argues that a sentence of life imprisonment on the felony murder charge and ten to fifty years on the armed robbery charge, to be served consecutively, punishes him twice for the same offense and violates the double jeopardy clause. We disagree.

The New Mexico Constitution provides that no person shall "be twice put in jeopardy for the same offense . . . ." N.M. Const., Art. II, § 15. The fifth amendment to the United States Constitution also prohibits double jeopardy and is enforceable against the states through the fourteenth amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The question in this case is whether the State would violate these guarantees by punishing the defendant for the separate, predicate felony which underlies a felony murder conviction in addition to punishing the defendant for the felony murder. Resolution of this issue requires an interpretation of the constitutional meaning of the words "same offense".

In the past, New Mexico courts have used several concepts in determining whether two crimes constitute the same offense. *See State v. Sandoval*, 90 N.M. 260, 561 P.2d 1353 (Ct.App.1977); *State v. Tanton*, 88 N.M. 5, 536 P.2d 269 (Ct.App.1975) (*Tanton I*) overruled in part; *State v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975) (*Tanton II*).

"Merger" is the name applied to the concept of multiple punishment when multiple charges are brought in a single trial. *State v. Sandoval, supra; Tanton I, supra.* The test of whether one criminal offense has merged in another is whether one offense "necessarily involves" the other. *State v. Sandoval, supra; State v. Martinez,* 77 N.M. 745, 427 P.2d 260 (1967). In determining whether one offense "necessarily involves" another offense so that merger applies, courts have looked to the definitions of crimes to see whether the elements are the same. *State v. McAfee,* 78 N.M. 108, 428 P.2d 647 (1967); *State v. Everitt,* 80 N.M. 41, 450 P.2d 927 (Ct.App.1969); *State v. Ranne,* 80 N.M. 188, 453 P.2d 209 (Ct. App.1969).

Section 30–2–1, N.M.S.A.1978 provides:

> Murder is the unlawful killing of one human being by another with malice aforethought, either express or implied, by any of the means with which death may be caused.
>
> A. Murder in the first degree consists of all murder perpetrated:
>
> . . . . .
>
> (3) in the commission of or attempt to commit any felony;
>
> . . . . .

Section 30–16–2, N.M.S.A.1978 provides:

> Robbery consists of the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence.

The element of these two statutes clearly differ. Either crime can be committed without committing the other.

Another concept used in determining whether two crimes constitute the same offense is the "same evidence" test defined by this Court in *Owens v. Abram,* 58 N.M. 682, 684, 274 P.2d 630, 631 (1954), *cert. denied,* 348 U.S. 917, 75 S.Ct. 300, 99 L.Ed. 719 (1955): "whether the facts offered in support of one [offense], would sustain a conviction of the other offense." *See also State v. Sandoval, supra; Tanton II, supra.* "If either information requires the proof of facts to support a conviction which the other does not, the offenses are not the same and a plea of double jeopardy is unavailing." *Owens, supra,* 58 N.M. at 684, 274 P.2d at 631. In this case, the first-degree murder statute requires proof of an unlawful killing, which the robbery statute does not. However, the robbery statute requires proof of the taking of another's property, which the first degree murder statute does not. Thus, under the test set forth in *Owens, supra,* the offenses are not the same even though it is necessary to prove the underlying felony in order to convict the defendant of first-degree murder.

Under both the definitions of the crimes and under the facts, the defendant is not being subjected to double punishment. *See State v. Archunde,* 91 N.M. 682, 579 P.2d 808 (Ct.App.1978). Consecutive sentences are proper in a case such as the one at bar.

For the foregoing reasons, we reverse the decision of the trial court, vacate the sentences, and remand this cause to district court for a new trial.

IT IS SO ORDERED.

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

601 P.2d 433

Edward H. BAKER, Petitioner-Appellant,

v.

Tasha R. BAKER, Respondent-Appellee.

No. 12297.

Supreme Court of New Mexico.

Oct. 22, 1979.

Burroughs & Rhodes, F. Randolph Burroughs, Alamogordo, for petitioner-appellant.

Jack T. Whorton, Alamogordo, for respondent-appellee.

OPINION

JOHN E. BROWN, District Judge.

Appellant, Edward Baker, appeals from an order of the Otero County District Court adjudging him to be in civil contempt of court for failure to comply with an order of the court concerning the summer visitation rights of his former wife, Tasha Baker, the appellee herein, to their minor child.

Three issues are presented for review:

1. Whether the trial court had jurisdiction to find appellant in contempt.

2. Whether the trial court abused its discretion in refusing to stay its proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. §§ 501–548, 560–574.

3. Whether the trial court abused its discretion in refusing to require appellee to post a bond to insure her performance with the previous orders of the court regarding visitation.

On each issue we affirm the judgment of the trial court.

Appellant was awarded an absolute divorce from appellee on August 5, 1977. At that time, appellant was stationed at Holloman Air Force Base, New Mexico as a member of the United States Air Force. Appellee was residing in Colorado. The child was living with his father in New Mexico. In the final decree, the trial court awarded custody of the child to appellant, but granted appellee certain visitation rights, including custody of the child during the summer of 1978.

Shortly after entry of the final decree, appellant received orders to report to a new duty station in West Germany. Appellee obtained a temporary order of custody and a temporary restraining order prohibiting

appellant from removing the child from the United States. Following a hearing in October 1977, the court awarded appellant custody of the child, including the right to take the child to Germany, but it confirmed the visitation rights of appellee for the summer of 1978. Although appellee failed to deliver the child to appellant, the child was eventually located in Texas, whereupon appellant took him to Germany.

Despite various efforts of appellee to secure the return of the child for the summer visitation period in 1978, appellant failed to comply with the previous orders of the court. Appellee filed a motion for an order to show cause, for an adjudication of contempt, and for a modification of custody. Appellant accepted service of these pleadings in Germany. After entry of two orders to show cause why he should not be adjudged to be in contempt of the previous orders of the court, appellant moved to dismiss the proceedings for lack of jurisdiction, or alternatively, to stay the proceedings under the Soldiers' and Sailors' Relief Act. The trial court denied both motions found appellant to be in civil contempt, and sentenced him to 60 days in jail, or until such time as he delivered the child to appellee.

I.

Appellant's first contention is that the trial court lacked jurisdiction over the motions filed by appellee because at the time the motions were filed, neither party nor the child was domiciled or physically present in New Mexico.

In support of this argument, appellant cites several cases which he asserts stand for the proposition that a court in a state in which neither the child nor the custodial parent are domiciliaries has no jurisdiction to modify a custody order previously entered by a court of competent jurisdiction. *See Hoefer v. Hoefer,* 67 N.M. 180, 353 P.2d 1066 (1960); *In Re Hughes,* 73 Ariz. 97, 237 P.2d 1009 (1951); *Graton v. Graton,* 24 Ariz. App. 194, 537 P.2d 31 (1975); *Word v. Word,* 236 Ga. 100, 222 S.E.2d 382 (1976).

These cases are not relevant to the jurisdictional issue in this case. Here the trial court did not enter an order changing the custody of the child. Rather, in adjudging appellant to be in contempt of court, the trial court merely sought to compel appellant to obey an order which had been entered at a time when both he and the child resided in New Mexico. When that order was entered, the court had unquestioned jurisdiction to determine custody and visitation rights. In fact, appellant himself sought that portion of the order which permitted him to take his child to Germany.

Appellant is now saying "catch me if you can." When it is convenient to obey the court, appellant is obedient, but when it is inconvenient, or if appellant changes his mind, the court is powerless to act because he is no longer present in the jurisdiction.

This position is untenable. Having had jurisdiction over appellant and the subject of custody originally, appellant's removal from the jurisdiction cannot defeat the power of the court to enforce its order by contempt. "[T]he affront is none the less directly against the dignity and authority of that court, no matter to what county or state the offender may go to violate the order of the court." *Farmers' State Bank of Texhoma v. State,* 13 Okl.Cr. 283, 164 P. 132 (1917). *See also Leman v. Krentler-Arnold Co.,* 284 U.S. 448, 52 S.Ct. 238, 76 L.Ed. 389 (1932); *Ogletree v. Watson,* 223 Ga. 618, 157 S.E.2d 464 (1967).

All that was required was sufficient notice to appellant of the proceedings being brought against him. *Leman, supra.* Appellant unquestionably received such notice. Therefore, the trial court properly denied appellant's motion to dismiss for lack of jurisdiction.

II.

Appellant's second contention is that the trial court abused its discretion by denying his motion to stay the proceedings under the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. §§ 501–548, 560–574.

50 U.S.C. App. § 521 provides:

> At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [sections 501–548 and 560–590 of this Appendix], unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

The trial court held that insufficient evidence existed to invoke the discretion of the court for the granting of a stay under this section. In so ruling, the court in effect found that there was no basis for concluding that appellant's ability "to conduct his defense" in this case was "materially affected by reason of his military service." We agree.

In *Stalcup v. Ruzic,* 51 N.M. 377, 382, 185 P.2d 298, 300 (1947), this Court noted that the party seeking relief under 50 U.S.C. App. § 521 had failed to show "any attempt had been made to procure leave" from his military duty station in order to be present in court, and had totally failed to show diligence on his part. *See also Jaramillo v. Sandoval,* 78 N.M. 332, 431 P.2d 65 (1967); *Norris v. Superior Court of Mohave County,* 14 Ariz.App. 183, 481 P.2d 553 (1971). Likewise, in this case, appellant's simple assertion that he was required to remain in Germany for another two years is not sufficient to invoke the relief provided for by U.S.C. App. § 521.

Appellant cites several cases in which courts in other jurisdictions have, under 50 U.S.C. App. § 521, granted servicemen a stay of proceedings to modify existing provisions for child custody. *Chaffey v. Chaffey,* 59 Cal.2d 792, 31 Cal.Rptr. 325, 382 P.2d 365 (1963); *Ratliff v. Ratliff,* 234 Iowa 1171, 15 N.W.2d 272 (1944).

Again, appellant misconstrues the nature of the proceedings in this case. As was noted with respect to the jurisdictional issue, this case does not involve a change of custody or a modification of the previous custody orders of the court. Rather, the only matters the trial court decided were that appellant had failed to comply with the visitation provisions of a custody order which he had sought, and that he should be held in contempt until he complied.

The Soldiers' and Sailors' Civil Relief Act was passed to give extra protection to military personnel. It certainly did not give a license to a serviceman to ignore lawful civil orders, which were directed at him while he was present in this country, once he had been transferred abroad. Having granted appellant the right to take his child to his foreign duty station, the trial court properly refused to permit him to invoke the provisions of the Relief Act in order to avoid the reasonable visitation conditions placed on that grant of custody.

III.

Appellant's final contention is that the trial court abused its discretion by refusing to require appellee to post a security bond to insure her performance under the previous orders of the court regarding visitation. Appellant contends that a bond should have been required because appellee failed to deliver the child to appellant following the October 19, 1977 order of the court permitting appellant to take the child to Germany.

It would be orderly and litigation would perhaps be reduced if performance bonds were required of each party to a custody action. However, the subject matter of custody actions is not an inanimate object, but a living, impressionable child whose future should not be shaped only by the parent possessing sufficient means to post a bond. The matter of requiring such bonds properly lies within the discretion of the trial court, and the exercise of that discretion will not be disturbed on review unless it has clearly been abused.

In this case, appellant is in the curious position of contending in a contempt proceeding against *him* for willful disobedi-

ence of a lawful court order that *appellee* should have been required to post a bond to insure her performance of visitation provisions whose enforcement *she* has sought. Under such circumstances, we cannot say that the trial court abused its discretion by refusing to require appellee to post a bond.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

SOSA, C. J., and PAYNE, J., concur.

601 P.2d 437

FIRST NATIONAL BANK IN CLAYTON, Plaintiff-Appellant,

v.

Roy M. WOOD, Defendant-Appellee.

No. 3752.

Court of Appeals of New Mexico.

Sept. 6. 1979.

Rehearing Denied Sept. 19, 1979.

Ethan K. Stevens, Clayton, J. Walter Park, IV, David T. Turlington, Davis & Turlington, Inc., San Antonio, Tex., for plaintiff-appellant.

Charles D. Alsup, Clayton, for defendant-appellee.

OPINION

SUTIN, Judge.

Plaintiff (The Bank) sued defendant (Wood) on a written guaranty given by Wood to The Bank to secure a portion of a debt owed to The Bank by Wood's son. The guaranty was in the sum of $20,000. Wood asserted the affirmative defense of coercion and duress exercised by The Bank in obtaining the guaranty and filed counterclaims. At the close of the case, both parties moved for a directed verdict. The court took the motions under advisement, but announced that it would like to leave the parties where they were when they first entered the courtroom.

After the case was submitted to the jury, it hung and a mistrial was declared. Thereupon, the court granted The Bank's motion for a directed verdict against Wood's counterclaims, and granted Wood's motion for a directed verdict, dismissing The Bank's complaint. The announcement of the court at the close of the case was made effective. The Bank appeals. We affirm.

Two points are raised on appeal but argued as one: (1) the evidence was insufficient to show as a matter of law, economic compulsion which caused Wood to sign the written guarantee, and (2) The Bank was entitled to a directed verdict on the guarantee agreement because the defense of duress or coercion was not established.

Prior to June, 1974, The Bank, along with a correspondent bank in Albuquerque, had extended to Wood a $500,000 line of credit. In June and December of each year, promissory notes at The Bank matured and were renewed if necessary.

In June, 1974, Wood's son was indebted to The Bank in the sum of $68,000. The Bank decided that it needed more security to cover the son's loan and that a guaranty was the only method of obtaining it. The president of The Bank contacted Wood and told him under instructions from the board that " '[W]e can't renew your line of credit until you sign a guaranty on [your son].' " Four other officers of The Bank confirmed the fact that The Bank demanded a guaranty by Wood of his son's indebtedness. Otherwise his notes and credit line would not be renewed. Wood refused to guaranty the entire indebtedness. He went to the First National Bank in Raton as an alternative source at which to seek credit in the sum of $400,000, but this bank was without money to loan him.

From June to September, Wood tried to get his credit renewed. Whenever he spoke with officers of The Bank, they spoke of the indebtedness of the son. Wood said:

> They were trying to force me to sign [his son's] guaranty before they would renew my note.

To keep his operations afloat, Wood had to sign a guaranty. He figured that the son's total indebtedness was $68,000; that his son's security was valued at $48,000 and that the deficiency was $20,000. On September 13, 1974, Wood finally agreed to sign the guarantee in the sum of $20,000 so that The Bank would renew his credit that was then 90 days past due. On that date, his son executed a note to The Bank in the sum of $66,337.20 and Wood signed the guarantee. Three days later, on September 16, 1974, Wood's note was renewed and his credit line extended.

The Bank's position was that Wood testified he had had no financial problems with The Bank. Nevertheless, unknown to Wood, the bank examiner notified The Bank that it had exceeded the Wood loan limit and had violated the law, and that The Bank had to negotiate some kind of agreement with Wood. On May 30, 1974, due to a drop in value of his collateral that secured his note, Wood was short $122,000, i. e., if all Wood's cattle were sold, Wood would still owe The Bank $122,000. The Bank told Wood that he had to liquidate a portion of his assets and reduce his indebtedness in order for The Bank to comply with its lending limits. Wood refinanced his land and paid the funds received to The Bank in September, 1974. Having complied, and having signed the guaranty, his note was renewed on September 16, 1974. The Bank's position has no reference to the defense of duress and coercion. But it is obvious that the fault of The Bank created a Bank-Wood problem.

Subsequently, The Bank recovered judgment against Wood's son, and in 1978, Wood's son was discharged in bankruptcy.

The Bank was entitled to a directed verdict against Wood on the guaranty agreement if Wood's defense failed. The only question on this appeal is:

> Did The Bank exercise duress or coerce Wood into signing the guaranty agreement as a matter of law?

The Bank relies on *Pecos Const. Co. v. Mortgage Invest. Co. of El Paso*, 80 N.M. 680, 459 P.2d 842 (1969); *Terrel v. Duke City Lumber Company*, 86 N.M. 405, 524

P.2d 1021 (Ct.App.1974), aff'd in part, rev'd in part, 88 N.M. 299, 540 P.2d 229 (1975). The Supreme Court affirmed *Terrel* on the issues raised in this appeal.

In *Pecos* and *Terrel*, plaintiff sued defendant for damages on the basis of business duress and compulsion. In each case, defendant was in the superior bargaining position. "In *Pecos* the establishment of a superior bargaining position (control of funds) created the duty to offer the weaker party a reasonable choice of alternatives." *Terrel, supra*, (86 N.M. at 423, 524 P.2d at 1039). In the case at hand, The Bank was master in the control of funds of Wood by way of non-renewal of Wood's credit line and notes. Its command to Wood was "Guaranty your son's indebtedness or else." No reasonable choice of alternatives were offered. Nevertheless, Wood did seek an alternative choice without success.

Caldwell v. Higginbotham, 20 N.M. 482, 151 P. 315 (1915) was cited in *Pecos* and *Terrel*. Paraphrasing the quoted language in 20 N.M. at 507 and 509, 151 P. 315 it reads:

> Duress exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man to obtain a guaranty is wrongfully induced thereby and ought not to be regarded as voluntary.
>
> To constitute the coercion or duress which will be regarded as sufficient to make the guaranty involuntary, there must be some actual or threatened exercise of power possessed, by the party exacting or receiving the guaranty over the person or property of another, from which the latter has no other means of immediate relief, than by making the guaranty. The doctrine established by the authorities is that a guaranty is not to be regarded as compulsory unless made to emancipate the person or property from an actual or existing duress imposed upon it by the party to whom the guarantee was given.

In effect, these were the instructions given to the jury in *Terrel*. See instructions Nos. 11 and 12 [Id. 418–19].

The evidence is undisputed that (1) The Bank threatened Wood with a serious attack upon his financial business operations, (2) that this duress was sufficient to affect Wood's conduct toward executing a guarantee, (3) that the execution of the guarantee was compulsory or involuntary, and (4) that The Bank did not offer Wood any alternatives. These facts established the defense of duress or coercion, commonly called "economic compulsion."

Wood has established by clear and convincing evidence as a matter of law that The Bank exercised duress or coercion in obtaining Wood's guaranty.

Affirmed.

IT IS SO ORDERED.

WOOD, C. J., specially concurring.

HERNANDEZ, J., concurring in Chief Judge WOOD's special concurrence.

WOOD, Chief Judge (specially concurring):

I agree that the trial court properly directed a verdict in favor of Wood on the economic compulsion claim; I agree that the Bank gave Wood no alternative in requiring execution of the guaranty before renewing Wood's loan. The evidence is undisputed that if Wood did not execute the guaranty, the Bank would call the loan.

This special concurrence is directed to the Bank's claim that it had a legal right to require the guaranty. See *Terrel v. Duke City Lumber Company, Inc.*, 86 N.M. 405, supra, at 419, 524 P.2d 1021.

Pursuant to the written loan commitment, signed by the parties, Wood had a line of credit to the maximum amount of $500,000. Wood began borrowing money in 1971. The loan was reviewed and renewed every six months. Wood used the money in connection with his cattle operations. Because of the amount of the loan, the Bank did not expect the loan to be paid off when the six-month note matured. The ordinary procedure was that the note was renewed after a review of Wood's financial condition

and operations during the preceding six months.

In 1974, the cattle market was severely depressed, resulting in loss in value of the cattle securing the loan. In June, 1974, the Bank imposed conditions for renewal, including the sale of some assets in order to reduce the amount of the loan. These conditions were consistent with, and permissible under, the written agreement of the parties. Wood met those conditions. Nevertheless, the Bank refused to renew the loan unless Wood also executed the agreement which guaranteed $20,000 of the son's indebtedness, for which Wood was not liable. There is nothing in the written loan commitment which gave the Bank the legal right to require the guaranty as a condition for renewing the loan, and there is nothing in the trial testimony that supports such a legal right. The Bank added the guaranty requirement without any legal right to do so.

HERNANDEZ, J., concurs.

601 P.2d 440

STATE of New Mexico, Plaintiff-Appellant,

v.

James L. STEELE, Defendant-Appellee.

No. 4018.

Court of Appeals of New Mexico.

Sept. 11, 1979.

Jeff Bingaman, Atty. Gen., Sammy J. Quintana, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Dan B. Buzzard, Clovis, for defendant-appellee.

OPINION

WALTERS, Judge.

The trial court suppressed the results of a blood-alcohol test taken of defendant without his consent, but under the authority of a search warrant issued upon probable cause. The State appeals.

Several grounds were urged in the trial court in support of defendant's motion for suppression. The sole question presented here, however, is whether, when a driver has been charged with vehicular homicide, § 66–8–111, N.M.S.A.1978, prohibits testing for blood-alcohol content after the driver refuses to be tested, even though a valid search warrant has been issued for that purpose.

New Mexico's Implied Consent Act (§§ 66–8–105 through 66–8–112, N.M.S.A. 1978), provides that one who operates a motor vehicle in this state is deemed to have consented to have his blood tested for alcoholic content if he is arrested for any act alleged to have been committed while driving under the influence of intoxicating liquor. The Act specifically permits such testing if the driver is incapable by death, unconsciousness or otherwise, to refuse the chemical testing. But the section relied on by defendant and persuasive to the trial court reads:

> 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 [the Act], none shall be administered.

Section 66–8–111 (formerly 64–22–2.11, N.M.S.A.1953).

In *State v. Wilson*, 92 N.M. 54, 582 P.2d 826 (1978) we held it proper to suppress a blood sample taken, over defendant's refusal, upon order of the arresting officer. Judge Hendley there wrote that a statute may enlarge constitutional rights and that a blood sample taken in violation of the statutory right might be suppressed.

The act of obtaining a search warrant to circumvent the statutory prohibition and the result in *Wilson, supra*, is unavailing. We note that the federal and state constitutional prohibitions against unreasonable searches and seizures expressly provide an exception upon issuance of a warrant supported by probable cause. U.S.Const. Amend. IV; N.M.Const. art. II, § 10. No such exception appears in the statute concerned with a "search" for blood-alcohol content.

We are led to the only conclusion possible under our reading of the statute; that is, that consent of the offending driver must be obtained before blood test results may be introduced in a trial charging a criminal act resulting from driving while intoxicated.

As was said in *People v. Todd*, 59 Ill.2d 534, 322 N.E.2d 447 (1975), "This is an unfortunate result and a cruel anomaly." It is especially so, considering that compulsory blood tests do not violate constitutional rights, *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), and searches accompanying valid arrests, even without search warrants, have long been recognized as constitutionally permissible to seize the fruits of the crime or to prevent destruction of evidence, *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950). We are mindful, too, of the case originating in New Mexico before passage of our Implied Consent Act, *Breithaupt v. Abram*, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957), in which the Supreme Court upheld the administration of a blood test to an unconscious driver and admission of its results in his subsequent trial for manslaughter.

The statutory proscription is an anomalous prohibition against any search without consent, warrant or not, because there are few more compelling demands for protection of the public over the individual than those which insist upon removing the drunk driver from the arena of carnage he wreaks day in and day out on our public highways.

Nonetheless, the legislature alone can write an exception into § 66–8–111 if it wishes to make blood tests obtainable upon issuance of a search warrant; the courts are without power to encroach upon the legislative prerogatives by judicial fiat or, even, by applying constitutional exceptions to statutes specifically denying such exceptions. N.M.Const. art. III, § 1; see *State v. Dennis*, 80 N.M. 262, 454 P.2d 276 (Ct.App. 1969). That being so, the trial court did not err in granting defendant's motion to suppress.

The order of suppression is affirmed.

IT IS SO ORDERED.

LOPEZ and ANDREWS, JJ., concur.

601 P.2d 442

STATE of New Mexico,
Plaintiff-Appellee,

v.

Steven Thomas NOLAN,
Defendant-Appellant.

No. 3911.

Court of Appeals of New Mexico.

Sept. 13, 1979.

Roderick A. Dorr, Terrazas & Dorr, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Michael A. Kauffman, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

LOPEZ, Judge.

Defendant appeals his conviction of armed robbery in violation of § 30–16–2, N.M.S. A.1978. We affirm.

Defendant presents four points for reversal: (1) the trial court erred in refusing to dismiss the criminal information against defendant; (2) the court erred in refusing to suppress evidence obtained during and after an allegedly illegal arrest of defendant and search of defendant and his vehicle; (3) the court erred in refusing to suppress a photographic identification and subsequent in-court identification of defendant; and (4) the court erred by sentencing defendant in a manner contrary to that authorized by the Legislature. Other issues listed in the docketing statement were not briefed; consequently, on appeal, they are deemed abandoned. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct.App.1977). After stating the relevant facts, we shall discuss each point in the order they appear.

Facts

Defendant was charged with armed robbery of an Allsup's convenience store in Eunice, New Mexico. The robbery occurred on April 19, 1977, at approximately 2:40 A.M. An employee of the store, Jo Ann Davis, was present when the robbery occurred. Shortly after its occurrence, she gave a description of the robber to Bill Standifer, an investigating officer with the Eunice Police Department. She described the robber as a male, weighing between 180 and 210 pounds, with a full beard, dark hair and brown eyes. She further told Standifer that the man was between 5′7″ and 5′7½″ in height and was wearing Levis, a shirt and what appeared to be a jacket and ski cap. At the time the robbery occurred, the store was well lighted, and Davis was able to observe the robber at close range. Standifer gave the description to the dispatcher and instructed her to give it to Hobbs and Jal, New Mexico, and Andrews, Texas.

At approximately 4:37 o'clock that same morning, William S. Barr, an officer with the Andrews Police Department, was on patrol in Andrews. He had previously received a report of an armed robbery in Eunice and a description of the suspect. The suspect was described as a white male with dark hair, full beard and mustache. In addition, the suspect was reported as being 5′10″ in height, weighing between 180 and 200 pounds and wearing a dark hat, possibly a toboggan type, and blue jeans. No description of a vehicle was given. Shortly after receiving the report, Barr observed a vehicle coming from the direction of Eunice. It is thirty-seven miles from Eunice to Andrews. This vehicle was driven by defendant.

Barr stopped his patrol vehicle, and, as defendant passed him, Barr failed to see any visible license plate on defendant's vehicle. Barr observed defendant not only when defendant passed but also when defendant stopped at a red traffic light. Defendant had long black or dark hair and a full beard. After stopping at the traffic light, Barr followed defendant's vehicle and radioed for another unit to back him up. Lieutenant Yarbrough and Officer Ronnie Cowan, of the Andrews Police Department, were in the other unit and had also received the dispatch from Eunice. Shortly after being radioed, Yarbrough and Cowan approached Barr's vehicle from behind, passed it and then overtook defendant's vehicle. When Yarbrough and Cowan were parallel to defendant's vehicle, Barr turned on his emergency equipment, and, after observing defendant, Yarbrough radioed Barr to advise him that defendant was probably the suspect who had committed the robbery in Eunice. At trial, Barr testified that he stopped defendant because he could see no visible license plate on defendant's vehicle and because defendant fit the description of the suspect which he had received from Eunice. Cowan testified that defendant was arrested because he was suspected of committing armed robbery. The bases for the suspicion was the Eunice description,

the time of day and the fact that defendant's vehicle was the only vehicle on the street and that it was coming from the direction of Eunice. Following the arrest, defendant and his vehicle were searched. During this search, the following items were seized and later admitted into evidence at trial: a hat that defendant was wearing, a shotgun, shotgun shells, a large paper sack with the name "Furr's" on it, and a certain amount of money.

Shortly after defendant was arrested, the Andrews Sheriff's Department notified the Eunice police that it had in custody a suspect fitting the description of the person who had robbed the Allsup's convenience store. Sergeant Tommy Joe Thompson of the Eunice Police Department and Deputy Tommy Crowe of the Eunice Sheriff's Department then took Jo Ann Davis to Andrews in order to determine if she could identify the suspect. When Davis arrived at Andrews Sheriff's Department, defendant's driver's license and personal effects, a Furr's paper sack, some bullets and beer were on a counter. Upon seeing the photograph on the driver's license, Davis readily identified it as a photograph of the robber. At trial, Davis testified that the personal effects, sack and bullets played a part in her identification. Subsequent to this identification, a photograph of defendant was shown to Davis. She again identified it as a photograph of the robber. Davis also identified defendant at trial.

After defendant waived extradition, Harlon Howell, Chief of the Eunice Police Department, and Sergeant Thompson went to Andrews in order to bring defendant back to Eunice. Before leaving Andrews, Chief Howell read defendant his *Miranda* rights. On the trip back to Eunice, defendant made certain inculpatory statements concerning the robbery of the Allsup's store. These statements were later admitted into evidence at trial.

Dismissal of Criminal Information

Defendant argues that the trial court committed a jurisdictional error by refusing to dismiss the criminal information against him. Defendant claims that the information should have been dismissed because his arrest was illegal. Although not specifically stated, defendant's argument appears to be that an illegal arrest is a bar to a court's jurisdiction over the person illegally arrested. At this point, we assume, but do not decide, that defendant's arrest was illegal. However, despite this assumption, we conclude that defendant's argument is without merit.

When faced with a similar argument, this Court in *State v. Halsell*, 81 N.M. 239, 465 P.2d 518 (Ct.App.1970), stated:

> The courts of this and many other jurisdictions have—in direct appeals, habeas corpus proceedings, and post-conviction proceedings—repeatedly held that the jurisdiction of a court to try a person accused of crime, or to accept his plea of guilty, is not divested, nor his conviction vitiated, because his arrest was irregular or unlawful. (Cites omitted.)

Id. at 240, 465 P.2d at 519; *accord, City of Roswell v. Martinez*, 82 N.M. 708, 487 P.2d 136 (Ct.App.1971). Accordingly, based upon this statement, we hold that the trial court did not commit a jurisdictional error by refusing to dismiss the criminal information against defendant.

In arriving at this holding, we are aware that our Supreme Court in *Benally v. Marcum*, 89 N.M. 463, 553 P.2d 1270 (1976), has questioned the validity of cases such as *State v. Halsell, supra, Frisbie v. Collins*, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952), and *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886), and their doctrine that "it is no defense to a criminal prosecution that the defendant was illegally brought before the court." *Benally, supra*, 89 N.M. at 466, 553 P.2d at 1273. As grounds for this questioning, the court relied upon the decisions rendered by the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Silverman v. United States*, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961); *Rochin v. Califor-*

nia, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952); *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943); Justice Brandeis's dissenting opinion in *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928); and an opinion written by the Second Circuit of the Court of Appeals in *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). However, the court in *Benally, supra*, failed to note that the United States Supreme Court, as recently as 1975, cited *Frisbie v. Collins, supra*, and *Ker v. Illinois, supra*, with approval and stated that ". . . we [do not] retreat from the established rule that illegal arrest or detention does not void a subsequent conviction." *Gerstein v. Pugh*, 420 U.S. 103, 119, 95 S.Ct. 854, 865, 43 L.Ed.2d 54 (1975). Therefore, because of this language, we conclude that *Benally, supra*, does not apply to the case at hand.

Suppression of Evidence

Defendant argues that the court erred in refusing to suppress evidence obtained during and after an allegedly illegal arrest of defendant and search of defendant and his vehicle. The incriminating statements made by defendant to the Eunice policemen on the trip back to Eunice are included in those items which defendant contends were improperly admitted into evidence. Defendant bases his contention of error on the assertion that, because his arrest was illegal, any items seized as a result of this arrest were also illegally obtained and should, therefore, have been suppressed. We disagree.

It is undisputed that the arresting officers did not possess a warrant for defendant's arrest. Defendant claims, however, that his arrest was illegal because the arresting officers did not have the necessary probable cause to arrest him. The legality of an arrest is determined by the law of the jurisdiction where the arrest was affected. *State v. Coleman*, 579 P.2d 732 (Mont.1978); see *Miller v. United States*, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958). In the present case, defendant was arrested in Andrews, Texas. Accordingly, Texas law should be applied to determine the legality of defendant's arrest. The court in *Brown v. State*, 481 S.W.2d 106 (Tex.Cr.App.1972), stated the standard for determining whether probable cause exists for an arrest:

> Probable cause for an arrest exists where, at that moment, the facts and circumstances within the knowledge of the arresting officer and of which he has reasonably trustworthy information would warrant a reasonable and prudent man in believing that a particular person has committed or is committing a crime.

Id. at 110.

The following facts and circumstances were within the knowledge of the officers arresting defendant. Barr received a radio dispatch from the Eunice Police Department concerning an armed robbery of an Allsup's convenience store in Eunice, New Mexico. This dispatch was received shortly after the robbery occurred. It described the suspect as a white male with dark hair, full beard and mustache. In addition, the suspect was reported as being 5'10" in height, weighing between 180 and 200 pounds and wearing a dark hat, possibly a toboggan type, and blue jeans. This description was based upon a report given by an eyewitness to the crime. At approximately 4:37 o'clock in the morning, Barr observed defendant's vehicle coming from the direction of Eunice. It is thirty-seven miles from Eunice to Andrews. Barr was able to observe defendant not only when defendant passed him on the road but also when defendant stopped at a red traffic light. Defendant had long black or dark hair and a full beard. Yarbrough and Cowan also received the dispatch from Eunice. They also were able to observe defendant as they passed his vehicle. Barr later testified that he stopped defendant because defendant fit the description of the suspect which he had received from Eunice. Cowan testified that defendant was arrested because he was suspected of committing armed robbery. The basis for this suspicion was the Eunice description, the time of day and the fact that defendant's vehicle was the only vehicle on the street and that it was coming

from the direction of Eunice. We rule that these facts and circumstances are sufficient to establish probable cause for defendant's arrest. *See Guzman v. State*, 521 S.W.2d 267 (Tex.Cr.App.1975); *Branch v. State*, 447 S.W.2d 932 (Tex.Cr.App.1969). Accordingly, we further rule that defendant's arrest was not illegal.

In arriving at these rulings, we are aware that defendant relies principally on *Brown v. State, supra*, as support for his claim that his arrest was illegal because the arresting officers did not have the necessary probable cause to arrest him. However, in that case, the description given by a witness to the robbery included only approximate height and weight and race. In addition, the arrest of defendants occurred approximately twenty-four hours later in a large city. In the present case, the description given by Davis included defendant's hair coloring, clothing and the fact that he had a beard. Furthermore, defendant was arrested shortly after the robbery, at an early morning hour and on a road leading from the town where the robbery occurred. Given these distinguishing facts, we conclude that *Brown v. State, supra*, is not controlling. We also conclude that, under the facts of the case at hand, defendant's argument based on *State v. Gorsuch*, 87 N.M. 135, 529 P.2d 1256 (Ct.App.1974), is without merit.

Based upon our ruling that defendant's arrest was not illegal, we hold that the court properly admitted into evidence the items seized from defendant's vehicle. The search which uncovered these items can be justified either as a search incident to an arrest based on probable cause to arrest or a search based on probable cause to search. *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *State v. Luna*, 91 N.M. 560, 577 P.2d 458 (Ct.App.), *cert. denied*, 91 N.M. 610, 577 P.2d 1256 (1978); *State v. Vallejos*, 89 N.M. 23, 546 P.2d 871 (Ct.App.1976). In addition, since we have already ruled that defendant's arrest was legal, defendant's argument that his incriminating statements should have been suppressed as evidence obtained directly from an illegal arrest is without merit. We, therefore, hold that the trial court properly admitted these statements into evidence.

Suppression of Identifications

Defendant contends that the court erred in refusing to suppress a photographic identification and subsequent in-court identification of defendant. The test in this jurisdiction with respect to suppression of out-of-court photographic identifications is whether the " 'photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' " *State v. Baldonado*, 82 N.M. 581, 582, 484 P.2d 1291, 1292 (Ct.App.1971); *accord, State v. Gilliam*, 83 N.M. 325, 491 P.2d 1080 (Ct. App.1971).

After reviewing the record, we conclude that the identification procedure in the present case was such that it did give rise to a substantial likelihood of irreparable misidentification. Davis was not shown an array of photographs; rather she was shown only one photograph which was a picture of defendant. In addition, defendant's driver's license which contained the photograph that Davis identified as the robber was in close proximity to other items connected with the robbery. Davis later testified that this fact played a part in her identification. Moreover, Davis knew she was going to Andrews for the specific purpose of determining whether she could identify the suspect in custody. In this situation, to show a witness only one photograph cannot be justified. Finally, the record does not disclose the existence of any urgency which could justify such a procedure. Accordingly, we conclude that the circumstances surrounding Davis's photographic identification were impermissibly suggestive.

However, despite this conclusion, we do not agree with defendant's contention that the photographic identification should have been suppressed. Our disagreement is based upon the United States Supreme Court decision in *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). The issue in this case was "whether the Due Process Clause of the Fourteenth Amend-

ment compels the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary." *Id.* at 99, 97 S.Ct. at 2245. In arriving at its holding, the Court discussed its decision in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), and stated that the central question was " 'whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive.' " 432 U.S. at 106, 97 S.Ct. at 2249. Based partly upon an analysis of this question, the Court held:

> We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations. The factors to be considered are set out in *Biggers.* 409 U.S., at 199–200, 93 S.Ct. 375. These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

Id. at 114, 97 S.Ct. at 2253.

Guided by this holding, we rule that Davis's photographic identification was reliable even though the procedure used was impermissibly suggestive. The record discloses that, when the robbery occurred, the store was well lighted and Davis was able to view the robber at close range. Additionally, there is nothing to indicate that Davis's degree of attention was impaired. This latter fact is supported by the accuracy and detail of Davis's prior description of the robber, which was a factor in leading to the eventual arrest of defendant. Moreover, when confronted with the photographs of defendant, Davis displayed no doubt, but readily identified him as the robber. Finally, only a few short hours elapsed between the crime and Davis's identification. Under these circumstances and weighed against the corrupting effect of the suggestive identification itself, we hold that the court properly admitted testimony concerning Davis's photographic identification of defendant. In addition, based upon the above facts concerning the reliability of Davis's identification, we rule that Davis's in-court identification was sufficiently independent of and not tainted by her extra-judicial identification so as to require its exclusion. *State v. Torres*, 81 N.M. 521, 469 P.2d 166 (Ct.App.), *cert. denied*, 81 N.M. 506, 469 P.2d 151 (1970).

Defendant's Sentence

Defendant argues that the court erred by sentencing him in a manner contrary to that authorized by the Legislature. We agree. Defendant pleaded guilty to burglary, a fourth degree felony, in violation of § 30–16–3, N.M.S.A.1978. Defendant was found guilty of armed robbery, a second degree felony, in violation of § 30–16–2. By a special finding, the jury found that defendant used a firearm in commission of the armed robbery. Defendant was also found in contempt of court. Defendant was then sentenced to not less than one year nor more than five years on the burglary charge. Section 31–18–3 D, N.M.S.A. 1978. Defendant was also sentenced to not less than fifteen nor more than fifty-five years on the armed robbery charge. This sentence was to run consecutively with the burglary sentence. Sections 31–18–3 B and 31–18–4, N.M.S.A.1978. After serving these sentences, defendant was to return to the Lea County Jail to serve thirty days for contempt. After serving all of these sentences, he was to be placed on probation for a period of three years.

Section 31–18–1, N.M.S.A.1978, provides:

> No person convicted of a crime under the Criminal Code shall be sentenced except in accordance with the Criminal Code.

In addition, § 31–20–5, N.M.S.A.1978, states:

> When a person has been convicted of a crime for which a sentence of imprisonment is authorized, and *when the district court has deferred or suspended sentence,*

it shall order the defendant to be placed on probation for all or some portion of the period of deferment or suspension if the defendant is in need of supervision, guidance or direction that is feasible for the probation service to furnish; provided, however, the total period of probation shall not exceed five years. (Emphasis added.)

A court may sentence a defendant only within those bounds prescribed by law. *See State v. Hovey*, 87 N.M. 398, 534 P.2d 777 (Ct.App.1975). The court in the present case ordered defendant placed on probation without deferring or suspending any of his sentences. Consequently, this action was not within the bounds prescribed by law. Section 31–20–5. We, therefore, hold that the probationary part of defendant's sentence is void. *See Sneed v. Cox*, 74 N.M. 659, 397 P.2d 308 (1964).

Based upon this holding and the foregoing, we affirm defendant's conviction and remand this cause with instructions to delete, the probationary period from the trial court's judgment and sentence. *Sneed v. Cox, supra.*

IT IS SO ORDERED.

WALTERS, J., specially concurring.

ANDREWS, J., concurs.

WALTERS, Judge (specially concurring).

I concur in the result reached by the majority in this matter; but I am unwilling to assume the arrest was illegal. The lack of a license plate and the arresting officer's recognition of defendant as the person described by the dispatcher, plus the other noted circumstances, supplied grounds for arrest. Dismissal of the indictment on the basis of illegal arrest was properly denied. Thus the discussion of the effect of *Benally v. Marcum, supra* (with which discussion I also do not agree), is unnecessary.

The matter must be remanded for correction of the sentences imposed.

601 P.2d 448

STATE of New Mexico, Plaintiff-Appellee,

v.

Michael RHEA, Defendant-Appellant.

No. 4016.

Court of Appeals of New Mexico.

Sept. 20, 1979.

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

Jeff Bingaman, Atty. Gen., Lawrence A. Barela, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant appeals his convictions of aggravated assault on a peace officer and escape from custody of a peace officer. Sections 30–22–22(A)(1) and 30–22–10, N.M. S.A.1978. 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). Substantial evidence supports the escape conviction. Enhancement of the sentences for use of a firearm did not violate double jeopardy. *State v. Gabaldon*, 92 N.M. 230, 585 P.2d 1352 (Ct. App.1978). The one issue requiring discussion involves the propriety of the instruction stating the elements of the offense of aggravated assault on a peace officer.

Section 30–22–22, supra, defines the offense in terms of the victim—a peace officer in the lawful discharge of his duties. The offense in this case involved striking at or assaulting such a peace officer with a deadly weapon. There is an approved instruction for this offense; it is U.J.I. Crim. 22.01.

The trial court modified the approved instruction. U.J.I. Crim. 22.01 states, as element 5:

> At the time, _____ was a
> name of victim
> _____ and was performing his
> official title
> duties [.]

The trial court's instruction, as to this element, states:

> At the time, Bob Rodgers was a Patrolman for the Hobbs Police Department[.]

The jury was not instructed that Rodgers must have been performing his duties. However, defendant raised no issue in the trial court concerning the propriety of the instruction; the departure from the approved instruction is not an issue.

Defendant claims fundamental error in the failure to instruct on essential elements of the offense. Failure to instruct on an essential element is reversible error. *State v. Bell*, 90 N.M. 134, 560 P.2d 925 (1977). The question is whether the instruction omitted essential elements.

Section 30–22–22, supra, requires the officer to have been "in the lawful discharge of his duties[.]" U.J.I. Crim. 22.-01 does not include lawfulness as an item to be decided by the jury. The Committee Commentary to U.J.I. Crim. 22.01 states: "The committee was of the opinion that the issue of lawfulness was almost always a

question of law to be decided by the judge." Inasmuch as "lawfulness" is not an item included in the approved instruction, this Court has no authority to hold that the omission of "lawfulness" from the instruction was error. *State v. Scott*, 90 N.M. 256, 561 P.2d 1349 (Ct.App.1977). In addition, in light of *State v. Doe*, 92 N.M. 100, 583 P.2d 464 (1978), we agree with the Committee Comment. We do not speculate as to when "lawfulness" might become a jury issue; however, it was not a jury issue in this case, and there was no error in the failure to include "lawfulness" as an element in the jury instruction.

Section 30–22–22, supra, requires the officer to have been in the "discharge" of his duties. This provision is included in the approved instruction by the phrase "and was performing his duties[.]" This provision was omitted. The State asserts the omission was not fundamental error because the omission did not involve an essential element of the offense.

■ What is, or is not, an essential element of an offense depends upon the statutory language, *Smith v. State*, 89 N.M. 770, 558 P.2d 39 (1976). This is a "knotty semantic problem" according to *State v. Bell*, supra.

Relying on *State v. Bell*, supra, the State contends whether the officer was performing his duties was no more than a "subsidiary fact" on which the jury was not required to be instructed. We disagree.

A comparison of the general assault and battery statutes, compiled in Chapter 30, Article 3, N.M.S.A.1978, with the assault and battery statutes involving peace officers, compiled in Chapter 30, Article 22, N.M.S.A.1978, shows that the Legislature has provided that assault and battery upon a peace officer is a higher felony degree. An aggravated assault in violation of § 30–3–2(A), N.M.S.A.1978 is a fourth degree felony; the same aggravated assault, where the victim is a peace officer, in violation of § 30–22–22(A)(1), supra, is a third degree felony. The difference between the two offenses, which justifies the different felony degrees, is that the peace officer must have been in the lawful discharge of his duties. Compare *State v. Kraul*, 90 N.M. 314, 563 P.2d 108 (Ct.App.1977); *State v. Cutnose*, 87 N.M. 307, 532 P.2d 896 (Ct. App.1974). If, as the State contends, performance of duties is not essential to a decision as to whether peace officer assault has occurred, the result would be to eliminate the distinction between the general and peace officer assault statutes. We may not eliminate that distinction. "The statute is to be read to mean what it says, no more and no less." *State v. Caruso*, 44 Wis.2d 696, 172 N.W.2d 195 (1969).

■ The requirement that the peace officer be performing his duties is an element of peace officer assault upon which the jury must be instructed. *United States v. Tijerina*, 407 F.2d 349 (10th Cir. 1969); *People v. Barrett*, 54 Ill.App.3d 994, 12 Ill.Dec. 624, 370 N.E.2d 247 (1977); *State v. Ramsdell*, 109 R.I. 320, 285 A.2d 399 (1971); see *State v. Jefferies*, 17 N.C.App. 195, 193 S.E.2d 388 (1972).

The approved instruction, U.J.I. Crim. 22.01, includes the provision that the officer be performing his duties. The General Use Note states:

> When a Uniform Instruction is provided for the elements of a crime . . . the Uniform Instruction must be used without substantive modification or substitution. In no event may an elements instruction be altered . . . ."

In approving the instructions, the Supreme Court adopted the instructions "with Use Notes . . . ."

The New Mexico requirement that the jury be instructed that the officer must have been performing his duties, and the restriction on fiddling with an elements instruction, indicates that the officer's performance is an essential element of the crime. This New Mexico requirement is consistent with the above-cited decisions from other jurisdictions and with the difference in statutory provisions, discussed above.

■ The failure to instruct, in accordance with U.J.I. Crim. 22.01, that the officer

must have been performing his duties, was the omission of an essential element. This omission requires reversal of the conviction of aggravated assault upon a peace officer. In so holding, we point out that efforts to reduce legislative provisions defining the offense to "subsidiary facts" raises problems in that such efforts spawn litigation. See the discussion in *State v. Bell*, supra. These efforts need not occur where the Supreme Court has approved instructions; the approved instructions need only be followed.

The State's reliance on *State v. Padilla*, 90 N.M. 481, 565 P.2d 352 (Ct.App.1977) is misplaced. *Padilla* dealt with "a failure to instruct the jury on a definition or amplification of the elements of a crime . . ." This case deals with a failure to instruct on an essential element.

The judgment and sentence for the escape conviction is affirmed. The conviction for aggravated assault on a peace officer is reversed. The cause is remanded for a new trial on the aggravated assault offense.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

601 P.2d 451

STATE of New Mexico,
Plaintiff-Appellee,

v.

John DOE, a Child, Defendant-Appellant.

No. 4065.

Court of Appeals of New Mexico.

Sept. 20, 1979.

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

Jeff Bingaman, Atty. Gen., Walter G. Lombardi, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

A teenage friend of the child died from a gunshot wound received during a deer hunt. The gun was held by the child at the time the gun discharged. A petition was filed in the children's court alleging delinquency by committing murder. Thereafter, a petition was filed asking that the matter be transferred to district court so that the child could be tried as an adult. After an evidentiary hearing on the transfer petition, the trial court ordered the transfer. The child appeals; we reverse.

We comment on, but do not decide the appeal on, the attitude of the prosecutor in seeking the transfer. "[I]t is our position that this is a serious crime, one which can best be heard in the District Court with all the publicity and all that is attendant in a District Court criminal trial, rather than in the privacy of a Children's trial . . . ." "[R]egardless of the age of the child, the kind of crime that was committed, if the evidence is such to show his guilt of the charge, the adult system is certainly the appropriate place to punish him rather than sending him to the Boys School . . . ."

One of the legislative purposes stated in § 32–1–2(B), N.M.S.A.1978 reads: "[C]onsistent with the protection of the public interest, to remove from children committing delinquent acts the consequences of criminal behavior and to substitute therefor a program of supervision, care and rehabilitation[.]" By § 32–1–31, N.M.S.A.1978, the Legislature has placed limits on the attendance of the general public at children's court proceedings. There may be dissatisfaction with these provisions, but until changed, they are the law which the prosecutor is sworn to uphold.

The transfer was sought under § 32–1–30, N.M.S.A.1978 which authorizes the children's court, in its discretion, to transfer the matter to district court, for prosecution, if the requirements of the statute are met. There is no question that the child was of sufficient age; he was two days past his 15th birthday when the killing occurred, and the petition alleged the delinquent act of murder.

For a valid transfer, § 32–1–30(A)(5), supra, requires the court to make "a specific finding upon the hearing that there are reasonable grounds to believe that the child committed the alleged delinquent act." This requirement involves probable cause. See Children's Court Rule 3(g).

The court did not make a specific finding of "reasonable grounds" or of "probable cause"; the court made no findings. Inasmuch as the statute requires a specific finding, and none was made, the transfer order is invalid because not entered in compliance with the statute. See *State v. Doe*, 90 N.M. 249, 561 P.2d 948 (Ct.App.1977). An implicit finding is insufficient when the statute requires a specific finding. See *State v. Doe*, 91 N.M. 644, 578 P.2d 345 (Ct.App.1978).

The child contends there was insufficient evidence for a belief that the child committed murder. While the direct evidence indicates an accidental discharge of the gun, there are inferences that would permit the court to find reasonable grounds or probable cause. We do not weigh the evidence on appeal, but only determine whether there is evidence to make the requisite finding. See *Matter of Doe*, 89 N.M. 700, 556 P.2d 1176 (Ct.App.1976). However, in this case, the court has not made the finding required by the statute. Compare *State v. Chavez*, 93 N.M. 270, 599 P.2d 1067 (Ct.App.1979).

Another requisite for a valid transfer is that the court consider "whether the child is amenable to treatment or rehabilitation as a child through available facilities[.]" Section 32–1–30(A)(4), supra. The amenability of the child is an evidentiary question. *State v. Doe*, 91 N.M. 506, 576 P.2d 1137 (Ct.App.1978). The child asserts the trial court abused its discretion in ordering the transfer to district court because the evidence as to the child's amenability is uncontradicted.

We agree that the amenability evidence is uncontradicted. There were two items going to the question of amenability.

One item was the testimony of the high school principal. The principal testified to several instances of improper conduct by the child; testified that correction and counseling of the child was effective for a short period of time after which the child would "go back to his old ways"; testified that consistent and controlled corrective counseling would help the child; and testified that the counseling the principal had in mind was the type "they use at the Boys School."

The second item was the report of the child's diagnostic evaluation. This evaluation had taken place with the consent of all parties. The report was not introduced as evidence; however, the transfer order indicates it was considered by the court. The report can only be considered as favorable to the child. The evaluators did not consider the child to be a hard-core threat to the safety of society, and did not consider the child to be a hard-core unrehabilitative juvenile. The report recommends that if "tried and convicted, that he [the child] be committed to the New Mexico Boys' School, (NMBS), to be provided with a juvenile program in contrast to an adult in an adult institution." In the event of acquittal, the report recommended the child be returned to the community and enrolled in a community-based program. The report also recommended that the child "be placed under probationary supervision for a reasonable period of time."

The diagnostic evaluation refers to specific instances of the child's past conduct. The principal testified to several instances of improper conduct of the child. The State asserts that these items of conduct raised a factual question concerning the child's amenability. They do not. Section 32–1–30(A)(4), supra, is concerned with amenability to treatment or rehabilitation through available facilities; amenability involves a prediction as to the child's future conduct. There may be instances where past rehabilitation efforts have failed, or past probation has been unsuccessful, that would be relevant to this prediction. See *State v. Doe*, 90 N.M. 249, 561 P.2d 948, supra; *Matter of Doe*, 89 N.M. 700, 55 P.2d 1176, supra. In this case, the only past efforts were those of the principal, and those efforts were successful for a short time. The prior conduct of the child, in itself, raises no factual issue as to whether the child is amenable to treatment or rehabilitation.

The evidence is uncontradicted that the child was amenable to rehabilitation through available facilities—the Boys' School. Section 32–1–30(A)(4), supra, requires the court to "consider" this uncontradicted evidence; that is, to think about this evidence with a degree of care and caution. *State v. Doe*, 91 N.M. 506, 578 P.2d 644, supra. The "thinking about" this evidence should be in relation to the legislative purpose of rehabilitation, § 32–1–2(B), supra, and in relation to the transfer being discretionary under § 32–1–30, supra. If the court thought about the uncontradicted evidence of amenability with a degree of care and caution, and rejected it, it was an abuse of discretion. See *Medler v. Henry*, 44 N.M. 275, 101 P.2d 398 (1940). If the court accepted the uncontradicted evidence of amenability, and nevertheless ordered the transfer, it was an abuse of discretion because of a failure to think about the evidence with care and caution. If the court failed to consider the uncontradicted evidence of amenability, the transfer order was an abuse of discretion because of a failure to comply with the statutory requirement that the amenability evidence be considered. We cannot determine, from the appellate record, how the court treated the amenability evidence. Regardless, the foregoing shows that however the evidence was treated there was an abuse of discretion.

Section 32–1–39(A), N.M.S.A.1978 states: "The name of the child shall not appear in the record on appeal." The statute has been violated. The clerk of the Court of Appeals is directed to delete the name of the child from all documents filed in this Court which are not part of the children's

court record or transcript. The children's court judge shall cause the deletion of the name of the child from the children's court record and transcript. The clerk of the Court of Appeals shall cause the children's court record and transcript to be returned to the children's court for the deletions hereby directed. Such deletions are to be done expeditiously and when done, the record and transcript is to be returned to this Court.

The transfer order is reversed. The cause is remanded for further proceedings in the children's court.

IT IS SO ORDERED.

HENDLEY and WALTERS, JJ., concur.

601 P.2d 718

Danny L. FRYAR, d/b/a Fryar Logging, Petitioner,

v.

Fred JOHNSEN, Respondent.

No. 12288.

Supreme Court of New Mexico.

Oct. 25, 1979.

Gallagher, Casados & Martin, David R. Gallagher, J. E. Casados, Albuquerque, for petitioner.

Branch, Coleman & Perkal, Albuquerque, for respondent.

OPINION

EASLEY, Justice.

The trial court awarded workmen's compensation to Fred Johnsen, plus $11,435.75 for attorney fees. The Court of Appeals affirmed and awarded an additional $3,000 as attorney fees, for a total of $14,435.75 for Johnsen's attorneys. We affirm in part and reverse in part.

The employer, Fryar, raises two questions: first, whether the testimony of Johnsen's expert medical witness lacks foundation because the causal connection between the accident and Johnsen's disability was not established. Second, whether the trial

court and the Court of Appeals, respectively, abused their discretion by awarding excessive attorney fees.

Causal Connection

Johnsen claimed compensation for a back injury which occurred on January 14, 1977. He received a medical release and went back to work. He received a second injury on May 17 or 18, 1977.

Johnsen's expert witness testified that there was a medical probability that his disability was caused by his first injury of January 14, 1977. There was no opposing medical testimony. Fryar relies on the case of *Niederstadt v. Ancho Rico Consolidated Mines*, 88 N.M. 48, 536 P.2d 1104 (Ct.App. 1975). The Court of Appeals found that case to be distinguishable. We agree.

In *Niederstadt*, the suit was for a second accident; medical evidence indicated that the plaintiff's injury preexisted this second accident. In the present case, the suit is on the first accident. Johnsen offered medical testimony at the trial that the accident of January 14, 1977 was causally related to his disability. There was no medical testimony offered that Johnsen's condition preexisted the *accident sued on*, as in *Niederstadt*. There is some indication in the record that Johnsen's accident in May merely aggravated the condition which resulted from the January accident.

Apparently, the medical expert in this case was not aware of Johnsen's later injury. Since there was no contradicting medical testimony and no evidence of a preexisting injury, the Court of Appeals correctly distinguished *Neiderstadt* and held that the expert testimony was sufficient to support a finding of causal connection.

Attorney Fees

There are two highly important and conflicting public policies which should be considered when a review court examines the appropriateness of an award of attorney fees.

> 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. (Emphasis added.)

Herndon v. Albuquerque Public Schools, 92 N.M. 287, 288, 587 P.2d 434, 435 (1978). When a successful claimant is not awarded attorney fees or when the fees awarded are too low, the above policy tends to be frustrated.

On the other hand, it is obvious that the total of all attorney fees paid in workmen's compensation cases are ultimately reflected in higher insurance premiums and later in the cost of goods and services to the general public. Excessive fees that are not justified by reference to services rendered the workman constitute a burden on the system, on other citizens and are against public policy. We must juxtapose the policy demanding preservation of the workman's right to adequate representation with the rights of other citizens to avoid unreasonable increases in the prices they pay for goods and services because of excessive fees paid to lawyers.

Section 52–1–54(D), N.M.S.A.1978 requires that the trial court take into consideration the amount of any offer by the employer both before the workman's attorney was employed and after the attorney was employed but before court proceedings were commenced, as well as any offer in writing made thirty days or more prior to the trial. The statute also requires that the court consider the present value of the award made.

In addition to the requirements in the statute, our courts have considered the following factors:

1. the relative success of the workman in the court proceedings: *Ortega v. New Mexico State Highway Department*, 77 N.M. 185, 420 P.2d 771 (1966); *Waymire v. Signal Oil Field Service, Inc.*, 77 N.M. 297, 422 P.2d 34 (1966); *Reed v. Fish Engineering Corp.*, 76 N.M. 760, 418 P.2d 537 (1966); *Gearhart v. Eidson Metal Products*, 92 N.M. 763, 595 P.2d 401 (Ct.App.1979); *Gallegos v. Duke City Lumber Co., Inc.*, 87 N.M. 404, 534 P.2d 1116 (Ct.App.1975); *Salazar v. Kaiser Steel Corp.*, 85 N.M. 254, 511 P.2d 580 (Ct.App.1973); *Brannon v. Well Units, Inc.*, 82 N.M. 253, 479 P.2d 533 (Ct.App. 1970);

2. the extent to which the issues were contested: *Waymire, supra; Reed, supra; Gearhart, supra; Gallegos, supra; Adams v. Loffland Bros. Drilling Co.*, 82 N.M. 72, 475 P.2d 466 (Ct.App.1970);

3. the complexity of the issues: *Ortega, supra; Lamont v. New Mexico Military Institute*, 92 N.M. 804, 595 P.2d 774 (Ct.App. 1979); *Marez v. Kerr-McGee*, 93 N.M. 9, 595 P.2d 1204 (Ct.App.1978);

4. the ability, standing, skill and experience of the attorney: *Elsea v. Broome Furniture Co.*, 47 N.M. 356, 143 P.2d 572 (1943);

5. the rise in the cost of living: *Shillinglaw v. Owen Shillinglaw Fuel Company*, 70 N.M. 65, 370 P.2d 502 (1962); and

6. the time and effort expended by the attorney in the particular case: *Turrieta v. Creamland Quality Chekd Dairies, Inc.*, 77 N.M. 192, 420 P.2d 776 (1966); *Ortega, supra; Waymire, supra; Reed, supra; Lamont, supra; Gearhart, supra; Marez, supra; Martinez v. Fluor Utah, Inc.*, 90 N.M. 782, 568 P.2d 618 (Ct.App.1977); *Gallegos, supra; Trujillo v. Tanuz*, 85 N.M. 35, 508 P.2d 1332 (Ct.App.1973); *Brannon, supra; Adams, supra.* However, the Court of Appeals has also held that the time spent and the effort expended by the attorney, while relevant, is not always dispositive of the amount of attorney fees to be awarded. *Lamont, supra; Marez, supra; Gallegos, supra*; and *see Maes v. John C. Cornell, Inc.*, 86 N.M. 393, 524 P.2d 1009 (Ct.App.1974). We agree.

Rule 2–106 of the Code of Professional Responsibility, although not specifically on point, gives some guidance as to the factors to be considered by a lawyer in determining the reasonableness of a fee. These include:

> (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
>
> . . . . .
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> . . . . .
>
> (7) the experience, reputation and ability of the lawyer or lawyers performing the services;
>
> . . . . .

These guidelines are applicable here.

The present case involves a single cause of action stated on one page of the complaint; an answer that denied disability, causation, notice, and the fact of the accident; two sets of requests for admissions; an answer to one set of requests for admissions; a motion to deem the other set admitted; no depositions; no interrogatories; and no requested findings and conclusions. The trial took less than a full day. It involved the testimony of eight witnesses, only one of which was an expert witness, who testified for the employee. The transcript of proceedings is only 200 pages. At the time of trial the value of the award was $53,306.86, exclusive of medical and other incidental expenses. This evidence in the record does not support an award of $11,000 for attorney fees. There was a notice of hearing on a motion for attorney fees. There is no record of the hearing. Neither party requested findings of fact and conclusions of law on the propriety of the award of attorney fees. There is not even a faint hint as to the motivation of the judge in granting such an amount for attorney fees.

Our trial court needs more definitive guidelines to determine the amount to award for attorney fees in workmen's compensation cases. We hold therefore that, in addition to the statutory requirements, the following factors are subject to consideration: the chilling effect of miserly fees upon the ability of an injured workman to obtain adequate representation; the time and effort expended by the attorney; the extent to which the issues were contested; the novelty and complexity of the issues involved; the fees normally charged in the locality for similar legal services; the ability, experience, skill and reputation of the attorney; the relative success of the workman in the court proceeding; the amount involved; and the rate of inflation. Further, we reiterate the need for evidentiary support for fees awarded by a trial court. *Trujillo, supra.*

N.M.R.Civ.P. 52(B)(a), N.M.S.A.1978 states:

> (6) A party will waive specific findings of fact and conclusions of law if he fails to make a general request therefor in writing, or if he fails to tender specific findings and conclusions.
>
> (7) . . . where *the ends of justice require* the cause may be remanded to the district court for the making and filing of proper findings of fact and conclusions of law. (Emphasis added.)

We have "repeatedly held that a party who does not request findings of fact and conclusions of law cannot on appeal obtain a review of the evidence." (Citations omitted.) *McNabb v. Warren*, 83 N.M. 247, 248, 490 P.2d 964, 965 (1971).

However, because of the inadequacy of the record, which prevents us from determining whether the decision comports with the law, the importance of the public policy involved and the size of the award, we are convinced that "the ends of justice" require that we review the propriety of the award of attorney fees. We cannot properly perform our reviewing function without findings and conclusions. Therefore, we remand this case to the trial court for consideration of the factors outlined above and for making findings of fact and conclusions of law on the issue of attorney fees awarded at trial.

As to the issue of attorney fees awarded by the Court of Appeals, we reiterate that such an award will not be disturbed in the absence of an abuse of discretion. However, we hold that there has been an abuse of discretion in the award of $3,000 for the appeal in this case.

We recently reduced an award made on appeal from $4,500 to $1,500. *Genuine Parts Co. v. Garcia*, 92 N.M. 57, 582 P.2d 1270 (1978). A review of recent awards made on appeal indicate that attorney fees of between $1,500 and $2,000 is the norm. *Lamont, supra* ($2,000); *Gearhart, supra* ($1,500); *Marez, supra* ($2,000); *Moorhead v. Gray Ranch Co.*, 90 N.M. 220, 561 P.2d 493 (Ct.App.1977) ($1,750).

On appeal, Johnsen filed a motion to dismiss appeal, a four-page memorandum brief in support of this motion, and a fifteen-page answer brief, in which only fourteen cases were cited. Johnsen has prevailed on the issues involving causal connection and medical costs (not raised here). However, in light of the minimum amount of work obviously performed in appealing this case, we are constrained to hold that the fee was excessive to the extent of $1,500.

The Court of Appeals' decision is affirmed with respect to the issue of causal connection; its award of attorney fees is reduced to $1,500. The case is remanded to the district court for proceedings on the issue of attorney fees awarded at trial.

IT IS SO ORDERED.

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

601 P.2d 722

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and Stanley Chavez, Plaintiffs-Appellees,

v.

Joe L. DURAN, Defendant,

and

Frank Duran, Defendant-Appellant.

No. 3678.

Court of Appeals of New Mexico.

Aug. 28, 1979.

Rehearing Denied Sept. 11, 1979.

Paul J. Matteucci, Edward L. Matteucci, Albuquerque, for defendant-appellant.

G. Richard Mantlo, Lamb, Metzgar & Lines, Albuquerque, for plaintiffs-appellees.

OPINION

WALTERS, Judge.

Plaintiff's insurance company and its insured sought subrogation recovery against Frank Duran, owner, and his brother Joe Duran, driver, for damages to Chavez's car and personal injuries sustained by the Chavezes in an automobile accident. Following a non-jury trial, judgment of $4,022.63 was entered against Frank Duran.

Appellant raises two points for reversal: (1) the trial court erred in concluding that appellant was negligent; and (2) the court erred in concluding that appellant was liable for the negligence of his brother based upon the Family Purpose Doctrine.

Application of the Family Purpose Doctrine upon the court's findings of negligence in this case presents matters of first impression and requires a summary of the facts.

Joe Duran, 56 or 57 years old, lived "off and on" with his brother Frank, 49, and was at his home "sometimes." Frank testified that Joe "stays with a friend over in Los Lunas, . . . and then [with another friend] . . . he's away; he comes and goes. I can't keep track of him." On the day of the accident, Frank and Joe left Frank's home where they had been drinking and went in Frank's car to a neighborhood bar. Both brothers became drunk. Frank spilled a can of beer at the bar and was asked to leave. Joe was playing pool at the time and wanted to finish his game, so Frank left the bar and fell asleep in the back seat of his car while he waited for Joe. When Joe came out, he removed the car keys from the sleeping man's pocket and while driving Frank's car, ran a red light and collided with the Chavez car.

Joe Duran's driver's license had been permanently suspended, and Frank Duran had never allowed his brother to drive his car. He did not give Joe permission to drive, or his keys, on the date of the accident.

The critical findings and conclusion upon which judgment was grounded are:

(Finding 10): That the proximate cause of the injury and damage sustained by the plaintiff and members of the plaintiff's family was the negligence of Joe L. Duran and Frank Duran.

(Finding 11): That in addition to his own negligence, Frank Duran is responsible for the negligence of Joe L. Duran as

members and residents of the same household and is liable for all of the plaintiff's damages and the damages to the plaintiff's family.

(Conclusion 6): That Frank Duran is also liable for the negligence of Joe L. Duran, pursuant to the Family Purpose Doctrine.

Appellant attacks Finding 10 as unsupported by the evidence, and insofar as Frank Duran's causal negligence is concerned, we agree. The issue of the owner's negligence in circumstances of vehicular "theft" must be governed by the analogous law of *Bouldin v. Sategna*, 71 N.M. 329, 378 P.2d 370 (1963). There the owner, in violation of statute, left his car unattended without removing the keys. Our Supreme Court held that he could not have anticipated that the car would be stolen nor reasonably have foreseen that theft and a subsequent accident would be "a natural or probable result" of leaving the car unlocked with the keys in the ignition. If the susceptibility of the vehicle to theft and the intervening negligence of the thief in *Bouldin* could not be foreseen under the circumstances present there, they are certainly less foreseeable in this case where the owner retained the keys on his person and remained in the car.

The proximate cause of the injury and damage to plaintiffs was Joe Duran's unforeseeable intervening negligence. *Bouldin, supra.*

Holding that Frank Duran was not causally negligent, however, does not relieve him of liability if the Family Purpose Doctrine applies. "The maintenance of the vehicle '* * * for the general use and convenience of [the] family * * *' *is essential to liability* under the doctrine." (Our emphasis.) *Peters v. LeDoux*, 83 N.M. 307, 491 P.2d 524 (1971). Such evidence is totally lacking in the instant case. There is nothing at all in the record to suggest that the vehicle was for anyone's use and convenience other than Frank's.

The Family Purpose Doctrine is grounded on principal-agent, master-servant principles. *Pavlos v. Albuquerque Natl. Bank*, 82 N.M. 759, 487 P.2d 187 (Ct.App. 1971); *Burkhart v. Corn*, 59 N.M. 343, 284 P.2d 226 (1955); *Boes v. Howell*, 24 N.M. 142, 173 P. 966 (1918). It is positioned in the Civil U.J.I. volume under "Chapter 4. Agency, Master and Servant." *See* U.J.I. 4.9.

The New Mexico master-servant cases resolve liability of the master upon the scope of the servant's authority. Where there was no authority, even though the opportunity for abuse was present by reason of the master's making the opportunity available, the master has been held not liable. *Fernandez v. Lloyd McKee Motors, Inc.*, 90 N.M. 433, 564 P.2d 997 (Ct.App.1977); *Morris v. Cartwright*, 57 N.M. 328, 258 P.2d 719 (1953); *Miller v. Hoefgen*, 51 N.M. 319, 183 P.2d 850 (1947).

Prior to adoption of the Rules of Evidence for the courts of New Mexico in 1973, any *presumption* of consensual agency in the driver when the owner was also present in the vehicle was rebutted when evidence to the contrary was presented. *State Farm Mut. Auto Ins. Co. v. Foundation Reserve Ins. Co.*, 78 N.M. 359, 431 P.2d 737 (Ct.App. 1967). Frank Duran denied granting consent, and that testimony was uncontradicted.

Likewise, it was held that any presumption of consent to the driver and thus agency in the driver, by proof of ownership in the defendant, "ceases to exist immediately upon the introduction of credible and substantial evidence which would support a contrary finding." *Payne v. Tuozzoli*, 80 N.M. 214, 453 P.2d 384 (Ct.App.1969); *Morris v. Cartwright, supra. Silva v. Traver*, 63 Ariz. 364, 162 P.2d 615 (1945), was cited in *Morris, supra*, for the proposition that "[w]henever evidence contradicting a legal presumption is introduced the presumption vanishes." At 57 N.M. 332–333, 258 P.2d 722, Morris addressed the fragile effect of the presumption that the driver's agency attached to proof of the defendant's ownership, and noted:

It must be conceded that proof or admission of ownership creates a presumption that the driver of a vehicle causing dam-

ages is the servant of the owner and using the vehicle in the master's business, and this presumption is sufficient in the absence of evidence to the contrary to support a verdict. But it is only a presumption of law and not evidence. When contradictory evidence is introduced, the presumption disappears as though it had never existed.

The law of New Mexico was observed to be the same as that quoted, in *Morris*, at 57 N.M. 333–334, 258 P.2d 723, from *Gallagher v. Holcomb*, 172 Okl. 1, 44 P.2d 44, 49 (1935):

And where the defendant . . . establishes that the son, on the occasion of the injury, was not driving the parent's car with the consent or approval of the latter, or in his business or interest, and was not then acting as his servant or agent, *and such evidence is uncontradicted by rebuttal evidence, and the witness is in no way impeached, the presumption of authority previously existing is overcome, the absence of authority on the particular occasion is established, and no question of fact as to agency at the time of the accident remains.* (Our emphasis.)

The disappearance of the presumption upon the presentation of contrary evidence was eliminated, however, when the 1973 Rules of Evidence were adopted. Rule 301 now provides that, generally, "a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." Thus the inference may continue to operate in an evidentiary sense even after introduction of evidence tending to establish the contrary, and may sufficiently influence the trier of facts to conclude that the presumed fact does exist.

The Commentary of the Advisory Committee which prepared and submitted the Rules to the Supreme Court instructs us, however, that "[p]resumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact." Defendant met the burden with positive evidence that Joe Duran did not have and never had had his permission to use or drive his car. However, as the factfinder, the trial court could have disbelieved defendant. The findings and conclusions do not reflect, however, that the court doubted defendant's credibility—they are expressive of its view of Frank Duran's foreseeable negligence in making it possible for Joe Duran to obtain his keys and drive his vehicle. We have already discussed the impropriety of that approach.

In *Pesqueira v. Talbot*, 7 Ariz.App. 476, 441 P.2d 73 (1968), a review of the Family Purpose Doctrine was undertaken and the analysis given it by numerous jurisdictions, as well as by Arizona, led to the following formulation of the elements that must be shown for its use:

[T]he substantial requisites for the application of this anomalous doctrine . . may be stated thus: there must be a family with sufficient unity so that there is a head of the family, the motor vehicle responsible for the injury must have been one "furnished" by the head of the family to a member of the family and this vehicle must have been used . . . . with the implied or express consent of the head of the family for a family purpose.

Other courts have defined "family" to mean that one or more persons live together in the same household, are supported by the head of the family in whole or in part, are dependent upon him for that support, and that the head is under a natural or moral obligation to render such support. *Manning v. Hart*, 255 N.C. 368, 121 S.E.2d 721 (1961); *Piechota v. Rapp*, 148 Neb. 443, 27 N.W.2d 682 (1947); *Jones v. Golick*, 46 Nev. 10, 206 P. 679 (1922). We are in accord with the foregoing statements as adjunctive to the requirements stated in *Peters v. LeDoux, supra.*

Although this was not a jury trial, we note that the "Directions for Use" following U.J.I. 4.9 emphatically caution: "This instruction is not to be used if a member of the family took the vehicle contrary to instructions." The New Mexico

law is, of course, the same for jury and non-jury trials. See *Peters v. LeDoux, supra*, 83 N.M. at 309–310, 491 P.2d 527. Under the definition of family, Joe Duran was not a family member, and the direct evidence in the case is that he had no permission or consent of defendant to ever use defendant's car.

Applying the principles stated to the facts of this case, it is clear that Joe Duran's sole negligence was the intervening and proximate cause of the accident and injuries. Frank Duran cannot be held responsible under the Family Purpose Doctrine in the absence of evidence that Joe was a member of a family as legally defined in these circumstances, and had either implied or express consent to use a vehicle maintained by the head of the family for the "general use . . . pleasure and convenience of himself and his family." *Peters v. LeDoux, supra.* Simply because Joe sometimes lived with Frank and was Frank's brother are insufficient facts upon which to call up liability under the Family Purpose Doctrine.

> The mere existence of a family relationship between a negligent driver and the vehicle owner does not automatically present a case where the issue of the family purpose doctrine will be found.

Annot., Modern Status of Family Purpose Doctrine with Respect to Motor Vehicles, 8 A.L.R.3d 1191, at 1195.

The judgment is reversed and the trial court is directed to dismiss plaintiff's complaint. Costs of appeal are to be assessed against appellee.

IT IS SO ORDERED.

LOPEZ, J., dissenting.

ANDREWS, J., concurring in result.

LOPEZ, Judge (dissenting).

I respectfully dissent. Under point (1), appellant challenges the court's finding of fact no. 10 and conclusions of law nos. 4 and 5 which read:

> 10. That the proximate cause of the injury and damage sustained by the Plaintiff and members of the Plaintiff's family was the negligence of Joe L. Duran [appellant's brother] and Frank Duran [appellant].
>
> 4. That Joe L. Duran and Frank Duran breached their duty of reasonable care.
>
> 5. That Joe L. Duran and Frank Duran were therefore negligent.

In challenging the court's finding, appellant necessarily argues that it is not supported by substantial evidence. It is well established in New Mexico that a trial court's finding will not be disturbed on appeal if it is supported by such evidence. *Montoya v. Travelers Ins. Co.*, 91 N.M. 667, 579 P.2d 793 (1978); *Stewart v. Barnes*, 80 N.M. 102, 451 P.2d 1006 (Ct.App.1969). Substantial evidence is relevant evidence which a reasonable person might find adequate to support a conclusion. *Shirley v. Venaglia*, 86 N.M. 721, 527 P.2d 316 (1974). In deciding whether a finding has substantial support, we must view the evidence in the light most favorable to support the finding. *Platero v. Jones*, 83 N.M. 261, 490 P.2d 1234 (Ct.App. 1971). Additionally, in determining the sufficiency of the evidence, a reviewing court will consider only that evidence and those reasonable inferences to be drawn therefrom which support the finding. Any evidence unfavorable to the finding will not be considered. *Stewart v. Barnes, supra.* We will not weigh the evidence or determine the credibility of witnesses. *Platero v. Jones, supra.* The trier of facts is the sole judge of this credibility and the weight to be given the testimony of a witness. *State ex rel. Reynolds v. Lewis*, 84 N.M. 768, 508 P.2d 577 (1973).

The challenged finding and conclusions are based upon the decision that appellant was negligent. Accordingly, in order to determine whether the finding is supported by substantial evidence and the conclusions are supported by the findings, it is first necessary to ascertain upon what legal theory the court based this decision. In this jurisdiction, a person is liable for "such consequences as were or should have been contemplated or might have been foreseen."

Valdez v. Gonzales, 50 N.M. 281, 288, 176 P.2d 173, 177 (1946). This principle has been called the "foreseeability" rule. *Valdez v. Gonzales, supra.* It is expressed in U.J.I. 12.1 as follows:

. . . . .

> 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.

. . . . .

The record discloses that it was partly upon this rule that the court based its decision that appellant was negligent. Therefore, given the evidence contained in the record and the above stated rules of appellate review, the issue for decision is whether it was reasonable for the court to infer that appellant should have reasonably foreseen his actions as involving an unreasonable risk of injury to appellees. Appellant argues that it was not reasonable for the court to infer that he should have foreseen his brother's driving the car and becoming involved in an accident. Appellees contend that it was reasonable for the court to make such an inference. I agree.

The evidence most favorable to the court's finding is as follows. Appellant and his brother were living together at appellant's house on the day of the accident. They began drinking at appellant's house and then drove his car to a bar some distance from the house. Appellant got drunk and observed his brother in a drunken state. After being asked to leave the bar, appellant went to his car and passed out in the back seat. Appellant's brother took the keys of the car from his pocket and while driving the car, the brother was involved in the accident which is the subject of this litigation.

I conclude that, from this evidence, it was reasonable to infer that appellant should have foreseen his brother's taking the keys out of his pocket and driving the car in an effort to take both of them to appellant's house. Because appellant observed his brother in a drunken state, I further conclude that appellant should have foreseen his brother's actions as creating an unreasonable risk of harm to persons, such as appellees, driving on the public highways. Additionally, because these consequences were of such a nature, I conclude that appellant's conduct was the proximate cause of appellees' damages. *Terrel v. Duke City Lumber Company, Inc.*, 86 N.M. 405, 524 P.2d 1021 (Ct.App.1974), *modified*, 88 N.M. 299, 540 P.2d 229 (1975). Finally, I conclude that a reasonable person might find the above inference adequate to support the court's finding. Accordingly, I would hold that the court's finding is supported by substantial evidence and that the court did not err in concluding that appellant was negligent.

In arriving at this holding, I am aware that our Supreme Court held in *Bouldin v. Sategna*, 71 N.M. 329, 378 P.2d 370 (1963), that the theft of a car is not a natural event to be foreseen by a person who is negligent in leaving his car unattended with the key in the ignition. The majority relies primarily upon this holding as support for its decision that the proximate cause of appellees' damages was the unforeseeable intervening negligence of appellant's brother. I believe the facts in the present case are sufficiently different to make *Bouldin* inapplicable. In that case, the thief was unknown to and had no connection with the defendant. Based upon these facts, the decision that the theft of the car was an efficient intervening cause logically followed. However, in the present case, the "thief" was appellant's brother, was living with appellant on the day of the accident and had gone drinking with appellant at a bar some distance from appellant's house. The special familial relationship and the fact that appellant and his brother were temporarily living together make the "theft" of appellant's car foreseeable. Because these facts are qualitatively different, I do not agree that the issue of appellant's negligence "must be governed by the analogous law" of *Bouldin.* Accordingly, I would hold that the court did not err in concluding that appellant was negligent.

In reaching this decision, I am also aware that appellant testified that he never allowed his brother to operate his car and that his brother's license to drive had been revoked. In addition, I am aware that appellant testified that he could not have foreseen his brother's taking the keys of his car and driving it. However, I would remind appellant that, as a reviewing court, we only consider that evidence and those reasonable inferences to be drawn therefrom which support the finding. We do not consider any evidence unfavorable to the finding. *Stewart v. Barnes, supra.* I would also remind appellant that the court is the sole judge of his credibility and the weight to be given his testimony. *State ex rel. Reynolds v. Lewis, supra.* Given these principles, I can only conclude that the court was correct in concluding that appellant was negligent. Furthermore, even if we could consider appellant's testimony, I agree with appellees' observation that, given the drunken state of appellant's brother, it might be expected that the brother would disregard the facts that (1) appellant never allowed him to drive the car, and (2) he did not have a driver's license. Finally, I do not agree with appellant's claim that the car could have been driven by a third party named Reuben Miera. The record does not indicate that Miera had a valid driver's license or that he was in a sober state.

Because I would hold that the court did not err in concluding that appellant was negligent, I do not reach appellant's second point for reversal.

601 P.2d 728

Lydia CHAVEZ, Plaintiff-Appellant,

v.

LECTROSONICS, INC., Employer and Pacific Indemnity Company, Insurer, Defendants-Appellees.

No. 3872.

Court of Appeals of New Mexico.

Sept. 6, 1979.

Bruce P. Moore, Santa Fe, for plaintiff-appellant.

Jerrald J. Roehl, Richard A. Winterbottom, Jerrald J. Roehl & Associates, Albuquerque, for defendants-appellees.

OPINION

SUTIN, Judge.

Summary judgment was granted defendants in a workmen's compensation case in which plaintiff made a false representation as to her physical condition in her application for employment with defendant. Plaintiff appeals. We reverse.

In 1966, while employed as a waitress in a cafeteria, plaintiff suffered a back injury. In 1969, the ruptured vertebra was removed. As a result of the injury, two workmen's compensation claims were filed. In 1975, plaintiff applied for work as an electronics assembler with defendant. During the interim period, plaintiff worked as an electronics assembler for three industries. While employed by defendant, plaintiff fell and suffered a back injury. In the application for employment, plaintiff was asked this question to which she made this answer:

Were you ever injured? No.

In a false representation case, *Martinez v. Driver Mechenbier, Inc.*, 90 N.M. 282, 562 P.2d 843 (Ct.App.1977) is controlling. *Martinez* says:

To bar recovery, three essential factors must be present: "(1) The employee must have knowingly and willfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury." [90 N.M. at 283, 562 P.2d at 844.]

To be awarded summary judgment, the burden is on defendants to show that there is no genuine issue of material fact as to each of the three essential factors.

Plaintiff admits the *first* factor. She made a false representation as to her physical condition.

Defendant established the *second* factor as a matter of law. Defendant relied upon the false representation as a substantial factor in the hiring. An affidavit of the president of the defendant corporation stated this fact.

Plaintiff claims that defendant did not rely on the false representation to any significant extent based upon the following facts:

(1) Employment application forms submitted to other potential employees contained significant omissions.

(2) Recommendations for employment from employees of defendant were the preferred method of gaining new employees, and plaintiff was interviewed by reason of a recommendation of an employee of defendant. In some instances, the president of the defendant corporation did not bother to check an applicant who was known to several employees.

(3) Previous employers of plaintiff, except the employer at which place the prior injury occurred, were called and, in response to questions asked, said that plaintiff " 'did do good work and she was a good solderer.' "

Plaintiff says that these facts raise a reasonable inference that defendant was completely "uninterested in her background" other than the extent to which she could do the technical work; that defendant utilized an informal network of personal acquaintances and other employees to make that determination. "Once that determination was made for Plaintiff," she says, "any concern Lectrosonics might have had about Plaintiff ceased to exist." We disagree.

A reasonable inference can be drawn that defendant relied upon the fact that plaintiff was a good worker, but none of the facts presented bear any relationship to the existence of prior injuries. To establish a genuine issue of material fact, a reasonable inference drawn must be sufficient to create an actual contradiction of an established fact. Giving plaintiff the benefit of the rule that reasonable inferences must be construed in favor of plaintiff in her search for a genuine issue of material fact, we cannot conclude that the facts presented mean: "Defendant did not rely on the false representation made by plaintiff."

Defendants established there was no genuine issue of material fact with reference to the *first* and *second* factors.

With reference to the *third* factor, "a causal connection between the false representation and the injury," defendants failed to establish that there was no genuine issue of material fact. No medical testimony was proffered. Defendants relied upon unsworn medical reports and letters that were inadmissible in evidence. At the close of the argument on motion for summary judgment, the trial court said:

> No one needs to be long exposed to a back injury to know that persons with a history of a back injury cannot [say], if it is a serious injury . . . [and] two previous claims for compensation . . that there would be no causal connection from one injury to the other. The Court does not know the facts of the injury in this case, but I don't think the Court needs to know that, when one relies upon the fact that this is also a back injury . . . . So, in the Court's view, the causal connection is undisputed as well. One can argue that it is not, but how can one get away from the fact that they are

exactly the same type injuries in both cases.

The trial court was mistaken. But the fault lies not with the court but with trial lawyers who refrain from presenting authoritative case law. Plaintiff's lawyer in this appeal was not one of the trial attorneys.

Under a uniform rule, causal connection must, with one exception, be established by expert medical testimony. *Daniels v. Gudis Furniture Co.*, 541 S.W.2d 941 (Tenn.1976); *Laminite Plastics Mfg. Co. v. Greene*, 561 S.W.2d 458 (Tenn.1978); *Foster v. Esis, Inc.*, 563 S.W.2d 180 (Tenn.1978); *Quaker Oats Co. v. Smith*, 574 S.W.2d 45 (Tenn.1978); *Dressler v. Grand Rapids Die Casting Corp.*, 402 Mich. 243, 262 N.W.2d 629 (1978), see dissenting opinion in which *Martinez, supra* is cited; *Rock Road Construction Co. v. Industrial Com'n*, 37 Ill.2d 123, 227 N.E.2d 65 (1967).

In *Daniels*, plaintiff had falsified his application. In 1969, he suffered a "pull" of the back muscles while employed elsewhere and received compensation benefits on the basis of five percent permanent partial disability. In 1974, while working for defendant, plaintiff also suffered a back injury. After stating that causal connection required a factual showing by expert medical testimony, the court said:

> There being no medical evidence tending to show a causal connection between the false representation made by appellant in his application for employment and the injury he sustained while working for appellee, appellant is entitled to benefits for the work-connected, permanent partial disability found by the chancellor. [541 S.W.2d at 942.]

The court further said:

> *Except in the most obvious cases,* such causation must be established by expert medical testimony. [*Id.*, 942.] [Emphasis added.]

Reference is made to *Floyd v. Tennessee Dickel Distilling Company*, 225 Tenn. 65, 463 S.W.2d 684 (1971). *Floyd* refers to the competency of a claimant to testify with respect to her own physical condition and disability. In an "obvious case," a workman can testify there was no causal connection, i. e., that he had recovered from a 1969 back injury to the extent that he was able to perform his duties in the same work undertaken with his previous employers without any physical difficulty. This testimony was sufficient to establish no causal connection even though a treating physician found nothing unusual about the workman's lumbar spine, and the examining physician could not opinionate as to the causal relationship between claimant's 1969 injury and that of 1976. *Laminite Plastics Mfg. Co., supra.*

Medical testimony on causation does not require proof to an absolute certainty. An employer can prevail where medical testimony opinionates that a workman has become an increased risk because of his previous permanent impairment or disability. *Foster, supra.* Under these circumstances, a previous back injury falsely represented is causally connected with the injury.

On the *third* factor, limited to the instant case, we hold the rule to be that (1) where an employer proves a previous permanent disability, and (2) that by medical testimony the risk of injury in his employment has increased, the employer has established a causal connection between the false representation and the injury. On the other hand, if a workman has proven that (1) his physical condition and disability is such that he was able to perform the same duties in prior employment without any physical difficulty, (2) before he made application for employment, and (3) he was able to perform the duties of his employment, no causal connection exists between the false representation and the injury.

In the instant case, defendants failed to establish a causal connection. On the other hand, plaintiff established that no causal connection existed because she was able to perform all of the duties as a solderer at previous employments. On the *third* factor, a genuine issue of material fact exists and summary judgment was erroneous

under Rule 56(c) and (e) of the Rules of Civil Procedure.

The rules stated above are not exclusive. There may be other facts or circumstances which play an important role in a determination of causal connection.

Another issue has been raised by plaintiff which deserves our consideration—waiver by employer of the defense of false representation because of "the intentional relinquishment of a known right."

Following oral argument on motion for summary judgment, but before judgment was entered, plaintiff filed an affidavit. She stated that the president of defendant corporation was advised of her prior back injury and surgery which he may have learned from other employees. While absent from work caused by diabetes, the president questioned her about the back injury and surgery, and knew the facts from six months to a year prior to her injury of June, 1976. When plaintiff asked for a promotion, which required heavy lifting, the president denied it because of her prior back injury.

When defendant learned that it had been deceived by the falsification, it had the right to terminate her employment. The deception did not make the contract for her services void, but voidable. *Cooper v. McDevitt & Street Company*, 260 S.C. 463, 186 S.E.2d 833 (1973). With knowledge of the false representation, together with knowledge that plaintiff was an experienced electronics assembler, defendant continued plaintiff in her employment. This was sufficient evidence to show that defendant intentionally relinquished its right to terminate plaintiff's employment. By waiver, plaintiff is accepted as an employee free of any fraud or deception. A genuine issue of material fact exists whether defendant waived its defense under the falsification concept.

We recognize that in every case the workman falsifies his physical condition to obtain employment. It has been said that it now legally pays to lie, that we condone and invite misrepresentation. However, we must not forget that we commend injured workmen who seek employment to support a family rather than play the part of Rip Van Winkle, so long as the workman does not prejudice the rights of the employer. Whether the workman has damaged the employer with falsification rests within the judicial wisdom of district and appellate judges.

The Summary Judgment is reversed.

IT IS SO ORDERED.

HERNANDEZ, J., specially concurring.

LOPEZ, J., concurring in result.

HERNANDEZ, Judge (specially concurring).

In my opinion the defendants established a *prima facie* case that there was no material issue of fact as to any of the three factors necessary to bar recovery set down in *Martinez*. My two brethren do not agree that the defendants established "a causal connection between the false representation and the injury." It is my opinion that the causal connection was established by the following: attached to the deposition of T. M. Keenan, which is included in the record, is a letter dated April 21, 1977, from plaintiff's attending physician, Dr. Joseph Hollinger, to the insurance adjuster. This letter reads in part:

> "I feel that it is highly unlikely that Mrs. Lydia Chavez will recover sufficiently to return to work. I feel that this is a combination of her original back injury, the surgery, the reinjury coupled with her overweight, diabetes, and emotional instability."

Attached to the plaintiff's demand for admissions as exhibit 11–D is a report from Dr. Hollinger dated February 23, 1977, about the plaintiff's condition. This report recites in part:

> "I have been following the patient for several months and frankly I do not see any improvement and I doubt seriously that she will ever be able to go back to any type of work. I will continue following her, however, I feel that because of the multiple problems, emotional, over-

weight, and diabetes along with the laminectomy and recurrent back sprain, that there is little likelihood for any significant improvement."

There are, in my opinion, two material issues of fact which must be resolved at the trial of this matter. The first is whether the defendant, Lectrosonics, Inc., knew about plaintiff's prior back injury and surgery. The second is, if it is determined that they knew of plaintiff's injury, did they waive the defense provided by *Martinez*?

In an affidavit filed in the trial court in opposition to defendant's motion for summary the plaintiff stated the following, among other things:

"5. I was employed by Lectrosonics from January of 1975 until June of 1976. Mr. Thomas P. Gilmer, Jr. was advised of my prior back injury and surgery. I do not know exactly how he knew of this but I presume that he knew of it from Dorothy Moore who had originally recommended me who was fully familiar with that injury and surgery and from Celeste McLeod who worked in the office.

6. I have been a diabetic for many years and did lose some time from work as a result of my diabetes. When I was forced to be off work because of my diabetes, Mr. Thomas P. Gilmer talked to me about my being off work and asked if it was in connection with my back injury, questioned me about the back injury and the surgery, and did definitely know all about the back injury and surgery from six months to a year prior to the injury of June, 1976.

7. When there was an opening in the final assembly area, I asked to be promoted to that area where I would work with Connie Garcia, at that time Mr. Ted Ulibarri, the supervisor and Mr. Thomas P. Gilmer, discussed my going into the final assembly area and refused to approve this because of my prior back injury because this work required lifting heavy cabinets.

8. Approximately one year prior to my injury of June, 1976, Mr. Thomas Gilmer acknowledged to me that he was fully aware of my prior back injury and surgery in conversation discussing my absence from work as a result of my diabetes and then subsequently acknowledged that he was fully aware of this condition subsequently in refusing to permit me to work in the final assembly area."

Both Mr. Gilmer and Mr. Ulibarri denied any prior knowledge about plaintiff's back injury and surgery.

"When an employee makes false statements in his application for employment, the application is voidable at the employer's option and the employer may discharge the employee." *Swanson v. American Manufacturing Company*, 511 S.W.2d 561 (Tex.Civ.App.1974).

If the defendant, Lectrosonics, Inc., knew of the plaintiff's previous injury and surgery and elected not to discharge her it might be determined that the defense provided by *Martinez* was waived.

"[A] waiver is the intentional relinquishment or abandonment of a known right, and that the act of waiver may be evidenced by conduct as well as by express words." *Cooper v. Albuquerque City Commission*, 85 N.M. 786, 518 P.2d 275 (1974).

601 P.2d 733

STATE of New Mexico, Plaintiff-Appellee,

v.

Donald Martin CARTER, Defendant-Appellant.

No. 3934.

Court of Appeals of New Mexico.

Sept. 13, 1979.

Mort Resnick, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Charlotte Heatherington Roosen, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

LOPEZ, Judge.

Defendant was tried by a jury on an information charging three counts, aggravated burglary, larceny and battery on a police officer. The jury acquitted defendant on count II, the larceny charge, and on count III, the battery charge. He was found guilty of commercial burglary, a lesser included offense to the charge of aggravated burglary. Defendant appeals from this verdict. We affirm.

The issues for decision are: (1) whether the trial court erred in refusing to allow defendant, pursuant to § 41–1–1 C, N.M.S. A.1978, to recant and revoke statements made by him to a police officer while he was under the care of a physician; and (2) whether substantial evidence supports the burglary conviction. Other issues listed in the docketing statement were not briefed; consequently, on appeal, they are deemed abandoned. *State v. Ortiz,* 90 N.M. 319, 563 P.2d 113 (Ct.App.1977).

Revocation of Defendant's Statements

The Independent Order of Firefighters was burglarized during the early morning hours of December 18, 1977. Defendant was an associate member of the club and was employed there as a security guard. While investigating a call from a silent alarm company, officers of the Albuquerque Police Department arrested defendant inside the club's premises at approximately 4:00 A.M. on the previously mentioned date. While being arrested, defendant incurred several head injuries. Defendant was taken to a hospital, and while there, he signed a waiver of rights form and indicated orally that he wished to talk. Defendant admitted that he left the club at approximately 1:45 or 2:00 A.M. to get his van and some tools. Upon returning to the club, he stated that he broke open the south door and then the bar cabinet where he found several money sacks. He also stated that he broke open several slot machines by drilling into the locks.

On April 18, 1978, defendant filed a "Notice of Revocation of Oral Statements" pursuant to § 41–1–1 C. After a hearing was held, the trial court denied defendant's mo-

tion to revoke. During trial, the statements were admitted into evidence over defendant's objection. On appeal, defendant argues that the court erred in refusing to allow him to revoke these statements. Section 41–1–1 provides:

41–1–1 Settlements, releases and statements of injured patients; acknowledgment required; notice.

A. No person whose interest is or may become adverse to a person injured who is either under the care of a person licensed to practice the healing arts, or confined to a hospital or sanitarium as a patient shall, within fifteen days from the date of the occurrence causing the person's injury:

(1) negotiate or attempt to negotiate a settlement with the injured patient; or

(2) obtain or attempt to obtain a general release of liability from the injured patient; or

(3) obtain or attempt to obtain any statement, either written or oral from the injured patient for use in negotiating a settlement or obtaining a release.

B. Any settlement agreement entered into, any general release of liability or any written statement made by any person who is under the care of a person licensed to practice the healing arts or is confined in a hospital or sanitarium after he incurs a personal injury, which is not obtained in accordance with the provisions of Section 2 [41–1–2 NMSA 1978] of this act, requiring notice and acknowledgement, may be disavowed by the injured person within fifteen days after his discharge from the care of the persons licensed to practice the healing arts or his release from the hospital or sanitarium, whichever occurs first, and such statement, release or settlement shall not be evidential in any court action relating to the injury.

C. 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.

The crux of defendant's argument is that the term "any statement" as it is used in Subsection C applies not only to all statements made by potential civil litigants but also to all those made by potential criminal defendants. We disagree.

The details of a statute must be germane or related to the subject matter expressed in the title. *City of Albuquerque v. Garcia,* 84 N.M. 776, 508 P.2d 585, 71 A.L.R.3d 1 (1973). Additionally, Article IV, § 16 of the New Mexico Constitution requires that the subject of a statute be embraced within its title. The title of the statute on which defendant relies contains no reference to statements made by criminal defendants; rather its title indicates that it relates to settlements and releases. Moreover, in *Mitschelen v. State Farm Mut. Auto. Ins. Co.,* 89 N.M. 586, 555 P.2d 707 (Ct.App.), *cert. denied,* 90 N.M. 9, 558 P.2d 621 (1976), this Court examined the legislative purpose of the section and stated: "The legislative purpose is clear; the statute was enacted to prevent injustice to a claimant while he is hospitalized or under the care of a doctor." *Id.* at 589, 555 P.2d at 710. In addition, we indicated in that case that the legislative intent is discovered only after examining the statute as a whole. After examining the relationship among the statute's various subsections, we construed the voiding provisions of subsection C in light of the provisions of subsections A and B. Defendant's argument overlooks these definitions. Subsection A limits "any statement" to one obtained "for use in negotiating a *settlement* or obtaining a *release.*" (Emphasis added.) Subsection B provides that any written statement not obtained in accordance with § 41–1–2 N.M. S.A.1978, "shall not be evidential *in any court action relating to the injury.*" (Emphasis added.) In denying defendant's motion, the trial court construed the statute as being limited to civil proceedings. Based upon the definitions contained in subsections A and B, we rule that the court's ruling was correct. Accordingly, we hold that the court did not err in refusing to allow defendant to revoke those statements made by him to a police officer while defendant was under the care of a physician.

Substantial Evidence to Support Burglary Conviction

Defendant claims that the evidence is insufficient to support his burglary conviction. Specifically, he contends that the evidence is insufficient to support a finding that his entry into the club was an "unauthorized entry." *See* § 30–16–3, N.M.S.A. 1978, Defendant's contention is based on a lack of testimony that the Independent Order of Firefighters denied him access to the club in its by-laws, rules, policies or resolutions. In considering the merit of such a contention, we must view the evidence in the light most favorable to the jury's verdict and resolve all conflicts and indulge all permissible inferences in favor of this verdict. *State v. Aubrey,* 91 N.M. 1, 569 P.2d 411 (1977); *State v. Fiechter,* 89 N.M. 74, 547 P.2d 557 (1976). In addition, we must determine whether there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt with respect to every element essential to a conviction. *See Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We have previously held that circumstantial evidence may be sufficient to prove an unauthorized entry, *State v. Mireles,* 82 N.M. 453, 483 P.2d 508 (Ct.App.1971); *State v. Gonzales,* 82 N.M. 388, 482 P.2d 252 (Ct. App.), *cert. denied,* 82 N.M. 377, 482 P.2d 241 (1971).

The evidence most favorable to the jury's verdict is as follows. Defendant was a security guard and an associate club member, and he worked only during normal working hours. He did not work when the club was closed. The club's president testified that defendant's authority to enter was limited to those times when the club was open for business. Defendant left the club sometime prior to 2:00 A.M. in the morning hours of December 18, 1977. The assistant bar manager closed the club at approximate 2:00 A.M. Defendant was then found in the club approximately two hours later by two police officers who had responded to a silent alarm. The south door to the club had been broken off and splintered. After being arrested, defendant signed a waiver of rights form and admitted that he left the club at approximately 1:45 or 2:00 A.M. to get his van and some tools. He also admitted that, upon returning to the club, he broke open the south door and then the bar cabinet where he found several money sacks. Finally, he admitted that he broke open several slot machines by drilling into the locks. Based upon this evidence, we rule that a rational trier of fact could have found beyond a reasonable doubt that defendant's entry into the club was unauthorized. Accordingly, we hold that there was sufficient evidence to support defendant's burglary conviction.

Based upon the foregoing, we affirm defendant's conviction.

IT IS SO ORDERED.

WOOD, C. J., concurs.

SUTIN, J., specially concurs.

SUTIN, Judge (specially concurring).

I concur.

In our democratic form of government, a defendant is presumed to be innocent until he is proven guilty of a criminal offense beyond all reasonable doubt. He/she is entitled to a fair trial even though the evidence establishes guilt beyond all reasonable doubt. A defendant is also entitled to assistance of a good, experienced defense lawyer, one who will put the prosecutor to task. Without research, I think this protection is shocking to the people and the media until one akin to them is involved.

However, criminal defense lawyers must be dedicated to this field of practice. If they are not learned in the law and not experienced in criminal defense work, they should not accept employment, and, if appointed, should seek to be excused. To become learned and experienced, a novice should assist good defense lawyers until confidence and ability begin to surge within themselves. Then, criminal defense lawyers must conduct a defense to the best of their ability.

A defense attorney should not raise nonsensical issues before trial. In the instant case, it is proper to file a motion to "recant and revoke" statements given by a defend-

ant and taken while under the care of a physician, even though this type of relief sought is unknown to me, PROVIDED, the lawyer has authority or good reasoning to support the motion. But to rely on the "oath taking" section of the Tort Release Act and to appeal from a denial of the motion is puerile. Common sense dictates that legislative intent is absent, but common sense is very uncommon. To seek to transform a protective civil device for a person under the care of a physician into a protective criminal device, absent authority or good reasoning, does not comport with standards required of good defense lawyers.

Defendant's Brief-In-Chief followed the Civil, not the Criminal, Rules of Appellate Procedure.

I do stand alone among appellate judges who use the judicial opinion as a vehicle directed to raising the standards of trial and appellate practice among members of the Bar. Many such opinions have been written and published. A large number have been written as "Correspondence Opinions" in response to Memorandum Opinions. This practice does provoke adverse comment among lawyers. But a crisis now exists in the United States with reference to competent trial and appellate lawyers, both civil and criminal, and appellate judges should not hesitate to accept their share of the burden in eradicating this plague.

601 P.2d 737

STATE of New Mexico, Plaintiff-Appellee,

v.

James URIOSTE, Frank Sena, Jr., and Ruben Orosco, Defendants-Appellants.

Nos. 4005, 4006 and 4008.

Court of Appeals of New Mexico.

Sept. 18, 1979.

John B. Bigelow, Public Defender, Santa Fe, Mark H. Shapiro, Asst. Public Defender, Albuquerque, for defendants-appellants.

Jeff Bingaman, Atty. Gen., Arthur Encinias, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Section 30–9–11(B), N.M.S.A.1978 defines CSP II (criminal sexual penetration in the second degree) to include CSP perpetrated "by the use of force or coercion when the perpetrator is aided or abetted by one or more persons . . . ." We discuss the meaning of the aiding and abetting language in this statute.

At a consolidated trial, Orosco was convicted of CSP II. Sena and Urioste were convicted of being accessories to Orosco's offense, and Urioste was also convicted of criminal sexual contact of a minor. Separate appeals were taken. Sena's and Urioste's appeals were previously consolidated; Orosco's appeal is hereby consolidated with the appeals of his co-defendants at trial.

The several docketing statements raised issues which have not been briefed; such issues have been abandoned. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct.App.1977).

Defendants suggest the trial proceedings raise a serious question concerning ineffective assistance of counsel. They arrive at this suggestion by combing the trial record for items that might possibly support the suggestion. The legal standard for determining ineffective assistance of counsel is whether the trial, considered as a whole, is a mockery of justice, a sham or a farce. *State v. Trivitt*, 89 N.M. 162, 548 P.2d 442 (1976). Under this standard, the ineffective assistance of counsel claim is without merit. We suggest that the appellate public defender heed the following: "It is relatively easy for different counsel on an appealed case to differ on trial tactics used during the trial of a cause. Hindsight is not always better than foresight in the course of litigation from beginning to end." *State v. Trivitt, supra.*

Section 30–9–11(B), supra, refers to the perpetrator being aided or abetted by one or more persons. The approved jury instruction, U.J.I. Crim. 9.49, does not refer to aider or abettor. The instruction requires the defendant (Orosco) to have "acted with the help or encouragement of one or more persons . . . ."

Orosco asserts: "Help or encouragement is not enough to aggravate a criminal sexual penetration to a second degree offense. The helpers or encouragers must also have intended the crime to be committed for them to be aiders or abettors." Thus, Orosco contends that his guilt of CSP II depends upon the intent of aiders or abettors, that to be an aider or abettor one must have intended that the CSP offense be committed. Since U.J.I. Crim. 9.49 fails to instruct on the intent of the aiders or abettors, Orosco contends his conviction must be reversed for failure to include the aider's or abettor's intent as an element of the CSP offense that Orosco committed. We disagree.

Orosco's argument is based on the view that the reference to aiding and abetting in § 30–9–11(B), supra, was used in a technical legal sense. The correct view of the statutory aiding or abetting, is stated in the Committee Commentary to U.J.I. Crim. 9.08. The Commentary states:

> The committee was of the opinion that the legislative use of the terms "aided and abetted" to describe the aggravated offense was not intended to involve consideration of complicated issues of the necessary criminal intent for an accessory. The culpability of the defendant for this aggravated charge of criminal sexual contact does not depend upon the intention of another entertained without his knowledge; it is the intention of the defendant and the effect of the assistance which is controlling.

The committee considered whether the statute must be construed to require that the aiding and abetting be an assist to the force or coercion. The committee decided that the help or encouragement provided the defendant by another may be an assist to any element of the unlawful contact. The gravamen of the offense is the use of another as a tool in the perpetration of the crime.

Therefore, the committee was of the opinion that the element of aided and abetted was properly stated by the phrase "acted with the help or encouragement of one or more persons." The committee noted that the legislature was expressing concern for the victim by including this element as an aggravating factor. A sexual assault by persons acting in concert poses a greater threat to a victim's physical and mental safety than an assault by a single defendant.

The trial court's instruction concerning Orosco, which was based on U.J.I. Crim. 9.49, was correct because the intent of the aider or the helper was not an element of Orosco's crime.

Sena and Urioste contend the jury was not instructed on the intent required of an aider or abettor. Consistent with the Use Note to U.J.I. Crim. 28.30, the jury was instructed as to the essential elements of Orosco's CSP II offense. In addition, U.J.I. Crim. 28.30 was given. This instruction requires that the defendants (Sena and Urioste) intended that Orosco's crime be committed. The jury was instructed in accordance with the approved instructions. Sena and Urioste complain that the required intent, for their accessory crimes, was not included in the instruction setting forth the elements of CSP II. Such was not required. Instructions are to be considered as a whole. *State v. Rhea*, 86 N.M. 291, 523 P.2d 26 (Ct.App.1974). When so considered, there was no deficiency in the instructions concerning the intent required of Sena and Urioste.

The judgments and sentences are affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

601 P.2d 1203

STATE of New Mexico ex rel. Ira ROBINSON, District Attorney, Petitioner,

v.

Hon. James A. MALONEY, District Judge, Respondent.

No. 12413.

Supreme Court of New Mexico.

Aug. 9, 1979.

This cause having heretofore been submitted and taken under advisement, and the Court now being sufficiently advised in the premises;

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the alternative writ of mandamus heretofore issued in this cause on March 14, 1979, be and the same is hereby made permanent.

601 P.2d 1203

COMMERCIAL UNION ASSURANCE COMPANIES, a corporation, Plaintiff-Appellee,

v.

WESTERN FARM BUREAU INSURANCE COMPANIES, a corporation, Defendant-Appellant.

No. 12431.

Supreme Court of New Mexico.

Nov. 1, 1979.

Modrall, Sperling, Roehl, Harris & Sisk, Ruth M. Schifani, Albuquerque, for defendant-appellant.

Montgomery, Andrews & Hannahs, Frank Andrews, Jeffrey R. Brannen, Santa Fe, for plaintiff-appellee.

OPINION

SOSA, Chief Justice.

The issue we decide in this case is whether the language "pro rata share" as used in the Uniform Contribution Among Tortfeasors Act, § 41–3–2, et seq., N.M.S.A.1978,

means "equal shares" or "proportionate shares" when applied to the right of contribution between tenants in common. We construe it to mean "equal shares."

This case arose out of a wrongful death action filed in Rio Arriba County. The basis of the suit was an allegation that four defendants, two of whom were insured by Commercial Union Assurance Companies (Commercial Union) and two of whom were insured by Western Farm Bureau Insurance Companies (Western Farm), negligently and proximately caused the death of one Esquibel, a minor. The accident causing Esquibel's death allegedly occurred when he fell into a well and drowned on property insured by Commercial Union and Western Farm. The negligence suit was settled. In settling the case, however, the two insurers disagreed on the amount to be contributed on behalf of their insureds towards settlement. The two companies sought a declaratory judgment adjudicating the rights and liabilities between them. Summary judgment was granted for Commercial Union. Western Farm Appeals.

Western Farm's position below and on appeal is that their liability is proportionate to their insureds' interest in the property. Western Farm's insureds own a twenty percent total interest in the property as tenants in common. Commercial Union's insureds own an eighty percent total interest in the property. Commercial Union argues that each insurance company owes fifty percent of the settlement amount, because each insured must contribute an equal amount regardless of the proportion of ownership.

It is well established that ours is a jurisdiction which adheres to the doctrine of contributory negligence as a bar to recovery in a tort action. *Syroid v. Albuquerque Gravel Products Co.*, 86 N.M. 235, 522 P.2d 570 (1974). This is based on the perception that justice is best served by not comparing degrees of negligence or fault. *Id.* While the instant case involves the relationship between defendants *inter se* rather than between defendants and plaintiffs, the same principle applies.

Professor Prosser states that "[n]ormally the apportionment of liability effected by contribution is on the basis that 'equality is equity,' which means that each tortfeasor is required ultimately to pay his pro rata share, arrived at by dividing the damages by the number of tortfeasors." Prosser, *Law of Torts*, § 50 at 310 (4th ed. 1971). We follow this rule. The duty owed by each owner of the property is the same, and the tortfeasors stand in the same relationship to one another. They are all equally liable for a breach of their duty.

We hold that "pro rata share" as used in § 41–3–2 of the Uniform Contribution Among Tortfeasors Act means "equal shares" when applied to the right of contribution between tenants in common.

The decision of the trial court is hereby affirmed.

IT IS SO ORDERED.

EASLEY and PAYNE, JJ., concur.

601 P.2d 1204

Rodney D. JEFFERS and Victoria M. Jeffers, his wife, Plaintiffs-Appellants,

v.

Betty L. Doel MARTINEZ, Defendant-Appellee.

No. 12350.

Supreme Court of New Mexico.

Nov. 2, 1979.

Cohen & Aldridge, William F. Aldridge, Albuquerque, for plaintiffs-appellants.

Avelino V. Gutierrez, Jess C. Sandoval, Albuquerque, for defendant-appellee.

OPINION

FELTER, Justice.

Plaintiffs-Appellants, Mr. and Mrs. Jeffers (hereafter Jeffers), sued Defendant-Appellee, Ms. Martinez, for specific performance of a real estate contract wherein Jeffers were the buyers and Ms. Martinez was the seller. From a summary judgment in favor of Ms. Martinez, this appeal was taken by the Jeffers. We reverse.

On February 5, 1978, Jeffers entered into a real estate contract with Ms. Martinez for the purchase of a house and lot in Albuquerque. Before her marriage to Frank R. Martinez (Mr. Martinez) the real estate in question was the sole and separate property of Ms. Martinez (formerly Betty L. Doel) resulting from a previous marriage of hers. Her husband at the time of execution of the real estate contract was Mr. Martinez. The real estate contract of February 5, 1978 was signed by Defendant-Appellee "Betty L. Doel [Martinez]." The Jeffers' position is that they had been assured that Ms. Martinez and her present husband, Mr. Martinez, had executed a marriage settlement agreement preserving, *inter alia,* the real estate with which we are here involved as the sole and separate property of Ms. Martinez. Further, the Jeffers claim they did not have either actual or constructive notice of any conveyance or transmutation of the real estate in question from the sole and separate property of Ms. Martinez to community property of Mr. and Ms. Martinez. It is uncontroverted that a quit claim deed purportedly given on May 3, 1977 from Ms. Martinez to Mr. and Ms. Martinez as husband and wife was never recorded.

Ms. Martinez controverts the Jeffers' position stating that the deed from Ms. Martinez to Mr. and Ms. Martinez as husband and wife is valid, thereby transmuting the subject real estate into community property. Further, Ms. Martinez alleges that no marriage contract ever existed between Ms. Martinez and her husband, Mr. Martinez. Mr. Richmond, the realtor who was handling the sale, at all times material thereto had knowledge of the facts which make the real estate community property. Richmond denies such assertion and corroborates the position of Jeffers.

Ms. Martinez contends that the real estate contract of February 5, 1978 is void

and unenforceable pursuant to Section 40–3–13(A), N.M.S.A.1978, which section provides that conveyances of real estate which is community property by one spouse alone is void. In support of this premise, Ms. Martinez also cites *Hannah v. Tennant,* 92 N.M. 444, 589 P.2d 1035 (1979). Ms. Martinez correctly interprets the law as it relates to community property.

The Jeffers claim they are innocent purchasers for value without notice or knowledge of the unrecorded deed or any other facts which would have changed the character of the real estate from the sole and separate property of Ms. Martinez to community property.

Section 14–9–3, N.M.S.A.1978 provides:

> No deed, mortgage or other instrument in writing, not recorded in accordance with Section 14–9–1, NMSA 1978, shall affect the title or rights to, in any real estate, of any purchaser, mortgagee in good faith or judgment lien creditor, without knowledge of the existence of such unrecorded instruments.

In *Mabie-Lowrey H. Co. v. Ross,* 26 N.M. 51, 189 P. 42 (1920) this Court stated, insofar as here material:

> The court below held that Ross was a purchaser in good faith, without knowledge of the existence of the unrecorded deed, and gave judgment in his favor.

26 N.M. at 52–53, 189 P. at 43.

> We therefore hold that the trial judge correctly decided in favor of the defendant.

26 N.M. at 55, 189 P. at 44.

Any conflict between §§ 40–3–13 and 14–9–3 should be resolved in favor of the latter statute which protects the rights of innocent purchasers for value without notice of unrecorded instruments. A grantor or a grantee of any deed to real estate may attend to the recordation thereof and thus protect title and status of real estate as may be desired. An innocent purchaser without notice of an unrecorded deed can do nothing to protect his position except to place his reliance upon the law as stated in Section 14–9–3. Equitable principles require that the innocent purchaser should prevail over one who negligently fails to record a deed upon which he seeks to rely.

If the Jeffers are found to be innocent purchasers for value without notice then the real estate was not at any material time community property as to the innocent purchaser for value. It is apparent, therefore, that summary application and effect could not be given properly to Section 40–3–13 upon the facts before the trial court. Before the law relating to sale and conveyance of community property may be made applicable to Jeffers in the real estate transaction before us, the trial court must first resolve as a question of fact that the Jeffers were not innocent purchasers for value or that they had prior knowledge or notice of the unrecorded deed from Ms. Martinez to Mr. and Ms. Martinez as husband and wife. A genuine issue of fact exists and must be decided before Section 40–3–13 can be applied. Where such an issue exists, summary judgment may not be granted. *Pharmaseal Laboratories, Inc. v. Goffe,* 90 N.M. 753, 568 P.2d 589 (1977); *Goodman v. Brock,* 83 N.M. 789, 498 P.2d 676 (1972); *Southern Pacific Company v. Timberlake,* 81 N.M. 250, 466 P.2d 96 (1970).

This case is reversed and remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

EASLEY and FEDERICI, JJ., concur.

602 P.2d 195

Jerome D. MATKINS, Administrator of the Estate of Johnny Lee Smith, Deceased, Plaintiff-Appellant,

v.

ZERO REFRIGERATED LINES, INC., a foreign corporation, and Jack D. Browning, Defendants-Appellees.

No. 3449.

Court of Appeals of New Mexico.

July 26, 1979.

Rehearing Denied Aug. 10, 1979.

W. T. Martin, Jr., Matkins & Martin, Carlsbad, for plaintiff-appellant.

Lawrence H. Hill, Civerolo, Hansen & Wolf, Albuquerque, for defendants-appellees.

OPINION

WALTERS, Judge.

Plaintiff-appellant, as administrator of the estate of Johnny Lee Smith, appeals from the order of the trial court granting summary judgment in favor of defendants Browning and Zero Refrigerated Lines, Inc. (Zero) in this wrongful death action. We reverse the summary judgment entered in favor of Zero and affirm the summary judgment granted to Browning.

Appellant's deceased and Browning were employed as truck drivers by R & M Truck Company (R & M). R & M entered into a lease agreement with Zero, a licensed interstate common carrier, by which R & M agreed to furnish a truck and two drivers

and Zero agreed to furnish the trailers for transporting commodities. Zero, as the holder of an ICC license, was the authorized entity to engage in transportation in interstate commerce. Under the negotiated leasing contract, R & M had sole responsibility for hiring, firing, directing and training the drivers, paying their wages, and providing for unemployment and workmen's compensation benefits. R & M was to be paid by the mile upon submitting documentation to Zero of its performance of the contract. R & M paid all expenses, including maintenance, operation costs and fees. It is not clear from the record to whom the drivers reported on a regular basis for instructions concerning the kind and destination of the commodities they delivered. The record does indicate, however, that R & M maintained all records on deliveries.

On November 12, 1973 Smith was killed while riding as a passenger in the leased truck, driven by Browning, when the truck failed to negotiate a curve and overturned. It is not disputed that Smith was killed during the course of his employment.

Appellant filed this wrongful death action charging Zero with liability for the negligence of Browning, as its agent, and Browning for his own negligence. Appellees denied liability and moved for summary judgment, resting on the pleadings. Summary judgment is proper when there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. N.M.R.Civ. 56(c), N.M.S.A.1978. Where, as here, the motion is made solely on the pleadings without supporting affidavits, it serves the same function as a motion for judgment on the pleadings. N.M.R.Civ. 12(c), N.M.S.A.1978. *See Valdez v. City of Las Vegas*, 68 N.M. 304, 361 P.2d 613 (1961). The appellees actually admit, for purposes of the summary judgment motion, the veracity of the allegations in the complaint and argue that even under the facts as alleged appellant is not entitled to relief. *See Worley v. United States Borax and Chemical Corp.*, 78 N.M. 112, 428 P.2d 651 (1967). In deciding this case, we therefore consider the facts pleaded as undisputed and determine if a basis is present to decide the issues as a matter of law.

Assuming the facts recited above are true, the trial court must have based its decision on the determination that (1) Smith (deceased) and Browning were employees of Zero; thus, appellant's exclusive remedy was under the Workmen's Compensation Act; or (2) if Smith and Browning were employees of R & M, the negligence of Browning, as an employee of R & M, could not be imputed to Zero.

As a preliminary matter, it must be pointed out that the exclusivity provision of the Workmen's Compensation Act does not preclude an employee or his estate from seeking damages against a third party who is not an employer, coemployee, or insurer or guarantor of his employer, § 52–1–6, N.M.S.A.1978. Thus, although the estate of deceased had received workmen's compensation benefits from R & M by means of a settlement agreement, appellant is not denied the right to bring suit against a third-party tortfeasor. Moreover, R & M's compensation carrier may gain the right of reimbursement from Zero depending on the success or failure of plaintiff at trial. § 52–1–56 N.M.S.A.1978; *Reed v. Styron*, 69 N.M. 262, 365 P.2d 912 (1961).

Employer-Employee Relationship

Appellees assert that the ICC regulations regarding leasing of vehicles for use in interstate transportation of goods, 49 C.F.R. §§ 1057.1 through 1057.6, are controlling in this situation and create an employer-employee relationship as a matter of law. Section 1057.4(a)(4), promulgated under 49 U.S.C. § 304(e), requires as a condition for licensed lessee-carriers to "perform authorized transportation in or with equipment which they do not own," that the contract with the lessor of the equipment

> [s]hall provide for the exclusive possession, control and use of the equipment, and for the complete assumption of responsibility thereto, by the lessee for the duration of said contract . . .

The cases cited by appellees relating to the ICC regulation were not concerned with the liability of the lessee to the worker as that liability might be affected by a claim for workmen's compensation benefits. In *Weeks v. Kelley*, 377 A.2d 444 (Me.1977), the court held that the common carrier-lessee was liable, as a matter of law, for any negligence attributable to the driver while operating leased equipment. Although the court determined that the ICC regulation "create[d] a relationship between the lessee carrier and the operator of the leased equipment comparable to that of employer-employee," *id.* at 447, it emphasized that the liability was for *negligence*. Nothing was said in *Weeks* about a conflicting employer-employee status resulting from application of a workmen's compensation law and, therefore, it is not helpful in analyzing the issue before us.

Appellees also refer us to a United States Supreme Court case, *Transamerican Freight Lines, Inc. v. Brada-Miller Freight Systems, Inc.*, 423 U.S. 28, 96 S.Ct. 229, 46 L.Ed.2d 169 (1975), which indicates that the carrier-lessee has the obligation of control and responsibility for operation of the equipment imposed by the ICC regulation; and they urge us that, by implication, Zero must be considered Smith's employer and thus subject only to a workmen's compensation claim. The Court's decision, however, focused on the development of the ICC regulation to satisfy the need for making and keeping the carrier-lessee "responsible to the public, the shipper, and the Commission." 423 U.S. at 39, 96 S.Ct. at 235. It was held in *Transamerican, supra*, that an indemnity clause directed toward the lessor's negligence did not conflict with the safety concerns of the ICC regulations. The question we are faced with, i. e., a third-party tort action, in addition to a workman's compensation claim, never arose.

Zero and R & M complied with the ICC regulation, as evidenced by ¶ 3 of their contract:

> The CARRIER shall have such exclusive possession, control and use of the CONTRACTOR'S equipment and shall assume responsibility in respect thereto to the extent required by the rules and regulations of the Interstate Commerce Commission and the Federal Highway Administration.

However, Zero passed on to R & M any responsibility it might have had to the deceased for workmen's compensation benefits, in ¶ 6:

> The CARRIER shall not be responsible for Workmen's Compensation Insurance covering the CONTRACTOR, its drivers, helpers and laborers. Such matters are the sole and exclusive responsibility and liability of the CONTRACTOR.

Appellees reason that since New Mexico case law emphasizes the right of control in determining if a worker is an employee, *Yerbich v. Heald*, 89 N.M. 67, 547 P.2d 72 (Ct.App.1976), we should be persuaded by those cases which hold that the ICC regulation creates a right of control in the lessee and thus an employer-employee relationship, and conclude such an employer-employee relationship as a matter of law for all purposes, even for the purpose of workmen's compensation law.

We must acknowledge first, however, that the New Mexico courts have repeatedly held that the employment status of a worker must be determined on a case-by-case basis. *Shipman v. Macco*, 74 N.M. 174, 392 P.2d 9 (1964); *Burruss v. B. M. C. Logging Co.*, 38 N.M. 254, 31 P.2d 263 (1934).

Secondly, although the major test which has emerged in New Mexico for determining status of employment is right of control of the details of the work, *Shipman v. Macco, supra*, that test is considerably modified when the work involved is "hauling." Hauling of material to or from a work site is more analogous to the lessee-carrier situation presented here than are those cases in which a worker employed by one person goes to work on the premises of another person. We must draw on the former type of cases for our resolution of this appeal. In *Abbott v. Donathon*, 86 N.M. 477, 525 P.2d 404 (Ct.App.1974), where the alleged employee was killed while hauling material

in his own truck for the defendant, this court observed:

> We feel that the power of termination is of great importance in this case because the facts are so similar to those in *Burruss.* That case also involved an alleged employee who was killed while hauling material in his own truck. In that case there was the same lack of "superintendence" or of "authoritative control," which defendants rely upon here. In cases involving hauling there is likely to be little actual direction other than as to time and place. Since the factor of actual control of details, often relied upon by courts in resolving this same issue, is not likely to be helpful here, the importance of other tests, such as power of termination and method of payment, is magnified.

86 N.M. at 478–479, 525 P.2d at 405–406.

Whether the test applied is right of control or consideration of other factors, R & M remains the factual employer of Smith and Browning. R & M had the power to terminate the drivers; Zero had no power to prevent R & M from retaining Browning as its employee. The contract provided that R & M should choose the routes, the numbers of drivers and helpers, the rest stops and points of service. It further provided that R & M should determine the method and means of performing the contract in addition to having responsibility for the direction and control of the drivers.

We realize that some courts have come to a different conclusion about the relationship of carrier-lessees to drivers. *See American Red Ball Transit Co. v. Industrial Com'n,* 145 Colo. 509, 359 P.2d 1018 (1961); *DeBerry v. Coker Freight Lines,* 234 S.C. 304, 108 S.E.2d 114 (1959). However, in addition to there being support in other jurisdictions for our position, *see Reed v. Industrial Com'n,* 23 Ariz.App. 591, 534 P.2d 1090 (1975) and *Miller v. Barnett,* 285 P.2d 233 (Okl.1955), we note the significant difference in the workmen's compensation coverage of those cases and we are particularly persuaded by the fact that Zero here contracted away its burden of providing workmen's compensation insurance.

Simply because the contract gave Zero that control necessary to meet the requirements of the ICC regulations does not, as a matter of law, make Zero the employer for purposes of invoking the provisions of our Workmen's Compensation Act to avoid a common-law suit. Under ¶ 6 of the contract Zero received the benefit of someone else paying workmen's compensation benefits to injured employees or to the estates of deceased employees. It also assumed the detriment of not being able to claim for itself the exclusive remedy section of the Workmen's Compensation Act when one of the drivers was injured or killed. § 52–1–8, N.M.S.A.1978. Although an employer cannot avoid his liability under the Workmen's Compensation Act by stating in a contract that the worker is not an employee but an independent contractor, *Reichart v. Jerry Reece, Inc.,* 504 S.W.2d 182 (Mo.App.1973) and *see Yerbich v. Heald,* 89 N.M. 67, 547 P.2d 72 (Ct.App.1976), in this case the contract provisions are evidence of Zero's bargained-for waiver of the benefits of the Workmen's Compensation Act, and Zero's purposeful subjection of itself to common-law liability for negligence. By relieving itself of the burdens of meeting the statutory obligation to provide workmen's compensation coverage, Zero relinquished to R & M the sole right to invoke the exclusionary provisions of New Mexico's Workmen's Compensation Act.

We hold, therefore, that based on the relationship of Smith and Browning to R & M; the relationship of R & M to Zero as evidenced by the record and, particularly, by the contract; and the contractual undertaking by R & M to provide workmen's compensation insurance for its drivers, Smith and Browning were employees of R & M with respect to rights and duties created by the Act, and that plaintiff is not precluded from bringing a wrongful death action against Zero.

In so holding, we emphasize that we are not addressing the status of the lessee-carrier as the employer for workmen's compensation purposes when it has not contracted

away its workmen's compensation obligations.

Negligence of Browning Imputed to Zero

After determining that Smith and Browning are employees of R & M and not Zero, we are confronted with the question of whether the negligence of one not an employee of a company may be imputed to that company. The basis for Zero's liability is found in the ICC regulations discussed above.

Since, at the time of the accident, Zero was an interstate trucking company licensed by the Interstate Commerce Commission, it was subject to the rules and regulations promulgated by that commission. We are concerned here with the rule cited above, 49 C.F.R. § 1057.4(a)(4), requiring that, under lease agreements, the lessee-carrier have full direction and control of leased vehicles and be fully responsible for their operation "as if they were the owners of such vehicles . . ." *Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 89 (4th Cir. 1974).

Appellant argues that this appeal is controlled by *Proctor, supra*, in which the court faced a similar question: whether a licensed interstate carrier is liable to an employee of a lessor for injuries resulting from the negligence of the lessor-driver in the operation of his equipment in the business of the carrier-lessee. The facts in *Proctor* differ from those presented here only in that the negligent driver, Boles, was also the owner-lessor of the equipment rather than a driver employed by the lessor. The injured workman was an assistant driver hired by Boles, riding as a passenger in Boles's tractor-trailer at the time of the accident.

In finding that the lessee-carrier was liable to the passenger for the negligence of the driver, the *Proctor* court based its decision on the supervision and control requirement of the ICC regulation, § 1057.4(a)(4), stating:

> These regulations were promulgated by the Commission to correct widespread abuses incident to the use of leased equipment by the carriers, . . . and "the intent [of the regulations] was to make sure that licensed carriers would be responsible in fact, as well as in law, for the maintenance of leased equipment and the supervision of borrowed drivers.", *Alford v. Major*, 470 F.2d 132, 135 (7 Cir. 1972). The statute and regulatory pattern clearly eliminates the independent contractor concept from such lease arrangements and casts upon [the carrier] full responsibility for the negligence of [the driver] of the leased equipment.

Id. at 91–92.

The holding in *Proctor* is still valid, contrary to appellees' contention that *Alford v. Major*, 470 F.2d 132 (7th Cir. 1972), cited in the *Proctor* decision, was overruled by the Supreme Court in *Transamerican Freight Lines, Inc. v. Brada-Miller Freight Systems, Inc., supra.* In *Transamerican*, the Court noted that the Seventh Circuit itself had modified its position in *Alford* regarding indemnification (423 U.S. 34 at n. 6, 96 S.Ct. 232 at n. 6), but the result in the *Alford* case had no bearing whatever on the *Proctor* decision. However, neither *Proctor* nor *Transamerican* grappled with a compensation claim and a tort claim and the complexities therein recognized in this jurisdiction in such decisions as *Kandelin v. Lee Moore Contracting Co.*, 37 N.M. 479, 24 P.2d 731 (1933), and *Castro v. Bass*, 74 N.M. 254, 392 P.2d 668 (1964), as well as the "hauling" cases discussed above.

One of the principal goals of the ICC regulation imposing responsibility on the carrier was to provide the public with financially responsible carriers. *Indiana Refrigerator Lines, Inc. v. Dalton*, 516 F.2d 795 (4th Cir. 1975). In acknowledgment of that purpose, *Proctor* reasoned that plaintiff, although an employee of the negligent driver and a passenger in the truck driven by him, was as entitled to the protection intended by the Commission's regulations as any other member of the traveling public. We feel that plaintiff here, representing the estate of deceased, is entitled to the same protection under the ICC regulations, and to deny him the right to seek recovery from the carrier would undercut one of the primary purposes of the regulatory pattern.

Zero, then, as an ICC carrier-lessee, is responsible as a matter of law for the negligence of lessor R & M's employees in the performance of the lease agreement. The trial court erred in granting summary judgment based either upon the employment status of Smith and Browning and the exclusivity provision of the Workmen's Compensation Act, or upon a conclusion that Zero had no responsibility for the negligence of Browning. Appellants are entitled to try to prove Browning's negligence, and a finding of negligence on his part, absent a finding of contributory negligence on the part of Smith, would require a finding of liability against Zero.

Common Law Liability of Browning

The trial court was correct in granting summary judgment in favor of Browning. Under our Workmen's Compensation Act, an employee of an employer who has complied with the requirements of the Act is not subject to liability under the common law for the injury or death of a coemployee. This rule is found in two sections of the Workmen's Compensation Act. Section 52–1–8, N.M.S.A.1978, states, in pertinent part:

> Any employer who has complied with the provisions of the Workmen's Compensation Act relating to insurance, *or any of the employees of the employer . . . 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.)

Section 52–1–6 D, N.M.S.A.1978, quoted in part, again excludes a co-employee in third-party suits:

> Nothing in the Workmen's Compensation Act, however, shall affect, or be construed to affect, in any way, the existence of, or the mode of trial of, any claim or cause of action which the workman had against any person *other than his employer, or another employee of his employer*, . . . (Emphasis added.)

The record discloses that R & M has paid workmen's compensation benefits to the estate of Smith, thus evidencing that R & M was in compliance with the insurance provisions of the Workmen's Compensation Act. The statute is clear that, under these circumstances, although Browning's negligence may have proximately caused the death of Smith, appellant is precluded from bringing a common-law action against him because of R & M's compliance with the Act, and Browning's status as an R & M employee.

The case is remanded to the district court for reinstatement of the complaint against Zero Refrigerated Lines, Inc.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HERNANDEZ, J., dissenting.

HERNANDEZ, Judge (dissenting).

I respectfully dissent.

I agree that both Smith and Browning were employees of R & M, as such a relationship is determined by New Mexico law. However, it is my opinion that this is one of those situations where state law must yield to federal law.

I agree with the Missouri Court of Appeals in *Transport Indem. Co. v. Teter*, 575 S.W.2d 780 (1978):

> "The cognate provision of § 304 [U.S.C.A.] of the Interstate Commerce Act—that the common carrier under ICC certificate shall have full control and responsibility for the operation of a leased motor vehicle—corrects the historical abuse whereby the carrier engaged an owner of equipment as an independent contractor to transport cargo and thus enabled the carrier to evade, among other responsibil-

ities, liability to the public for injury from the negligence of the contractor. *Duke v. Thomas*, 343 S.W.2d 656, 658 (Mo.App.1961). The intention of § 304, found by our Supreme Court in *Brannaker v. Transamerican Freight Lines, Inc.*, 428 S.W.2d 524 (Mo.1968), l. c. 529, was to put the use and operation of leased vehicles on a parity with equipment owned by the authorized carrier and operated by its own employees.

In terms of the requirement of § 315 [U.S.C.A.] that a motor carrier secure the public against injury from the negligent operation of motor vehicles used under ICC license, § 304 denies a carrier the defense of independent contractor [*Duke v. Thomas*, supra, l. c. 659], renders the driver a statutory employee of the carrier [*Rannaker v. Transamerican Freight Lines, Inc.*, supra, l. c. 535] and, on principles of vicarious liability, the carrier liable as a matter of law for the negligence of the driver of a vehicle—owned or non-owned—operated under the certificate of the carrier."

I think that Smith and Browning were statutory employees of Zero. Assume that some member of the traveling public had been injured or killed in the same accident the negligence of Browning would be imputed to Zero.

602 P.2d 616

STATE of New Mexico,
Plaintiff-Appellee,

v.

Jerry Don ROGERS,
Defendant-Appellant.

No. 12404.

Supreme Court of New Mexico.

Nov. 13, 1979.

Martha A. Daly, Appellate Defender, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Michael E. Sanchez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

FELTER, Justice.

Defendant-Appellant, Rogers, was convicted and sentenced to life as a four-time felony offender under the Habitual Offender Statute, § 31–18–5, N.M.S.A.1978 (current version at § 31–18–17, N.M.S.A.1978 (Cum.Supp.1979)). From this conviction, Rogers raises two issues on appeal: (1) whether the evidence supports an enhanced sentence as a four-time felony offender; and (2) whether, in the context of this case, a life sentence is cruel and unusual punishment and therefore unconstitutional.

We hold that the evidence and findings in this case could sustain Rogers' sentence only as a three-time felony offender, but not as a four-time felony offender. This

holding renders moot Rogers' claim that a life sentence is cruel and unusual punishment.

The defendant was charged with felonies in four accusatory pleadings: Curry County Case Nos. 5781, 6016, 6569 and 8011. Specifically, the felonies underlying the habitual offender charge were: Unlawful Taking of a Vehicle; Commercial Burglary; Possession of a Stolen Motor Vehicle and Fraudulent Signing of a Credit Card Slip; and another charge of Commercial Burglary. The Information in Curry County Case No. 5781 which charged the defendant with Unlawful Taking of a Vehicle and the Amended Information in Curry County Case No. 6016 which charged the defendant with Commercial Burglary both failed to show the date on which the offenses were committed. The accusatory pleadings for the other two cases did show the dates on which the offenses charged therein were committed.

An Habitual Offender Criminal Information was filed in Curry County charging Rogers with being the same person convicted of felonies in all of the above Informations or Indictments. The habitual offender charge which resulted in Rogers' conviction as a four-time felony offender was tried on January 11, 1979, and a life sentence was imposed on him. An amended sentence to allow credit for "post-sentence confinement" was imposed on February 12, 1979.

Rogers contends that in order for him to be sentenced under the Habitual Offender Act, the date of commission of each enhancing crime must follow the date of a previous conviction. With that contention we agree.

In *State v. Linam,* 93 N.M. 307 at 309, 600 P.2d 253 at 255 (1979), *cert. denied,* — U.S. —, 100 S.Ct. 91, 62 L.Ed.2d 59 (1979), decided by this Court on January 11, 1979 (the same date that Rogers was tried as an habitual offender), we stated:

> It is a question of first impression in this Court whether, in a proceeding to enhance sentence for a third or fourth felony, *each* felony must have been committed after conviction for the preceding felony.
>
> * * * * * *
>
> * * * We hold it 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. Thus the use of the words "upon conviction of such second felony" or "third felony" as used in the statute must be held to mean felonies committed subsequent to the dates of the convictions relied on to effect an increase of the penalty.

The issue of whether *Linam* applies because of retroactivity is addressed later, and need not be discussed here.

In *Linam,* no direct proof concerning the dates on which any of the offenses involved in the habitual offender case were committed appeared of record, except for the last felony committed. Rather, the State relied upon an implication that each crime was committed after conviction for the preceding crime, except for the last felony committed, because the period between the dates of conviction were longer in each case than the sentence imposed.

Linam was charged with two counts of forgery committed on May 21, 1976. He was convicted of both counts on September 1, 1976. Nowhere in the habitual offender proceeding following Linam's conviction appeared any direct evidence of *any* dates of *commission* for any other felonies alleged. Sequential dates of conviction appeared as direct evidence in the habitual offender proceedings, but allowed for speculation as to sequential dates of commission.

In the case at bar, two of the accusatory pleadings upon which Rogers was convicted state explicitly the sequential dates of commission of felonies therein charged. Rogers' objections at trial to the relevancy of accusatory pleadings were without merit and properly were overruled by the trial court. The last felony, commercial burgla-

ry, was committed on July 1, 1978. The preceding crimes of possession of a stolen vehicle and fraudulent use of a credit card were committed on September 4, 1973. Previous to that, Rogers had been convicted of other felonies as charged in a Criminal Information which was filed on February 6, 1968, and as charged in an Amended Criminal Information was filed on December 2, 1970. Though the accusatory pleadings for the crimes charged therein did not state their dates of commission, it is obvious that the dates of commission had to precede the accusatory pleadings charging the offenses. The hiatus of sequential proof as to dates of commission of felonies here exists only as between Curry County Cases Nos. 5781 and 6016. Crimes are not charged anticipatorily before their actual commission, however, and the evidence is susceptible of no other conclusion than that offenses alleged in both of those cases were committed prior to September 4, 1973, the commission date for the crime, possession of a stolen vehicle and fraudulent use of a credit card, the offenses in Curry County Case No. 6569.

The sequential commission of felonies by the defendant on three dates is established by uncontroverted evidence as follows: (1) unlawful taking of a vehicle as charged in Curry County Case No. 5781, and commercial burglary as charged in Curry County No. 6016, both of which had to have been committed before *December 2, 1970,* the date of filing of the last of the two accusatory pleadings; and for which offenses the respective dates of conviction were March 30, 1968 and December 16, 1970; (2) possession of a stolen vehicle and fraudulent use of a credit card on September 4, 1973 as charged in Curry County Case No. 6569, and for which Rogers was convicted on December 3, 1973; and (3) commercial burglary on July 21, 1978 as charged in Curry County Case No. 8011 for which Rogers was convicted on January 9, 1979.

Because the evidence presented did not establish whether the first commercial burglary conviction on December 16, 1970 had been committed after the conviction of March 30, 1968 for unlawful taking of a vehicle, both convictions cannot be used for purposes of sentence enhancement. Rogers, therefore, should be considered a three-time felony offender for purposes of the Habitual Offender Act upon the evidence now before us.

The State contends that Rogers' position that *Linam* is controlling requires retroactive application of the rule in that case, inasmuch as the habitual offender case at bar was tried on January 11, 1979, the same day this Court's decision in *Linam* was filed. That argument overlooks the fact that in the case at bar the jury only made Findings of Fact on January 11, 1979, and sentence under the habitual offender's act was not imposed until after *Linam* was decided.

The jury's Findings of Fact support a sentence for a three-time felony offender under the law set out in *Linam.* Further, *Linam* may be made applicable to this case without applying its rule retrospectively. The question of whether or not a rule of law is to be applied retrospectively arises only for causes that have been finalized. Cases are finalized only when "there has been a judgment of conviction, sentence *and* exhaustion of rights of appeal." (emphasis added). *State ex rel. La Follette v. Raskin,* 30 Wis.2d 39, 48, 139 N.W.2d 667, 672 (1966). *See also United States v. Dachsteiner,* 518 F.2d 20 (9th Cir. 1975); *Huffman v. United States,* 163 U.S.App.D.C. 417, 502 F.2d 419 (D.C. Cir. 1974); *Pendergrast v. United States,* 135 U.S.App.D.C. 20, 416 F.2d 776 (D.C. Cir. 1969), *cert. denied,* 395 U.S. 926, 89 S.Ct. 1782, 23 L.Ed.2d 243 (1969); *State v. Kaufman,* 108 R.I. 728, 279 A.2d 412 (1971); *Curry v. State,* 488 S.W.2d 100 (Tex.Crim.App.1974); *Allison v. State,* 62 Wis.2d 14, 214 N.W.2d 437 (1974); *La Claw v. State,* 41 Wis.2d 177, 163 N.W.2d 147 (1968).

An habitual proceeding involves only sentencing, not trial of an "offense", and therefore jeopardy does not attach. *See Linam, supra; Gryger v. Burke,* 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948); *Davis v. Bennett,* 400 F.2d 279 (8th Cir.

1968); and *Pearson v. State,* 521 S.W.2d 225 (Tenn.1975). No impediment exists if the State, at a new trial, can furnish proof of the sequential order of commission of the felonies, thus establishing that Rogers is a four-time felony offender under the criteria required by *Linam, supra.* On the other hand, if no new trial is had, the Findings of the jury would support a sentence against Rogers as a three-time felony offender.

We reverse and remand for further proceedings consistent with this opinion.

IT IS SO ORDERED.

SOSA, C. J., and PAYNE, J., concur.

602 P.2d 619

Jose GONZALES, Plaintiff-Appellant and Cross-Appellee,

v.

UNITED SOUTHWEST NATIONAL BANK OF SANTA FE, New Mexico, a National Banking corporation, Defendant-Appellee and Cross-Appellant.

No. 12064.

Supreme Court of New Mexico.

Nov. 13, 1979.

Chester H. Walter, Jr., Santa Fe, for plaintiff-appellant and cross-appellee.

Solomon, Roth & Van Amberg, F. Joel Roth, Santa Fe, for defendant-appellee and cross-appellant.

OPINION

PAYNE, Justice.

Gonzales applied to the District Court in Santa Fe County for an order compelling United Southwest Bank of Santa Fe to arbitrate a controversy arising from the Bank's firing of petitioner. The firing was allegedly done without cause and in violation of a previously executed employment contract. From a judgment in favor of the Bank, Gonzales appeals.

Gonzales claimed that the contract was still in effect at the time of his discharge and that arbitration of employment matters was required by the contract as a condition precedent to any action by the Bank affecting his employment. The Bank countered that the employment contract had expired prior to the discharge, relieving it of its duty under the agreement to arbitrate.

The trial court ruled that the issue of whether the contract was in effect at the time of the termination was a matter for the court, and not the arbitrator, to decide. The court found that the contract had expired after three years, that there was no evidence that it had been renewed or extended in writing, as required by the Statute of Frauds, and that, having expired by its terms, it could not be revived and extended by parol agreement. We affirm the district court decision on each point.

There are three issues for resolution in this case. First, was it the province of the court or of the arbitrator to determine the existence and duration of a contract requiring the parties to arbitrate? Second, did this employment contract provide Gonzales with lifetime or permanent employment so long as he conducted bank business competently? Finally, if the employment agreement was not a contract for life, but for a three-year term, was it renewed for an additional three years by virtue of the conduct of the parties?

The trial court properly took jurisdiction to determine whether a contract existed between the parties which required arbitration. When a petition is filed to compel arbitration pursuant to a contract's arbitration clause and the responding party denies the existence or validity of the contract, the court must determine whether the contract is still in force to compel the requested arbitration. Until this threshold issue is resolved, an arbitrator has nothing to arbitrate.

The pertinent provisions of the Uniform Arbitration Act, §§ 44–7–1 and 44–7–2(A), N.M.S.A.1978, state respectively:

> 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. * * *
>
> On application of a party showing an agreement described in Section 1 [44–7–1 NMSA 1978] 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.

These sections make it clear that the threshold issue of whether there was an existing agreement requiring arbitration is a matter for the court, not the arbitrator. In this regard, the court must rule upon the existence or validity of an alleged contract.

Petitioner suggests that our opinion in *K. L. House Const. Co. v. City of Albuquerque*, 91 N.M. 492, 576 P.2d 752 (1978) interprets the statute in a manner extending arbitration beyond the contract period. We agree that in some instances that may be so but the terms of a contract providing for arbitration cannot be ignored. At some point the parties' obligation to arbitrate will end. In *House*, even though the contract had been completed, we held that the parties were still bound by its broad arbitration clause because the dispute related back to the performance rendered during the contractual period. We concluded "that any

disputes pertaining to the performance of the contract, even if they arise after the warranty has expired, are disputes which arise out of the contract and are therefore subject to" the arbitration agreement in existence at the time of performance. 91 N.M. at 493, 576 P.2d at 753.

We do not view this dispute to have arisen "out of the contract." The dispute between Gonzales and the Bank arose well after the time that their original written employment contract had expired.

Gonzales claimed that the original written employment agreement provided for lifetime or permanent employment if he competently conducted bank business. He argued that he could only be discharged for good cause. Therefore, he asserts, the original written employment agreement would still control the relationship of the parties.

In *Garza v. United Child Care, Inc.*, 88 N.M. 30, 31, 536 P.2d 1086, 1087 (Ct.App. 1975), the Court of Appeals set forth the meaning of "permanent employee" as follows:

> The rule is uniform that a contract for permanent employment, not supported by any consideration other than performance of duties and payment of wages, is a contract for an indefinite period. It is terminable at the will of either party. A discharge without cause does not constitute a breach of such contract justifying recovery of damages. (Citations omitted.)
>
> Where a contract for permanent employment provides additional consideration, the employee can recover damages for his discharge when made without just cause. (Citations omitted.)
>
> In the instant case, there is no evidence that any consideration, other than employment and payment of wages, was given by defendant to plaintiffs.

In the case at bar, the contract providing for lifetime employment is not supported by any consideration, other than performances of duties and payment of wages. It is therefore a contract for an indefinite period, terminable at the will of either party. *Garza, supra.* The agreement in dispute uses the word "permanent" to describe petitioner's employment. We hold that its usage in this context means steady employment, as opposed to temporary or part-time employment. The contract also contained a clause providing for its renewal, thus refuting any suggestion that the contract was for life. A lifetime contract need not be renewed.

Gonzales argues in the alternative that if his contract was not for life, upon the expiration of the first three-year term, an additional three-year term automatically became effective. He further asserts that if the Statute of Frauds is applicable, the Bank should be estopped from asserting it. We find no facts to substantiate the claim of estoppel.

The argument assumes the existence of a provision for automatic renewal. Nowhere in the contract is there such a provision. The contract does contain an "option for renewal" clause, which by its very term implies that the parties must affirmatively exercise the option. It follows that if the option relates to a matter falling within the Statute of Frauds, it must be exercised in writing. Where a written contract is for a period of more than one year, a renewal contract for a like period is not enforceable without a writing. *See* 2 A. Corbin, *Contracts* § 504 (1950). The contract at issue called for a three-year period of performance, bringing it within the purview of the Statute of Frauds. *Westerman v. City of Carlsbad*, 55 N.M. 550, 237 P.2d 356 (1951). An expired contract within the statute cannot be revived and extended by parol agreement, *Adams v. Thompson*, 87 N.M. 113, 529 P.2d 1234 (Ct. App.1974), *cert. denied*, 87 N.M. 111, 529 P.2d 1232 (1974), nor can a contract in writing be modified or varied by a subsequent oral agreement, *Gee v. Nieberg*, 501 S.W.2d 542 (Mo.App.1973). Accordingly, we hold that part or continued performance by the parties in this case did not take the contract out of the application of the Statute of Frauds.

The decision of the trial court is affirmed.

IT IS SO ORDERED.

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

602 P.2d 622

In re INVESTIGATION NO. 2 OF THE GOVERNOR'S ORGANIZED CRIME PREVENTION COMMISSION.

GOVERNOR'S ORGANIZED CRIME PREVENTION COMMISSION, Petitioner-Appellee,

v.

Carlos L. JARAMILLO, Respondent-Appellant.

No. 12197.

Supreme Court of New Mexico.

Nov. 14, 1979.

David L. Norvell, Albuquerque, for appellant.

Harris L. Hartz, Albuquerque, Toney Anaya, Atty. Gen., Ralph W. Muxlow, II, Jane H. Yaker, Asst. Attys. Gen., Santa Fe, for appellee.

Raymond W. Schowers, Dan A. McKinnon, III, Gregory D. Huffaker, Jr., Albuquerque, Amicus Curiae.

OPINION

EASLEY, Justice.

Jaramillo, the former New Mexico State Liquor Director, appeals from a contempt order entered by the district court after he failed to produce, at a hearing before the

Governor's Organized Crime Prevention Commission (Commission), certain documents pursuant to a subpoena duces tecum which the district court had previously ordered enforced. We reverse.

The case turns on whether Jaramillo waived his right against self-incrimination by failing to raise the issue at the subpoena enforcement hearing before the district court, rather than later at the agency hearing held pursuant to the trial court's order that the documents be produced for the Commission.

In conjunction with an investigation concerning infiltration of organized crime into the liquor industry in New Mexico, the Commission issued a subpoena ordering Jaramillo to appear before it and to produce for inspection certain of his personal and corporate records. Jaramillo appeared as directed, but no court reporter was available. He was asked to return later in the day; he refused to do so.

Since the Commission's subpoena was not of itself binding, it brought an action in district court to enforce the subpoena. Jaramillo and his attorney appeared at a hearing on an order to show cause why he should not produce the documents demanded. Jaramillo argued that production of the documents would be unnecessarily burdensome and that the Commission already had the requested documents. He did not raise the privilege against self-incrimination as a defense. His attorney stated that he would appear at the Commission hearing later and produce whatever documents were within his control, but that he would assert whatever privileges were available in response to questions from the Commission. The trial court ordered the subpoena enforced.

When Jaramillo appeared before the Commission, he refused to produce some of the requested documents on the ground that they might tend to incriminate him. The Commission went back to district court for a contempt order. That court held that any Fifth Amendment privileges were waived when they were not asserted in the earlier subpoena enforcement hearing.

Jaramillo asserts that the enforcement hearing was not the proper forum in which to raise his privilege and that failure to assert it there could not constitute a waiver. He further states that he put the Commission and the trial court on notice at the enforcement hearing that he was going to claim "certain privileges" at the administrative hearing later.

The subpoena duces tecum called for Jaramillo to produce various items within his control involving at least six business entities. The language of the subpoena was broad: it asked for such things as all checks, billings, bank statements and invoices involving the listed businesses, from January 1, 1971 to the present. Jaramillo knew the *general* categories of documents requested by the Commission at the time of the enforcement hearing; the subpoena spelled these categories out. And, apparently, at the Commission hearing Jaramillo produced some of these requested documents.

It is obvious that Jaramillo could not have known the incriminatory aspects of *specific* documents until the Commission hearing, when their incriminatory nature could be considered in the context of the specific questions asked. He raised his claim of privilege with respect to three specific requests by the Commission: those documents relating to two trips, one to Las Vegas and one to Mexico, and those involving the lease or purchase of a specific liquor license.

It is further obvious that under the above circumstances, Jaramillo would have been premature in raising a blanket claim of privilege at the subpoena enforcement hearing as to either entire categories of the subpoenaed documents or as to all documents relating to one of the listed business entities.

The American Civil Liberties Union's amicus curiae brief in support of Jaramillo's position asserts that, *in some circumstances,* the invocation of the privilege is premature prior to appearing before an investigative body. It claims: that the evaluation of a

claim of privilege before the witness appears under oath and refuses to answer a specific question is inefficient and awkward because the district court is not familiar with the subject matter and the scope of the Commission's inquiry; that the court cannot intelligently assess the validity of the witness' claim of privilege because it cannot compare a specific question or demand with a specific, allegedly incriminatory answer or document; and that if the district court decided the self-incrimination issue, then it could, in a case where it found the claim to be well founded, frustrate the Commission's discretionary power to grant immunity under Section 29–9–9, N.M.S.A. 1978.

This issue has not been previously considered by the New Mexico courts. However, federal and state courts have held that claims of privilege are premature before incriminatory information is *specifically* requested, either in the form of questions or documents, by the investigating agency. *United States v. Malnik,* 489 F.2d 682 (5th Cir. 1974); *United States v. Bell,* 448 F.2d 40 (9th Cir. 1971); *Fielder v. Berkeley Properties Company,* 23 Cal.App.3d 30, 99 Cal. Rptr. 791 (Ct.App.1972); *Gilmartin v. Lipson,* 34 Misc.2d 998, 229 N.Y.S.2d 611 (1962). We agree with this general principle of law and hold that it is applicable here.

New Mexico courts have repeatedly held that constitutional rights can be waived, either by a failure to raise them or by a failure to raise them in a timely fashion. *Baird v. State,* 90 N.M. 667, 568 P.2d 193 (1977); *Neller v. State,* 79 N.M. 528, 445 P.2d 949 (1968); *State v. Montoya,* 81 N.M. 233, 465 P.2d 290 (Ct.App.1970); *State v. Gonzales,* 80 N.M. 168, 452 P.2d 696 (Ct. App.1969). "Waiver of constitutional rights, however, is not lightly to be inferred." (Citations omitted.) *Smith v. United States,* 337 U.S. 137, 150, 69 S.Ct. 1000, 1007, 93 L.Ed. 1264 (1949).

To sustain the decision of the trial court we must infer a waiver of Jaramillo's right against self-incrimination from the bare fact that he failed to affirmatively assert it at the hearing at which the trial judge ordered him to produce the documents requested. However, such an inference flies in the face of the statement at the time by Jaramillo's attorney that on Jaramillo's appearance before the Commission he "does not submit himself to questioning that he is not able to protect himself from by the exercise of certain privileges in responding." Thus, contrary to there being evidence from which to infer waiver, there was a specific statement to the court and the Commission that Jaramillo would protect himself at the Commission hearing by asserting his privileges. We hold that waiver was "lightly" inferred by the trial court under these facts. *Smith, supra.*

The decision below is reversed and the contempt charge is dismissed.

IT IS SO ORDERED.

FEDERICI and FELTER, JJ., concur.

602 P.2d 624

Roy ANDREWS, John Archambeau, Stanley Benson, Carl Cole, Ben Cruz, Larry Dillon, Chris Gurule, Jose Herrera, Thomas King, Arthur Lawson, Judge Lightfoot, Bennie Montoya, Leroy Motley, Ronnie Mowles, Leo Schuessler, Gerald Ulibarri, Robert White and George Johnson, Plaintiffs-Appellants,

v.

STEARNS–ROGER, INC., Public Service Company of New Mexico, Davy Powergas, Inc., Foster Wheeler Energy Corporation, F. Glenn Frazier, Paul B. Rose, Lorin Strange, Ron Mershon, Don Ellery, International Union of Operating Engineers, Local 953 and New Mexico Building and Construction Trades Council, Defendants-Appellees.

No. 12423.

Supreme Court of New Mexico.

Nov. 16, 1979.

Friedland, Simon, Vigil & Nelson, Morton S. Simon, Peggy Nelson, Santa Fe, Karp & Goldstein, Sander N. Karp, Denver, Colo., for plaintiffs-appellants.

Campbell, Cherpelis & Pica, George Cherpelis, John F. Nivala, Poole, Tinnin & Martin, Nicholas J. Noeding, Keleher & McLeod, John B. Tittmann, Kool, Kool, Bloomfield & Eaves, Gerald R. Bloomfield, Albuquerque, for defendants-appellees.

OPINION

FELTER, Justice.

Plaintiffs-appellants (the employees) filed suit alleging the following: first, that the companies, defendants-appellees and their agents, violated their Master Labor Agreement by terminating employees, refusal to rehire or to arbitrate, and by blacklisting; second, that the individual agents are liable for damages for their participation in the blacklisting of employees; and third, that the employees' union failed to fairly represent the employees as was its lawful and contractual duty. The trial court granted defendants' motion to dismiss, which it treated as a motion for summary judgment as to all counts except the count alleging that the union failed to fairly represent the employees, which count was reserved for trial. Plaintiffs-appellants were employees of Stearns-Roger, Inc. (the employer). Following their termination, International Union of Operating Engineers, Local 953 (the Union), of which employees were members, filed a grievance with a Joint Administration Committee. The Committee conducted a hearing and by a vote of 5 to 1 reached a decision against the employees. That decision was the basis for the lawsuit from which this appeal is taken. We affirm in part and reverse in part.

The following questions are presented on appeal: first, whether the court erred in dismissing Counts I and II on the defense of prior binding arbitration, and second, whether the court erred in dismissing the claim of damages for blacklisting.

POINT I

It is uncontroverted that all plaintiffs are members of Local 953 of the International Union of Operating Engineers and that the Union was their exclusive collective bargaining representative. Plaintiffs aver that: (1) at all material times a Master Labor Agreement existed between all parties; (2) this agreement contained differing grievance and arbitration procedures from those provided in the Project Agreement, which, if they were to be applied, would materially alter the rights of the parties; and (3) the defendants violated the Master Labor Agreement in the ways indicated above.

The companies urge that the Project Agreement, and not the Master Labor Agreement, is the document governing this controversy. Article 17 of the Project Agreement makes it applicable to "any contracts or subcontracts for work to be performed at the jobsite which are let by the Employer subsequent to the date of this Agreement."

The Master Labor Agreement, which employees contend was controlling, is not before this Court by way of any exhibit in evidence or through affidavit, deposition or verified pleading. Although the Project Agreement, effective April 1, 1975, and the "Wobble" (walkout) Agreement executed July 7, 1977, were not formally in evidence before the trial court, copies of both agreements were attached to briefs filed in this case, and are a part of the record on appeal.

Employees contend that there is no evidence to the effect that the Union executed the "Wobble" Agreement, that the Union was a member of the "Council" at the time of its execution, and that the Union membership had never ratified or approved the Wobble Agreement as required by the Constitution of the International Union of Operating Engineers, Article XXIV, Subdiv. 11, Section (e). That constitutional section, as amended April of 1976, provides in pertinent part as follows:

Such agreements and modifications thereof shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and have been approved by the membership affected, provided, however, that a Local Union may delegate to its Local Executive Board or to its bargaining committee authority to approve such agreements and modifications without such submission of the same to vote of its membership.

Mitigating against the employees' challenge to the procedures followed and the basis for such procedures, the New Mexico Building and Construction Trades Council and Local 953 of the International Union of Operating Engineers appear as signatories to both the Project Agreement and the "Wobble" Agreement. Further, on behalf of the employees, the Union's business agent filed the grievance with the Joint Administration Committee as provided for by the Project Agreement. The Joint Administration Committee proceeded with its hearing pursuant to the Project and "Wobble" Agreements. The decision of the Committee was based particularly on Article 16 of the "Wobble" Agreement which, insofar as pertinent, provided:

The Council and Employer agree that there will be no strike or lockout or other collective action which will interfere with, or stop, the efficient operation of construction work of the Employer. Participation by an employee or group of employees, in any act violating the above provision will be cause for discharge by the employer.

* * * * * *

ANY PERSON OR GROUP OF PERSONS WHO IS FOUND TO BE IN VIOLATION OF THE ABOVE PROVISION SHALL BE TERMINATED AND SHALL NOT BE ALLOWED TO WORK ON ANY PHASE OF THE PROJECT IN ANY CAPACITY FOR THE DURATION OF THE AGREEMENTS.

Seventeen of the plaintiffs appeared in person and one plaintiff appeared by affidavit before the Committee. No objection was voiced by any person or group of persons concerning the manner of conducting, or the authority of, the Joint Administration Committee to entertain the grievance. It was only after having "tested the waters", and after having received an adverse ruling, that plaintiffs for the first time challenged the authority of the Joint Administration Committee and the controlling effect and validity of the Project and Wobble Agreements.

Ostensibly the Joint Administration Committee acted with authority under and properly applied the Project Agreement and the Wobble Agreement. The Committee's decision was made on November 2, 1977, at the end of its hearing or shortly thereafter. In any event, it was made before December 15, 1977, when a determination to return 13 operating engineers to the "eligible for rehire" list was made pursuant to a directive in the decision. It was not until the filing of the complaint by plaintiffs on May 8, 1978, 144 days later, that the authority of the Joint Administration Committee and the applicability and validity of the Project Agreement and the Wobble Agreement were first questioned by the plaintiff employees. No claim that the Master Labor Agreement applied or was controlling was ever raised until first asserted in the lawsuit from which this appeal was taken. Neither in the trial court nor here on appeal is objection made to the substance and provisions of those two agreements. Rather, objection is made to their legality and applicability to the grievance procedure and the dispute.

No provision of the Master Labor Agreement or any other evidence was before the court which would allow any inference that the Master Labor Agreement controlled instead of the Project and "Wobble" Agreements. The only information in this regard that was before the court was the naked assertion of the plaintiffs that the Master Labor Agreement was controlling. However, this was coupled with the employees' participation in the proceeding before the Joint Administration Committee without objection or protest. It was within this

setting that the trial court correctly found, as a predicate for dismissal of Counts I and II, that the Project Agreement and "Wobble" Agreement were controlling.

Defendants contend that the proceeding before and decision of the Joint Administration Committee was an arbitration proceeding and therefore subject to the Uniform Arbitration Act, §§ 44–7–1 to 44–7–22, N.M.S.A.1978. Assuming arguendo that this premise is correct, then plaintiffs lost their right by lapse of time to apply to the court to vacate the award. Section 44–7–12(B), N.M.S.A.1978 requires that such an application be made within ninety days after delivery of a copy of the award to the applicant. Moreover, having participated without protest in the proceedings before the Joint Administration Committee, plaintiff employees are bound by the award made. *See Design Engineering Corp. v. Jenkins*, 74 N.M. 603, 396 P.2d 590 (1964); *Robinson v. Navajo Freight Lines, Inc.*, 70 N.M. 215, 372 P.2d 801 (1962); *Neece v. Kantu*, 84 N.M. 700, 507 P.2d 447 (Ct.App. 1973), *cert. denied*, 84 N.M. 696, 507 P.2d 443 (1973); *Chacon v. Mountain States Mutual Casualty Co.*, 82 N.M. 602, 485 P.2d 358 (Ct.App.1971).

In *Design Engineering*, the rule was succinctly stated by this Court, in quoting with approval from *Dugan v. Phillips*, 77 Cal. App. 268, 246 P. 566 (1926), as follows:

> "* * *. 'He appeared before the committee and presented his side of the controversy. Had the award been in his favor he doubtless would have insisted that the plaintiff was bound by it. A party cannot be allowed thus to speculate upon the action of the arbitrators and then refuse to be bound by an adverse award. "Participation in the arbitration proceedings is of itself evidence of the party's prior agreement to submit."'"

74 N.M. at 605, 396 P.2d at 591.

It is next contended by the employees that even if the Project Agreement were controlling and the proceedings before the Joint Administration Committee were authorized, lawful and proper, still no final arbitration decision was made under the law. The Project Agreement provided, inter alia:

> If the Joint Administrative Committee cannot reach a mutually satisfactory settlement within five (5) working days following referral of the grievance it shall select an impartial arbitrator within five (5) working days to serve with the Committee as an arbitration panel.
>
> * * * * * *
>
> The decision of the majority of the arbitration panel shall be binding upon all parties.

The Employees contend that no "mutually satisfactory settlement" was reached, inasmuch as the decision was by a 5 to 1 vote and therefore not unanimous. Additionally, it is argued that the proceeding before the Committee was not an "arbitration" proceeding and the quoted provision in the Project Agreement was not followed. Neither argument has merit. Where parties voluntarily submit a grievance to a joint management union committee for decision, the decision of that committee is subject to and governed by the same standards as an arbitrator's award, and is to be accorded the same finality. *See Truck Drivers Union v. Riss & Co.*, 372 U.S. 517, 83 S.Ct. 89, 9 L.Ed.2d 918 (1963); *Intern. Broth. of Team., Etc. v. W. Pa. Mo. Car.*, 574 F.2d 783 (3d Cir. 1978); *Intern. Broth. of Elect. Wkrs., Etc. v. Prof. Hole*, 574 F.2d 497 (10th Cir. 1978); *Walters v. Roadway Express, Inc.*, 557 F.2d 521 (5th Cir. 1977).

The Joint Administration Committee was composed of six members, three designated by the Employer and three designated by the New Mexico Building and Construction Trades Council, AFL–CIO. With such a partisan composition of the joint committee, it is not unreasonable to surmise that the provisions in the Project Agreement relating to selection of "an impartial arbitrator" were calculated for use in cases of a tie vote within the Committee. Further, in view of the partisan composition of the committee, it would be reasonable to surmise that a unanimous decision would be

a predictable result on a frequent basis. Viewed in this context we cannot agree that the language "mutually satisfactory settlement" was intended to mean the unanimous decision of the committee. It is more rational to assume that it was intended to mean a majority decision. Thus, the 5 to 1 decision by the Joint Administration Committee finalized settlement of the grievance. There was no necessity or basis for selection of "an impartial arbitrator" for further proceedings.

Employees cite common law authority for the proposition that an arbitration award must be unanimous. The Uniform Arbitration Act is in effect in New Mexico and it supersedes conflicting common law authority. Section 44–7–1 makes the Uniform Arbitration Act applicable to "arbitration agreements between employers and employees or between their respective representatives unless otherwise provided in the agreement." Neither the Project Agreement nor the "Wobble" Agreement provides that the Uniform Arbitration Act shall not apply, nor is its application repugnant to any provision within either of those agreements. Section 44–7–4 provides that:

> The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by the Uniform Arbitration Act [44–7–1 to 44–7–22 NMSA 1978].

The decision of the Joint Administration Committee was lawful, and was final and binding. However, its decision is still subject to the question raised in Count III of plaintiff's complaint. That question, whether the Union fairly represented the employees in the grievance proceedings according to the duty imposed upon it by law, was reserved by the trial court for hearing and decision.

POINT II

It is undisputed that the "blacklist" referred to in plaintiff's complaint is the same as the "ineligible for rehire" list.

The blacklisting statute of New Mexico, from which employees assert a derivative tort action, reads as follows:

> Blacklisting consists of an employer or his agent preventing or attempting to prevent a former employee from obtaining other employment.

Section 30–13–3, N.M.S.A.1978.

In their Second Amended Complaint, employees have alleged that certain defendants did "prepare and circulate a blacklist of the plaintiffs, requesting that building contractors operating *in San Juan County, New Mexico, and in other locations*, as well as each other not employ the plaintiffs." (emphasis added.) Defendants deny those allegations and assert affirmatively that "any comments to third persons concerning Plaintiffs were true, privileged, justified and not made to harm Plaintiffs."

The only defendant that could be classified as an employer as contemplated by Section 30–13–3 is Stearns-Roger, Inc., because plaintiffs, after termination, were "former employees" only of Stearns-Roger, Inc. The trial court properly dismissed Count II as against all defendants, except for a possible cause of action against Stearns-Roger, Inc. In dismissing Count II against Stearns-Roger, Inc., the court treated it as a summary judgment. The trial court, insofar as the record on appeal reflects, was without affidavits, depositions, or factual stipulation reflecting upon the alleged blacklisting activity. In essence the dismissal, which was treated as a summary judgment, was made upon the basis of the pleadings. As to the defendant, Stearns-Roger, Inc., we believe that the pleadings presented a genuine issue of material fact as to whether that employer had committed a tort against the plaintiffs by blacklisting them. Where a genuine issue exists as to a material fact, summary judgment may not be granted. *Runyan v. Jaramillo*, 90 N.M. 629, 567 P.2d 478 (1977); *Pharmaseal Laboratories, Inc. v. Goffe*, 90 N.M. 753, 568 P.2d 589 (1977); *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972); *Southern Pacific Co. v. Timberlake*, 81 N.M. 250, 466 P.2d 96 (1970). Plaintiffs' claim for damages for blacklisting was not before the Joint Ad-

ministration Committee as a part of the grievance complaint which that committee decided. The trial court erred in dismissing Count II as against the defendant, Stearns-Roger, Inc.

The decision dismissing Counts I and II is affirmed except for dismissal of Count II against the defendant, Stearns-Roger, Inc. The dismissal of Count II against the defendant, Stearns-Roger, Inc. is reversed. This case is remanded to the trial court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

PAYNE, J., and JOE H. GALVAN, District Judge, concur.

602 P.2d 1021

MUNDY & MUNDY, INC., a New Mexico Corporation, Plaintiff-Appellant,

v.

Ranger ADAMS and Theresa Adams, his wife, Defendants-Appellees.

Isaac Velasquez, Sylvia Velasquez, his wife, Adela V. Polaco and Elfigo Polaco, her husband, Frutoso Velasquez, Eddy Velasquez, Frances F. Trujillo, Soraida V. Cordova and Joe B. Cordova, Intervenors-Appellees.

No. 12333.

Supreme Court of New Mexico.

Nov. 5, 1979.

Rehearing Denied Nov. 26, 1979.

Gerber & Ives, Paul D. Gerber, Santa Fe, for appellant.

Arthur H. Coleman, P. C., Albuquerque, for appellees.

OPINION

WALTERS, Judge.

Mundy & Mundy, Inc. (hereinafter "Mundy") brought an unlawful detainer suit against defendants Adamses for possession of a 109.6 acre tract of land within the Tierra Amarilla Land Grant known as the "Payne Parcel." Mrs. Adams and the Intervenors in this suit are survivors and heirs of Enetro and Delfinia Velasquez. Enetro was a party litigant to a 1957 federal court suit concerned with the ownership of the Payne Parcel. Adams and the Intervenors (hereafter "Velasquez heirs") counterclaimed below, alleging ownership of the "Hicks Survey Parcel," which was larger than and included the Payne Parcel. Adopting the Velasquez heirs' proposed findings and conclusions verbatim (*see Mora v. Martinez,* 80 N.M. 88, 451 P.2d 992 (1969)), the trial court found in favor of the Velasquez heirs and dismissed Mundy's complaint. Mundy appeals.

The chronology of developments in this case may lead to a better understanding of the various contentions raised by the parties below:

In 1928 Enetro and his wife Delfinia moved onto the Payne Parcel, constructing a home and other buildings and using the land for ranching purposes. They or their heirs paid taxes on the land from 1928 through the time of this trial in 1978.

In 1946 Enetro received and recorded a "documento" purporting to convey 160 acres to him from the Tierra Amarilla Land Grant, Corporacion de Abiquiu. That land was described as being bordered on the east, south and west by Grant lands and on the north by the Brazos River.

In 1957 the Payne Land & Livestock Company, Mundy's predecessor, filed suit in the United States District Court against Enetro Velasquez for possession of the Payne Parcel, requesting that title be quieted in Payne. A judgment was entered in that suit approving and confirming a stipulation entered into by the parties, ordering that the rights and obligations of the Payne Company and Enetro be "fixed and established by the terms and provisions of said Stipulation." Included in the stipulation was the agreement that "defendant Velasquez and his wife shall have a life estate for their joint lives," in and to the land known here as the Payne Parcel. The stipulation further provided for payment of taxes by Enetro while he occupied the property, for upkeep of fences and improvements to the

land, and "that upon the termination of the estate herein granted him and his wife that said improvements shall be and become the property of plaintiff [Payne Land & Livestock Company] without further consideration." The approved stipulation, which became a part of the judgment, also contained the following paragraph:

> It is further stipulated that the defendant and his wife, if she be the survivor of them, shall promptly pay all water assessments and all other water charges necessary to keep in good standing any and all water rights now pertinent to this land, or which may hereafter become pertinent to this land, and that said right shall be transferred to the plaintiff, its successors and assigns, at the same time possession of the real estate is so delivered.

The paragraph granting a life estate to Enetro and his wife carried a limitation:

> . . . provided, however, that if they or their survivors move off of the land during their lifetime then the life estate shall terminate and full title and possession immediately be vested in the plaintiff or its assigns or successors.

A supplemental judgment determined the tract of land in dispute in 1957 to be as surveyed by one G. H. Denton, containing "approximately 109.6 acres." The parties to this appeal agree that the property referred to in the federal suit is the same property sued for here and described as the Payne Parcel. The 1957 judgment and supplemental judgment were recorded in Rio Arriba county in 1960 and again in 1976.

Between the date of the Denton survey in 1957 and the Hicks survey in 1976, the Brazos River, as the northern boundary of the Payne Parcel, had moved north approximately 1,000 feet in the northwest and north central portion of the tract, thus accounting for the difference of approximately 90 acres between the sizes of the Payne Parcel and the Hicks Survey Parcel.

In 1962 Enetro and his wife deeded the property described in the "documento" (the Payne Parcel) to their sons Frutoso and Isaac Velasquez, but the parents continued to reside on the premises. Enetro died in 1974, and Delfinia died the following year. At the time of suit, Isaac's daughter and her husband, the Adamses, were living on the land.

The trial court found that the Velasquez heirs were the owners in fee simple of the 201.578 acres described in the Hicks Survey Parcel, as heirs of Delfinia as well as by reason of adverse possession. It found, also, that Enetro's and Delfinia's ownership, presumably by adverse possession, was held as community property; that the federal court judgment was void "particularly as to Delfinia Velasquez because of the failure to join Delfinia Velasquez as a party therein"; that Delfinia succeeded to Enetro's and the community's interest and title upon Enetro's death; that even if Enetro had acquired his interest as his sole and separate property by reason of the "documento," his interest was commingled and transmuted and became community property and that he and Delfinia had held it openly and adversely for more than ten years from the date of recording the documento until the federal suit was filed; that if the title was not perfected in Enetro and Delfinia, Isaac perfected it by adverse possession between the date of the deed from his parents in 1962 and the recording of the 1957 judgment in 1976.

Upon those findings the trial court made parallel conclusions, holding the 1957 federal court judgment void, and concluding that any interest of Enetro's was community property by intent, transmutation, commingling "and otherwise"; and that the Velasquez heirs were the owners in fee simply by inheritance from Delfinia as well as through clear and convincing evidence of their holding through adverse possession. One of its conclusions was that "[p]laintiff is not lawfully entitled to possession of the property or any of the same, nor was it so entitled at any time material hereto."

In our view, the judgment below can be sustained only if the trial court correctly determined the nullity of the 1957 judgment, because there is no evidence that will support a finding or conclusion that any of Enetro's and Delfinia's heirs were in posses-

sion of the property for a ten-year period after the 1962 deed to Frutoso and Isaac so as to meet one of the essential elements of adverse possession by the heirs, or any of them.

It is plain from the findings and conclusions made that the factor most influencing the trial court's declaration that the 1957 judgment was void was the plaintiff's failure, in the 1957 suit, to join Delfinia as a defendant. We disagree with the trial court's assessment of that judgment, and the ramifications flowing from its conclusion of nullity, for a number of reasons:

1. If Delfinia was an indispensable party to the 1957 lawsuit, she would have been so only because she and her husband had established a community property title by adverse possession prior to that time. Section 37–1–22, N.M.S.A.1978 [then § 23–1–22, N.M.S.A.1953], requires proof of three essential elements to satisfy a claim of title by adverse possession:

(a) the claim must be made "in good faith under color of title";

(b) claimant must show that, for ten years, possession was "actual and visual 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

(c) claimant, his predecessors or grantors, must have continuously paid all taxes assessed against the property during the ten-year period.

The only "color of title" instrument in existence in 1957 was that 1946 documento from the Tierra Amarilla Land Grant to Enetro. Insofar as the public records indicated, in 1957, the documento conveyed title to Enetro only. Enetro's answer to the 1957 complaint, received in evidence below and admitted to be true under N.M.R.Civ.P. 36, N.M.S.A.1978, did not raise the defense of failure to join an indispensable party. Enetro's affirmative defenses and counterclaim in that suit alleged only that the *defendant* (Enetro Velasquez) was the owner in fee simple by reason of *his* adverse possession of the premises after receipt of the 1946 documento. His answer establishes his denial of community property by transmutation, commingling, "or otherwise," as of 1957.

The 1957 judgment, also a part of the evidence in this suit, recited that presentation of evidence had been concluded when the parties "reached a compromise and settlement of the issues involved" and, upon the stipulation of the parties, the court received and approved it and ordered its provisions to be carried into effect. The "issues involved" in that suit were the claims by Payne Land & Livestock Company to fee simple ownership of the land and right to possession, and Enetro's defense and counterclaim of ownership by reason of adverse possession. Thus it is beyond dispute that, in 1957, Enetro *abandoned* and *compromised* his adverse possession contention, and accepted instead a life estate in the premises for himself and his wife.

The Velasquez heirs were allowed, in 1978, to do what Enetro failed to do in 1957—that is, they were permitted to interpose the affirmative defense of failure to join an indispensable party to the Payne complaint twenty years after the defendant in that case, Enetro, failed to do so. Rule 12 of the Rules of Civil Procedure clearly contemplates that all affirmative defenses be raised either in the responsive pleading to a complaint or by separate motion, and be decided prior to entry of judgment. The *only* defense which is not waived by failure to assert it prior to judgment is lack of subject matter jurisdiction, and that defense may even be raised for the first time on appeal. *Chavez v. County of Valencia,* 86 N.M. 205, 521 P.2d 1154 (1974); *Kalosha v. Novick,* 84 N.M. 502, 505 P.2d 845 (1973).

The issue of adverse possession in Enetro (or in Enetro and Delfinia) having been voluntarily relinquished by Enetro in 1957, and the claim of Delfinia's interest never having been raised, it does not matter whether any interest of Enetro's was commingled or transmuted prior to 1957. All such interesting theories were waived by the compromise which became a part of the 1957 judgment. That judgment "fixed" the

rights of Enetro *and Delfinia* to a life estate as set forth in the stipulation. The effect of the judgment was to settle with finality, in 1957, Enetro's claim of adverse possession in himself alone and, because it was not raised and therefore waived, it also foreclosed any claim by Enetro or his heirs that Delfinia had either a personal or community interest to assert as an adverse possessor. A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties or their privies, *First National Bank of Albuquerque v. Tome,* 23 N.M. 255, 167 P. 733 (1917), and in the absence of identity of causes of action, as in this case, a judgment on those ultimate issues litigated and necessarily determined in the prior action is an absolute bar to relitigation in a later suit. *City of Santa Fe v. Velarde,* 90 N.M. 444, 564 P.2d 1326 (1977). Enetro's adverse possession claim was put at issue and disposed of in 1957.

2. If the trial court reasoned that adverse possession in Delfinia was not decided in the federal suit, and that Enetro could not compromise *her* community property rights in real property, and thus *her* heirs were not barred from raising her title by adverse possession prior to 1957, we must reject that explanation also. There was no evidence whatever that Delfinia ever had "color of title" upon which to initiate a claim of adverse possession in herself, either as a sole possessor or as a possessor in community property. Moreover, the abandonment by Enetro of his claim of adverse possession destroys the basis upon which she could have claimed a community interest as an adverse possessor, since her community interest by transmutation, commingling or "otherwise" must necessarily depend upon such an interest first being found in her husband. The federal court judgment extinguished any such claim in Enetro, and that is an ultimate issue which could not be relitigated in this suit, but is collaterally binding in a subsequent suit between the same parties or their privies. *Torres v. Village of Capitan,* 92 N.M. 64, 582 P.2d 1277 (1978). There is no question that all parties here are privies of the litigants in the 1957 lawsuit.

3. Finally, appellees urge that the language of the stipulation is ambiguous regarding the estate granted to Enetro and Delfinia, because it did not unequivocally declare that Payne Company held the reversionary fee simple estate upon termination of the life estates created by the stipulation. Reading the stipulation as a whole and relying on the entirety of it rather than a single phrase to which we are referred by appellees, we hold that the stipulation sufficiently created a life estate in "defendant Velasquez and his wife . . *for their joint lives.*" It is true that the 1957 judgment did not unequivocally quiet title in the Payne Company, Mundy's grantee. But it is indisputable that the Velasquez interest was limited to a life estate, and a life estate terminates upon the death of the person's or persons' lives by which the estate is measured. *Moynihan, Survey of the Law of Real Property,* 24, 28 (1940 ed.) It is equally clear that the stipulation identified the Payne Company as, at least, a vested remainderman. Payne Company and Enetro agreed that Enetro and Delfinia should have "a life estate for their joint lives." Under the definition of a life estate, it follows that the estate would terminate when the last of the "joint lives" terminated.

Appellees point to another proviso, however, which permitted termination at an earlier date "if *they* or *their survivors* move off the land during *their lifetime,*" when "*full title* and possession" would then "*be vested in the plaintiff* or its assigns or successors." They would ignore other language in other paragraphs which refers to improvements becoming the *property of plaintiff* "upon the termination of the estate *granted him and his wife*"; water rights to be transferred to the plaintiff "at the same time possession of the real estate" was delivered by "defendant and his wife, if she be the survivor *of them,*" and similar obligations of "defendant or his *surviving wife,* if she should be *the survivor.*" We

acknowledge that grammatical agreement between the pronouns "they" and "their survivors" and their antecedents, "defendant and his wife," is syntactically incorrect. Nevertheless, we are persuaded by the entirety of the stipulation that nothing more was intended by the settlement document than to grant a life estate to Enetro and Delfinia; that all references to survivor or survivors were intended to mean the spouse who survived the other; and that the use of the plural pronoun referred back only to Enetro and Delfinia and not to other survivors. Any other construction would destroy the meaning of "life estate" and make the provisions for termination of the life estate and vesting of possession in the plaintiff meaningless.

We are obliged not only to enforce a former judgment bearing upon the issues raised in a subsequent lawsuit, but we are required, in doing so, to determine the intention and meaning of the judgment and resort to the pleadings and other documents of record, if necessary, to ascertain the nature of the rights asserted and the significance of the judgment entered. *Hollingsworth v. Hicks,* 57 N.M. 336, 258 P.2d 724 (1953). In the 1957 suit, both plaintiff and defendant asserted ownership in fee simple, one by reason of purchase and the other through adverse possession. By the judgment, defendant and his wife received a life estate for the term of their joint lives and plaintiff was to have the real estate, water rights and improvements appurtenant to the land upon termination of that estate. We construe the contract of stipulation, which is a part of the judgment, to effectuate the intention of the parties, and, in so doing, we will give meaning and significance to each part in its proper context with all other parts. *Schultz & Lindsay Const. Co. v. State,* 83 N.M. 534, 494 P.2d 612 (1972). Using this rule as a guideline, we do not hesitate to hold that the 1957 judgment quieted fee simple title to the property in the Payne Company; the judgment also granted to the ancestors of the Velasquez heirs a life estate therein; and that the life estate was terminated by the death of Delfinia in 1975.

As Mundy proved its right to possession by admission of appellees that it was Payne's successor, it was entitled to judgment below. In view of our holding, the other points raised on appeal do not require discussion.

The judgment entered in this case is reversed, and the matter is remanded to the district court with direction to enter judgment in plaintiff's favor.

IT IS SO ORDERED.

EASLEY and PAYNE, JJ., concur.

602 P.2d 1026

LLOYD McKEE MOTORS, INC., a New Mexico Corporation, Plaintiff-Appellee,

v.

NEW MEXICO STATE CORPORATION COMMISSION, Defendant-Appellant, Malcolm Services, Inc., Gaede Shamrock and Wrecker Service, and Wrecker Conference, New Mexico Motor Carrier Association, Intervenors-Appellants.

No. 12473.

Supreme Court of New Mexico.

Nov. 21, 1979.

Jeff Bingaman, Atty. Gen., W. W. Royer, Asst. Atty. Gen., State Corp. Commission, Santa Fe, for appellant.

Jack Smith, Zeikus & Jacobson, Albuquerque, for intervenors-appellants.

Dickson & Dubois, Duane Keating, Jack A. Smith, Albuquerque, for appellee.

OPINION

SOSA, Chief Justice.

This is an appeal by the New Mexico State Corporation Commission (hereafter Commission) from a ruling by the First Judicial District Court that the Commission does not have jurisdiction to regulate a wrecker-towing service proposed by Lloyd McKee Motors, Inc. (hereafter McKee).

Two issues are presented. The first is whether the Commission has jurisdiction to regulate the wrecker service proposed by McKee. The second is whether, if the Commission does have jurisdiction over McKee's proposed operation, its orders denying McKee's application to operate a wrecker service were based upon substantial evidence. We conclude that the Commission does have jurisdiction over McKee's proposed operation and that it did base its orders on substantial evidence.

McKee filed an application for a Certificate of Public Convenience and Necessity (hereafter Certificate) with the Commission pursuant to the Motor Carrier Act, §§ 65–2–1 to 65–2–79, N.M.S.A.1978 (hereafter Motor Carrier Act). The application requested that the Commission authorize McKee to operate

> a wrecker by an employee of Lloyd McKee Motors, Inc. for the purpose of transporting vehicles from points all over New Mexico to the premises of Lloyd McKee Motors, Inc., so that those vehicles might be serviced or repaired at that facility. In addition, Lloyd McKee Motors, Inc. intends to use its wrecker for the purpose of transporting vehicles to persons who may have purchased those vehicles from Lloyd McKee Motors, Inc.

A hearing was held on the application at which time it was amended to a request for a Permit to Operate as a Contract Carrier (hereafter Permit) pursuant to § 65–2–18, N.M.S.A.1978. On July 6, 1977, the Commission issued an order denying the application for a Permit. McKee then advised the Commission that it would conduct the wrecker operations anyway, unless restrained by a court or an appropriate order by the Commission. On October 4, 1977 the Commission issued a second order to McKee prohibiting it from conducting the operation without a proper Certificate or Permit. McKee appealed both orders to the district court. The court determined that the Commission acted unlawfully because McKee's proposed operation was that of a private carrier not subject to regulation by the Commission. The Commission now appeals from the decision of the district court.

Our first inquiry is whether the Commission has authority to regulate a service such as that proposed by McKee. Article XI, Section 7 of the New Mexico Constitution provides that the Commission shall fix, determine, supervise, regulate and control all rates and charges of transportation and common carriers and determine all matters of public convenience and necessity as provided by law. The Motor Carrier Act gives the Commission authority to

> supervise and regulate the transportation of persons and property by motor vehicle *for hire* upon or over the public highways of this state in all matters whether specifically mentioned herein or not so as to: (1) relieve the existing and all future undue burdens on the highway arising by reason of the use of the highways by motor vehicles; (2) protect the safety and welfare of the traveling and shipping public in their use of the highways; (3) carefully preserve, foster and regulate transportation and permit the coordination of transportation facilities. (Emphasis added.)

Section 65–2–1, N.M.S.A.1978.

The Motor Carrier Act then defines common carriers, § 65–2–2, contract carriers, § 65–2–13, but nowhere defines private carriers. Case law establishes, however, that a private carrier is one which is not for hire. *McWood Corporation v. State Corporation Commission*, 78 N.M. 319, 431 P.2d 52 (1967); *Rountree v. State Corporation Commission*, 40 N.M. 152, 56 P.2d 1121 (1936). A private carrier is accordingly not subject to regulation by the Commission. *Id.*

McKee claims that its proposed wrecker service is not for hire. It urges that we employ the "primary business test" as recognized by this Court in *McWood Corporation, supra,* to determine whether its proposed operations are for hire. In *McWood,* the Court stated

> that the carriage is 'for hire' if the primary business of the carrier is transportation of the goods, but that the carriage is private if its primary business is the sale of its own goods which the owner transports in furtherance of that business and the transportation is merely incidental thereto. The 'primary business test' has been applied by other courts, reviewing orders of administrative agencies charged with the regulation and supervision of transportation, in determining whether a carriage by one transporting his *own goods* was private or for hire. (Citations omitted and emphasis added.)

78 N.M. at 321, 431 P.2d at 54.

Accordingly, the primary business test should be used only when title to the goods being transported is held by the carrier. *Red Ball Motor Freight v. Shannon,* 377 U.S. 311, 84 S.Ct. 1260, 12 L.Ed.2d 341 (1964); *Brooks Transp. v. United States,* 93 F.Supp. 517 (E.D.Va.1950). The test's purpose is to prevent a carrier from buying items solely for the reason of having title during transportation, then selling the items upon delivery, in order to be characterized as a private carrier. Such an operation would be "a mere subterfuge to defeat the law." *Rountree v. State Corporation Commission, supra,* at 40 N.M. at 156, 56 P.2d at 1123. In the case at bar it appears uncontroverted that title to the goods being transported will not belong to McKee. We therefore decline to use the primary business test.

Instead, when the carrier does not hold title to the goods, we look to the manner in which the carrier charges its customers and how the charges are determined. *Rountree v. State Corporation Commission, supra.* Here, much of the service would be devoted to customers who would pay McKee specifically for the tow. The charge would be dependent upon the distance travelled and the time of day. The service is available to anyone who desires to have their automobile worked on at McKee's facilities. We find it hard to characterize such an operation as being anything other than for hire. The operation proposed by McKee is subject to regulation by the Commission as authorized by the Motor Carrier Act.

Our second inquiry is whether the Commission based its findings upon substantial evidence. On appeal, this Court makes the same review of the administrative agency's determination as did the district court. The agency's determination must be based upon substantial evidence which appears in the record before the agency. *Rinker v. State Corporation Commission,* 84 N.M. 626, 506 P.2d 783 (1973). " 'Substantial evidence' means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (Citations omitted.)" *Id.* at 627, 506 P.2d at 784.

The Commission's first order denied McKee's application for a Permit based upon the finding that the "applicant did not furnish a proposed contract as required for a Contract Motor Carrier applicant." We find that this is a proper basis for denial, and that there is substantial evidence in the record to support such a finding. The form which McKee introduced as evidence of a contract was not a contract. Thus, the first order was proper. The second order addressed only the jurisdictional issue, which we have already discussed.

The order of the district court is hereby reversed and the cause is remanded for affirmance of the Commission's orders.

PAYNE and FELTER, JJ., concur.

602 P.2d 1030

In the Matter of the ESTATE OF Bernice Jarrott LORD, Deceased.

Sue Clair HUGHES, Personal Representative of the Estate of Bernice Jarrott Lord, Petitioner,

v.

Robert W. LORD, Respondent.

No. 12510.

Supreme Court of New Mexico.

Nov. 21, 1979.

Modrall, Sperling, Roehl, Harris & Sisk, Alan K. Konrad, Albuquerque, for petitioner.

Jones, Gallegos, Snead & Wertheim, Steven L. Tucker, J. E. Gallegos, Santa Fe, for respondent.

OPINION

SOSA, Chief Justice.

This suit was brought by petitioner, Sue Clair Hughes, for the formal probate of the will of her deceased sister, Bernice Jarrott Lord, and for appointment of Hughes as personal representative of decedent's estate. Decedent's husband, Robert W. Lord, objected to the formal probate of the will, contending that an oral antenuptial agreement whereby decedent allegedly agreed to leave all her property to Lord in return for his promise to marry her should be specifically enforced, notwithstanding the terms of decedent's will. The trial court excluded any evidence as to the alleged antenuptial agreement on the grounds that any such agreement was unenforceable because it would violate the Statute of Frauds and would be contrary to public policy. The Court of Appeals reversed and remanded the case to the trial court with directions to hear the excluded evidence. We granted

certiorari. We reverse the Court of Appeals and affirm the trial court.

Decedent, a sixty-four year old widow, who lived alone on a ranch outside Santa Fe, was suffering from squamous cell cancer. According to Lord, in October 1974, decedent allegedly agreed to devise to him her entire estate if he would marry her and "take care of her like a husband would" until her death. Lord contends that he agreed to this proposal, and he and decedent were married on November 21, 1974. The will which was admitted to probate was executed on the following day. The will devised ten thousand dollars to Lord, but left the bulk of decedent's estate to her sister, Hughes.

Lord contends that he fulfilled his part of the alleged oral antenuptial agreement by caring for decedent until her death in 1977. Consequently, he contends that rather than admitting the will to probate, the trial court should have specifically enforced this oral antenuptial agreement.

On the first day of trial, Hughes, contending that the alleged agreement was void and unenforceable, filed a motion in limine to exclude all evidence bearing on that agreement. The trial court granted the motion, but allowed Lord to make an offer of proof. The court found that the alleged agreement was void and unenforceable because it violated the Statute of Frauds and was against public policy.

The Court of Appeals held that a motion in limine is improper in a non-jury case, and that the trial court therefore erred in refusing to hear the evidence regarding the alleged antenuptial agreement. The court remanded the case to the trial court for the purpose of hearing the evidence Lord sought to introduce concerning the alleged agreement.

Hughes petitioned for a writ of certiorari, contending that if an oral antenuptial agreement whereby one spouse agrees to leave all his property to the surviving spouse in return for a promise of marriage is unenforceable, then no purpose would be served by remanding the case to the trial court for the purpose of hearing evidence concerning that alleged agreement. This follows, Hughes argues, because the ultimate result must necessarily be the same on remand.

We agree with Judge Sutin's dissent from the Court of Appeals' decision, wherein he stated that the issue is "whether the oral agreement, irrespective of any evidence based thereon, was invalid as a matter of law, not the propriety of the name given to the motion" which sought to exclude such evidence.

In *Tellez v. Tellez,* 51 N.M. 416, 186 P.2d 390 (1947), this Court held that a contract whereby one spouse agrees to pay the other spouse for his or her care, which is part of the other's duties as a spouse, is against public policy and is therefore void. In that case, Mr. Tellez was alleged to have orally agreed to leave all his property to one Guadalupe Diaz "if she would marry him and take care of him as his wife until his death." 51 N.M. at 418, 186 P.2d at 391. After marrying Ms. Diaz, Tellez executed a deed to his real estate in favor of his children. Following his death, Tellez' widow brought an action for specific performance of the alleged oral antenuptial agreement, which this Court refused to enforce.

We believe that *Tellez* states a proper principle, and we hereby reaffirm the public policy basis for that decision. It is the policy of this state to foster and protect the marriage institution. It is not the policy of the state to encourage spouses to marry for money.

Lord seeks to distinguish the alleged agreement in this case from the agreement in *Tellez* on the basis that he performed extraordinary services, far beyond the normal duties any spouse owes to the other spouse. However, even if we were to recognize that such a distinction would require a different result, which is a question we do not reach, the offer of proof Lord made and his testimony at trial do not establish the basis for such a distinction.

Lord testified that the only services he was to render to decedent were "to be a loyal, faithful husband," and "to take care of her like a husband would." The evidence indicates that decedent was very ill during the marriage, and that Lord assisted decedent and attempted to alleviate her suffering. However, there is nothing exceptional or extraordinary about one spouse utilizing his or her particular skills or aptitudes to assist the other spouse in times of trouble. Such a situation does not materially differ from the situation in *Tellez*.

Therefore, the decision of the Court of Appeals is reversed and the judgment of the trial court is affirmed.

IT IS SO ORDERED.

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

603 P.2d 285

BOKUM RESOURCES CORPORATION, Continental Oil Company, Gulf Oil Corporation, Kerr-McGee Nuclear Corporation, Phillips Petroleum Company, Ranchers Exploration and Development Corporation, United Nuclear Corporation, United Nuclear-Homestake Corporation, United Nuclear-Homestake Partners and Union Carbide Corporation, Petitioners,

v.

NEW MEXICO WATER QUALITY CONTROL COMMISSION, Respondent.

No. 12374.

Supreme Court of New Mexico.

Nov. 16, 1979.

Peter J. Nickles, Covington & Burling, Washington, D. C., Bruce D. Black, Campbell & Black, Santa Fe, for petitioner Kerr-McGee Nuclear Corp.

James G. di Zerega, II, Gulf Mineral Resources Co., Denver, Colo., Watson, Stillinger & Lunt, Santa Fe, for petitioner Gulf Oil Corp.

David Cullen, Houston, Tex., for petitioner Continental Oil Co.

Kenneth Heady, C. J. Roberts, Bartlesville, Okl., for petitioner Phillips Petroleum Co.

G. Stanley Crout, Sunny J. Nixon, C. Mott Woolley, Bigbee, Stephenson, Carpenter & Crout, Santa Fe, for petitioners Bokum Resources Corp., Continental Oil Co., Phillips Petroleum Co., Ranchers Exploration and Development Corp., United Nuclear Corp., United Nuclear-Homestake Partners, United Nuclear-Homestake Corp. and Union Carbide Corp.

Bruce S. Garber, James G. Huber, Weldon L. Merritt, Santa Fe, Rand L. Greenfield, Albuquerque, for respondent.

OPINION

EASLEY, Justice.

After notice and hearing, the New Mexico Water Quality Control Commission (Commission) amended existing regulations and enacted new ones governing the discharge of toxic pollutants that may move into ground water. Bokum Resources Corporation and other plaintiffs (Bokum) appealed to the Court of Appeals. The Court of Appeals affirmed, except for one minor issue. We affirm in part and reverse in part.

The Commission held lengthy hearings, in which Bokum and others participated. There are no complaints about the adequacy of the hearings. However, Bokum attacks the regulations as being vague, arbitrary and capricious and in excess of the law. It is asserted by Bokum that enforcement of the rules will cost the uranium industry in the state approximately $86,000,000.

Bokum raises these issues:

1. the definition of "toxic pollutants" is unconstitutionally vague;

2. the Commission failed to specify its reasons for adopting the regulations;

3. the Court of Appeals has jurisdiction to review the adoption of the "standards" involved;

4. the Commission failed to weigh all of the evidence before adopting the regulations;

5. the Commission exceeded its authority by passing regulations that require water dischargers to bear the burden of proving that no conditions exist which would justify a denial of their permit; and

6. in adopting the regulations and standards, the Commission was not performing a mere "ministerial act".

The facts bearing on each of these issues will be discussed, along with the law, in the order given.

1. *Definition of "Toxic Pollutants"*

Bokum's most serious complaint is that the definition of "toxic pollutants" in the regulations is unconstitutionally vague. We agree. In addition, we confirm that the judicial doctrine of unconstitutional uncertainty is most perplexing. Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 Cornell L.Q. 195 (1955).

Under Section 3–106(A) and (B) of the Commission's regulations, any person who discharges "toxic pollutants" which may migrate into ground water is required to submit a discharge plan to the Director of the Environmental Improvement Division (Director) for approval. Section 3–109(G)(3) of the regulations prohibits the Director from approving a discharge plan for "the discharge of any water contaminant which may result in toxic pollutants being present in the ground water."

Section 1–101(X) of the regulations defines "toxic pollutants" as:

> . . . those water contaminants, or combinations of water contaminants present in concentrations which, upon exposure, ingestion, inhalation or assimilation into humans or other organisms of direct or indirect commercial, recreational or esthetic value, either directly from the environment or indirectly by ingestion through food chains, will, *on the basis of information available to the director or the commission*, cause death, disease, behavioral abnormalities, genetic mutation, physiological malfunctions or physical deformations in such organisms or their offspring. (Emphasis added.)

Section 74–6–5(P), N.M.S.A.1978 provides that in the event a "toxic pollutant" is discharged, the person discharging it is subject to a fine of not less than $300 per day nor more than $10,000 per day or imprisonment for a period not exceeding one year, or both. In addition, Section 74–6–5(Q) authorizes a civil penalty of up to $5,000 per day.

Bokum claims that subjecting water users to such penalties, when their guilt or innocence may be determined not by what

is specified in the regulations but by "information available to the director or the commission," fails to meet the due process requirements of notice. Bokum asserts that water users cannot determine what the regulations command or forbid.

The Court of Appeals held that the definition of "toxic pollutants" constitutes a standard rather than a regulation and that the Court of Appeals has no jurisdiction to review standards. This point is addressed elsewhere in this opinion.

Bokum claims that the definition of "toxic pollutant" leaves the discharger without a discernible standard. At his peril, the discharger must determine which organisms are of "direct or indirect commercial, recreational or esthetic value." Furthermore, the discharger's acts are to be judged, not by what he can read in print about the standards, but by "information available to the director or the commission." The term "available" has an infinite scope. This information, which may be the basis upon which a person could be convicted and sent to jail for one year, may be in the files of the Director or a majority of the Commission members, in the Library of Congress or part of the wisdom of a friendly Curandero, and still be considered "available". The term "information" in the definition of "toxic pollutants" is also limitless. There are no tests provided in the regulation for determining the reasonableness, reliability or scientific accuracy of the "available" information. Conceivably, a person could find himself in jail for violating totally unreasonable requirements, that are supported by crank mail in the Director's files, without the discharger of water having any prior notice or knowledge of the information's nature or availability to the Director.

Most of the cases dealing with the vagueness doctrine construe statutes as opposed to regulations. However, our courts and others apply the same legal principles to both. *State v. Ashby*, 73 N.M. 267, 387 P.2d 588 (1963); *Rainbo Baking Co. of El Paso v. Commissioner of Rev.*, 84 N.M. 303, 502 P.2d 406 (Ct.App.1972); *Agrico Chemical Co. v. State, Etc.*, Fla.App., 365 So.2d 759 (1978).

The same strict rule of construction that is applied to statutes defining criminal action must be applied to rules enacted by an agency pursuant to statutory authority. *Kraus and Bros. v. United States*, 327 U.S. 614, 66 S.Ct. 40, 90 L.Ed. 894 (1946).

It is well established that a penal statute or regulation which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application, lacks the first essential of due process of law. *Balizer v. Shaver*, 82 N.M. 347, 481 P.2d 709 (Ct.App.1971); *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

In *Connally*, the United States Supreme Court was construing a statute which provided a penalty for payment of less than " 'the current rate of per diem wages in the locality.' " *Id.* at 388, 46 S.Ct. at 126. The Court held that the statute contained no ascertainable standard of guilt since it could not be determined with any degree of certainty what sum constituted a current wage in any locality, and that the term "locality" itself was fatally vague and uncertain. The Court stated: "the vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the Legislature meant one thing rather than another, . . ." *Id.* at 394, 46 S.Ct. at 128.

In the recent case of *Colautti v. Franklin*, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed. 596 (1979), the United States Supreme Court held the Pennsylvania abortion control act unconstitutionally vague. The act required every person who performed an abortion to make a determination, " 'based on his experience, judgment or professional competence,' " that the fetus is not viable. If the person performing the abortion determines that the fetus "is viable" or that " 'there is sufficient reason to believe that the fetus may be viable,' " he must then exercise the same care to preserve the fetus' life and health as would be required in the case of a fetus intended to be born live. In addition, the person performing the abortion must

use that abortion technique providing the best opportunity for the fetus to be aborted alive, so long as a different technique is not necessary to preserve the mother's life or health.

Apparently, the determination of whether the fetus "is viable" is to rest upon the basis of the attending physician's "experience, judgment or professional competence." But the Court held that the subjective language applied to the second condition that activates the duty to the fetus, i. e., whether "sufficient reason to believe that the fetus may be viable" exists, is ambiguous. The Court stated:

> It is settled that, as a matter of due process, a criminal statute that "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States v. Harriss*, 347 U.S. 612, 617 [, 74 S.Ct. 808, 812, 98 L.Ed. 989] (1954) or is so indefinite that "it encourages arbitrary and erratic arrests and convictions," *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 [,92 S.Ct. 839, 843, 31 L.Ed.2d 110] (1972), is void for vagueness. See generally *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 [, 92 S.Ct. 2294, 2298–2299, 33 L.Ed.2d 222] (1972). This appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights. *Id.*, at 109 [, 92 S.Ct. 2294, at 2299]; *Smith v. Goguen*, 415 U.S. 566, 573 [, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605] (1974); *Keyishian v. Board of Regents*, 385 U.S. 589, 603–604 [, 87 S.Ct. 675, 683–684, 17 L.Ed.2d 629] (1967).

Id. 439 U.S. at 390–391, 99 S.Ct. at 683, 58 L.Ed.2d at 606.

The Court held that the statute conditioned potential criminal liability on confusing and ambiguous criteria and that, therefore, it presented serious problems of notice and discriminatory application and had a chilling effect on the exercise of constitutional rights.

The Eighth Circuit, in *CPC International Inc. v. Train*, 515 F.2d 1032 (8th Cir. 1975), invalidated an Environmental Protection Agency pre-treatment standard for waste treatment which read:

> (d) [w]astes at a flow rate and/or pollutant discharge rate which is excessive over relatively short time periods so that there is a treatment process upset and subsequent loss of treatment efficacy.

Id. at 1052. The court held that a plant operator could be subject to substantial civil or criminal penalties for violating this standard even though it was too vague to warn the industry or a plant operator of the scope of prohibited conduct. The Eighth Circuit ordered EPA to amend the regulation so as to define "in a reasonably specific manner what it considers to be an excessive discharge to a municipal plant over relatively short periods of time." *Id.* The court recognized that providing a definition would be a difficult task. "Nevertheless, this is a difficulty with which the Administrator must grapple." *Id.*

■ Men of common intelligence cannot be required to guess at a criminal enactment. *Winters v. New York*, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948); *Hines v. Baker*, 422 F.2d 1002 (10th Cir. 1970). Adequate notice of what is prohibited must be given. *Ginsburg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968); *Hines, supra; Hynes v. Mayor of Oradell*, 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976); *Note*, 62 Harvard L.Rev. 77 (1948).

Cline v. Frink Dairy Co., 274 U.S. 445, 47 S.Ct. 681, 71 L.Ed. 1146 (1927), dealt with a Colorado anti-trust act which set up a new test or standard of criminality which was unknown to the common law. This act outlawed conspiracies and combinations of persons and corporations for the purpose of fixing prices. But it provided an exception if the object of the agreement was to conduct operations " 'at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed.' " The United States Supreme Court held that the exception in the act left the entire act without a fixed standard of guilt, since there was no indication as to what would be considered a reasonable profit.

The Court in *Cline* stated:

> The principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation, . . .

Id. at 463, 47 S.Ct. at 687.

> But it will not do to hold an average man to the peril of an indictment for the unwise exercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result.

Id. at 465, 47 S.Ct. at 687; *United States v. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516 (1921); *Champlin Refining Co. v. Commission*, 286 U.S. 210, 52 S.Ct. 559, 76 L.Ed. 1062 (1932); *United States v. Mazurie*, 487 F.2d 14 (10th Cir. 1973).

There is the danger that the State will get away with more inhibitory regulations than it has a constitutional right to impose. "Persons at the fringes of amenability to regulation will rather obey than run the risk of erroneous constitutional judgment." Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. of Pa.L. Rev. 67, 80 (1960).

To the extent that regulations such as these in question place a penalty upon completed acts, concepts of fairness require that they be sufficiently definite to give notice as to what conduct is necessary to avoid those penalties.

> It is clear, however, that some substantial degree of definiteness should be required; for if a man is to be charged with knowledge of all his rights and duties under a statute regardless of whether he has read or understood it, fundamental fairness requires that he be given at least the opportunity to discover its existence, its applicability and its meaning.

Note, 62 Harvard L.Rev., *supra* at 79–80.

The United States Supreme Court, in *Winters v. New York, supra*, struck down an obscenity law for vagueness, and cited in support thereof the New Mexico case of *State v. Diamond*, 27 N.M. 477, 202 P. 988 (1921):

> Where the statute uses words of no determinative meaning, or the language is so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be made criminal, it will be declared void for uncertainty.

Id. at 485, 202 P. at 991.

In *Diebold, Inc. v. Marshall*, 585 F.2d 1327 (6th Cir. 1978), the Sixth Circuit recognized that this principle applies with special force to statutes which regulate in the area of first amendment rights. But even as to those statutes which govern in purely economic or commercial activity, if their violation can engender penalties, a constitutionally adequate warning to those whose activities are governed must be given. *State v. Heffernan*, 41 N.M. 219, 67 P.2d 240 (1937); *see Jordan v. DeGeorge*, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951).

The New Mexico Court of Appeals, in *State v. Jaramillo*, 83 N.M. 800, 498 P.2d 687 (Ct.App.1972), considered a penal statute which proscribed " 'remaining in or occupying any public property after having been requested to leave by the lawful custodian, or his representative, *who has determined* that the public property is being used or occupied contrary to its intended or customary use. . . . ' " (Emphasis added.) *Id.* at 801, 498 P.2d at 688. The Court of Appeals ruled that the statute did not provide a standard to guide the custodian in making his determination, and declared the statute unconstitutional. This statute is similar to the one in question. The information necessary to convict under the Commission's regulations may be "available" only to the Director or the Commission. Neither the Director nor the Commission is given a guiding standard to determine what aspects or how much of the "available" information should be taken into account before penalizing a discharger.

This Court, in *State v. State Board of Finance*, 69 N.M. 430, 367 P.2d 925 (1961), held that a statute authorizing the State

Board of Finance to reduce all annual operating budgets of various state agencies by not more than ten per cent, subject to certain exceptions, was unconstitutional. The statute did not provide standards to guide the Director of the Department of Finance and Administration and was therefore unconstitutionally vague. This Court stated:

> As we read the section, the grant is absolute and is totally devoid of restraints, direction or rules. Accordingly, the fact that respondent acted only under certain self-imposed restraints can in no way serve to supply what has been omitted. It is not what has been done but what can be done under a statute that determines its constitutionality.

Id. at 440, 367 P.2d at 932.

In *Safeway Stores, Inc. v. City of Las Cruces*, 82 N.M. 499, 484 P.2d 341 (1971), this Court examined a statute which set forth requirements for obtaining a liquor license and which specified that the local governing body must either approve or disapprove the issuance or transfer of the license. No guidelines for the exercise of the authority to approve or disapprove a license were contained in the statute. This Court voided the statute stating: "[w]ithout any statutory standard whatever, we do not feel that a local governing body could give vent to whatever whims they [sic] might choose." *Id.* at 500, 484 P.2d at 342.

A statute purportedly setting forth the essential elements of the offense of embezzlement was held unconstitutional by this Court. *State v. Prince*, 52 N.M. 15, 189 P.2d 993 (1948). This vague and indefinite statute made it a crime for a person having property of another in his possession, but which he believed to be his own, to appropriate such for his own use. This Court held that "[a] penal statute should define the act necessary to constitute an offense with such certainty that a person who violates it must know that his act is criminal when he does it." *Id.* at 18, 189 P.2d at 995.

If there is any doubt about the meaning of a penal statute or rule, it will be construed against the state or agency which enacted it and in favor of the accused. *State v. Ortiz*, 78 N.M. 507, 433 P.2d 92 (1967).

We hold that the wording in Section 1–101(X) in the Commission's regulation, which defines "toxic pollutants" to be contaminants that will, "on the basis of information available to the director or the commission, cause death," or other dire results, is unconstitutionally vague on its face. This overbroad definition of "toxic pollutants" also voids Section 1–101(N), which defines "hazard to public health." The regulations, to this extent, are declared void.

We reverse the Court of Appeals on this issue and remand the case to the Commission for further consideration.

2. *Reasons For Adopting Regulations*

Bokum argues that the reasons given by the Commission for the adoption of its regulations are not legally sufficient. The Commission gave eight reasons, which are set out in full in the Court of Appeals' opinion. *Bokum v. New Mexico Water Qual. Con. Com'n.*, 18 N.M.St.B.Bull. 162, 165 (1978).

The record shows that the regulations were presented section by section by specialists from the Commission's staff and consultants. Concurrently, the reasons for the proposals were thoroughly analyzed. Bokum was given the opportunity to cross-examine and to make statements concerning the presentations. Bokum requested and was permitted to submit additional written statements and evidence after the hearings were concluded. After the evidentiary hearing, the Commission held a three-day meeting at which all parties had an opportunity to review the transcript, discuss the wording of the standards and make objections or suggestions. In addition, the Commission had a summary of the hearings prepared by its staff. This summary was properly included in the record.

Bokum relies on *City of Roswell v. New Mexico Water Qual. Con. Com'n.*, 84 N.M. 561, 505 P.2d 1237 (Ct.App.1972), *cert. denied*, 84 N.M. 560, 505 P.2d 1236 (1972), in which the Court of Appeals stated:

> 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.

Id. at 565, 505 P.2d at 1241. There is a significant difference between the instant case and the *City of Roswell* case. The Commission in the latter case did not give any general statement of its reasoning, and it gave no indication as to what testimony or exhibits were relied upon in formulating the regulations in question.

Bokum complains that the reasons given are "conclusory" and "self-serving". On the other hand, the Commission cites to *New Mexico Mun. L., Inc. v. New Mexico Envir. Imp. Bd.*, 88 N.M. 201, 539 P.2d 221 (Ct.App.1975) in which a similar set of reasons was given to support the Board's adoption of solid waste management regulations. The Court of Appeals there considered twelve rather general statements and held that they fulfilled the obligation of the Commission as called for in *City of Roswell, supra. Pharmaceutical Mfrs. Ass'n. v. New Mexico Bd. of Ph.*, 86 N.M. 571, 525 P.2d 931 (Ct.App.1974), *cert. denied*, 86 N.M. 657, 526 P.2d 799 (1974).

We agree with the Court of Appeals that the Commission reasonably complied with the principle set forth in *City of Roswell*: that reasons should be given upon which the Commission bases its adoption of regulations.

3. *Appellate Review of "Standards"*

The Court of Appeals held that it had no jurisdiction to review what it classified as "standards", which it defined as the criteria for judging whether given levels of performance have been achieved. It defined "regulations" as rules of procedure by which a course of conduct is controlled "according to certain standards." Bokum argues that if the Court of Appeals cannot review what it terms as "standards" under various regulating schemes, a citizen can test "standards" only by violating them and thereby risk the imposition of criminal penalties.

We are faced with considerable confusion because of nomenclature. Although the Court of Appeals makes a distinction between "standards" and "regulations", the State Rules Act, § 14–4–1, et seq., N.M.S.A. 1978, does not. The statutory designation for an enactment by an agency designed to have the force and effect of law and to control the actions of persons who are being regulated by the agency is a "rule". In Section 14–4–2(C), the State Rules Act defines "rule" as meaning any "rule, *regulation*, order, *standard*, statement of policy . . . ." (Emphasis added.) The Act provides for the format, the style, the filing and distribution of newly issued rules and designates the State Library as the official depository. These requirements were met in this case. The whole procedure here was for the purpose of enacting enforceable rules for prevention of ground water pollution. Section 74–6–7, N.M.S.A. 1978, which provides for an appeal from the adoption of water pollution regulations, specifies that the appeal must be taken within thirty days after filing of the regulations "under the State Rules Act."

Thus, it is clear that the standards contained in the regulations adopted by the Commission, after the required notice, hearing and filing, are exactly what the Legislature calls them: "rules". A standard is a rule, if the proper procedure has been followed in promulgating it. If the "standards" adopted by the Commission in this case did not constitute rules under the State Rules Act, they would have no efficacy, validity or enforceability. § 14–4–5, N.M.S.A. 1978. In this case the standards for the evaluation of waste water to determine whether it is contaminated were adopted as rules, and are appealable to the Court of Appeals. *See* §§ 34–5–8(F) and 74–6–7(A), N.M.S.A. 1978. We reverse the Court of Appeals on this issue.

We specifically overrule *Taos Ski Valley Water and Sanitation Dist. v. New Mexico Water Qual. Con. Comm.*, 91 N.M. 203, 572 P.2d 550 (Ct.App.1977), to the extent that it holds there is no right of appeal from "standards" adopted by the Commission in a rule.

The Court of Appeals left some of Bokum's claims unanswered when it decided that its jurisdiction did not include review of "standards". Normally this Court would remand a case to the lower appellate court to address the issues that were purposefully undecided, after having ruled that the issues were material. However, in the interest of speeding the resolution of this long delayed, complex and important case, we entertain the questions and decide them.

Bokum alleged that the standards for selenium and total dissolved solids are arbitrary, capricious and unsupported by substantial evidence. However, Bokum did not comply with N.M.R. Civ.App. 9(d), N.M. S.A. 1978 regarding substantial evidence questions which requires that appellant state the substance of *all* the evidence in the record that is material to the issue and supply transcript page numbers.

Nevertheless, we have reviewed the record as to each of these standards and find, as Bokum acknowledged in its Brief-In-Chief to the Court of Appeals, "*conflicting* expert *testimony* of a highly technical nature." (Emphasis added.)

This Court has repeatedly held that it is not within our province to weigh conflicting evidence. *Sternloff v. Hughes*, 91 N.M. 604, 577 P.2d 1250 (1978); *Romero v. Garcia*, 89 N.M. 1, 546 P.2d 66 (1976). In fact, conflicts or contradictions in evidence on appeal are resolved in favor of the successful party. *Skyhook Corp. v. Jasper*, 90 N.M. 143, 560 P.2d 934 (1977); *State ex rel. Santa Fe Sand & G. Co. v. Pecos Const. Co.*, 86 N.M. 58, 519 P.2d 294 (1974). We reiterate that if a judgment is supported by substantial evidence, it will not be disturbed on appeal.

There is substantial evidence to support the regulations on selenium and totally dissolved solids. We also hold that the Commission was not arbitrary and capricious in promulgating these standards.

The Court of Appeals further held that the section in the regulations defining "toxic pollutants" is a "standard by definition". As heretofore explained, the section must stand or fall as a "rule".

4. *Weighing All Evidence*

Bokum relies on *Alto Village Services Corp. v. New Mexico Public Service Commission,* 92 N.M. 323, 587 P.2d 1334 (1978) for the proposition that the Commission must "weigh all of the evidence in the case." Bokum argues that the Court of Appeals' opinion did not require the Commission to have weighed all of the evidence. Significantly, Bokum does not claim under this point that the evidence is not substantial to support the decision. The argument is that we should find as a matter of law that the Commission did not weigh *all* the evidence and, for this reason, hold that the regulations are void.

In *Alto Village*, an engineer in the field of municipal water systems testified as an expert. His testimony went to the issue of what percentage of the village water plant was "used and useful". The Commission disregarded his testimony and accepted contrary testimony from the Commission's staff rate analyst, who was not an engineer. This Court reversed, quoting the "well established [rule] . . . that the testimony of witnesses, whether interested or disinterested, cannot arbitrarily be disregarded by the trier of the facts . . . ." *Id.* at 1337. Particularly in that case, the testimony of an expert witness could not be disregarded when contradicted only by a lay witness.

Alto Village is distinguishable. Bokum does not allege that expert testimony was disregarded in favor of lay testimony, but rather that the testimony of the Commission's experts was accepted over that of Bokum's experts. Thus, *Alto Village* is not controlling.

We are not being asked to weigh the evidence, and could not, if so requested. There is conflicting testimony contained in the record. We cannot say, as a matter of law, that all of the evidence was not properly considered. We sustain the decision of the Court of Appeals in this regard.

5. *Burden to Disprove Pollution*

Bokum claims that the regulations depart from the statute by authorizing the

Director to disapprove a discharge plan if the discharger fails to provide a site and method for flow measurement and by placing on the discharger the burden of proving the discharge of a water contaminant will not result in toxic pollutants being present in ground water.

Section 74–6–5(D), N.M.S.A. 1978 provides that the appropriate agency may deny a permit if the effluent would not meet applicable state or federal regulations or limitations, or if any provision of the Water Quality Act would be violated, or if it appears that the effluent would cause any state or federal stream standard to be exceeded.

Bokum argues that an agency's authority is limited to the powers expressly granted by its enabling statute and fairly implied therefrom. *Winston v. New Mexico State Police Board*, 80 N.M. 310, 454 P.2d 967 (1969). Thus, Bokum argues that the regulations in question require the Director to deny permits for reasons not specified by the above statute and do not give the Director the discretion to grant a permit where the statute provides that he do so. Bokum claims that the regulations require the discharger to *disprove* the existence of any reason that might justify the denial of his application. And, further, Bokum claims that the regulations require the discharger to demonstrate that his plan will neither cause the applicable standards to be exceeded nor toxic pollutants to be present at the place of withdrawal for present or reasonably foreseeable future uses.

Section 74–6–5(G) provides that the Commission may, by regulation, impose reasonable conditions upon permits. These conditions include requiring permittees to: install and use effluent monitoring devices; sample effluents at locations and intervals as may be prescribed by the Commission; and provide any other information relating to the discharge of water contaminants.

"Reviewing courts overturn the administrative interpretation of statutes by appropriate agencies *only if they are clearly incorrect.*" (Emphasis added.) *Pharmaceutical Mfrs. Ass'n., supra*, 86 N.M. at 576, 525 P.2d at 936. In determining whether the administrative interpretation was "clearly incorrect", the Court of Appeals in *Pharmaceutical* looked at the objective of the statute in question. "The authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy." *Public Serv. Co. of N.M. v. New Mexico Envir. Imp. Bd.*, 89 N.M. 223, 227, 549 P.2d 638, 642 (Ct.App.1976).

The objective of the Water Quality Act, which contains all the sections governing the Commission discussed in this opinion, is to abate and prevent water pollution. It is not "clearly incorrect" for the Commission to require the discharger to provide a site and method for flow measurement and to provide any pertinent information relating to the discharge of water contaminants in order to demonstrate to the Commission that the plans of the discharger would not result in a violation of the standards and regulations. These requirements are well within the statutory mandate. We affirm the decision of the Court of Appeals as to this issue.

6. *"Ministerial Acts"*

The Court of Appeals rules that the Commission, in formulating a majority of the regulations, was engaged in a legislative function and was thus performing a mere "ministerial act". The phrase was defined to mean obedience to legal authority without the exercise of the actor's "own judgment upon the propriety of the act being done."

The parties to the appeal did not raise an issue concerning ministerial acts. The opinion of the Court of Appeals, where the phrase was first mentioned, did not explain its relevance to any issue before that Court. We do not see the relevance here.

However, considering that this case will be remanded for further action, we are constrained to clarify the point. Section 74–6–4, N.M.S.A. 1978 requires the Commissioners, in making regulations, to exercise their own judgment on numerous ques-

tions: technical practicability, economic reasonableness, feasibility of treatment, property rights, social and economic value of sources of water contaminants and other issues. The whole rulemaking process, which has for its end product a set of judgment calls that will have the force and effect of law, is hardly subject to characterization as ministerial in nature. In making these rules a Commissioner is not performing a ministerial act; he is not acting "in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment." Black, *Law Dictionary*, 1148 (4th ed. 1968). We disagree with the Court of Appeals that promulgating these rules is a ministerial act.

Other Regulations

We affirm the decision of the Court of Appeals that Section 3–105(H) of the regulations be remanded for clarification as to its application to rainwater percolating through "undisturbed materials". We also affirm that Court's decision that the regulations conform to the statutes in permitting reasonable degradation and in providing for plans for the discharge of leachates.

Section 74–6–12(C), N.M.S.A. 1978 prohibits the regulation of ground water if the pollution is confined entirely within the boundaries of the property where pollution occurs, when the polluted water does not combine with other waters. Bokum argues that this exemption is not repeated in the regulations. The Commission counters that, although the exemption is not set forth expressly in its regulations, the definition of "water" found in Section 74–6–12(C) and in Section 1–101.DD of the regulations covers the exemption. Furthermore, it is implicit in Bokum's argument that the statute providing for this express exemption is not valid or binding on the Director unless it is repeated in the regulations. This premise is untenable. It was not error for the Commission to rely on the statutory exemption and leave that exemption out of the regulations.

This cause is remanded to the Commission for actions not inconsistent with this opinion.

IT IS SO ORDERED.

SOSA, C. J., and PAYNE, J., concur.

FEDERICI and FELTER, JJ., not participating.

603 P.2d 295

Robert Dale MORRISON, Plaintiff-Appellee,

v.

Rudi WYRSCH, Defendant-Appellant.

No. 12434.

Supreme Court of New Mexico.

Nov. 27, 1979.

Anthony F. Avallone, Las Cruces, Standley & Suzenski, Fred M. Standley, Santa Fe, for defendant-appellant.

Robert Dale Morrision, Taos, for plaintiff-appellee.

OPINION

PAYNE, Justice.

Defendant Wyrsch appeals from an order of the district court which struck all of his pleadings and granted summary judgment to plaintiff Morrison. We are called upon to decide the propriety and timeliness of Wyrsch's pleadings and to review the summary judgment granted in this instance. We must determine whether Wyrsch's counterclaim, jury demand and response to request for admissions complied with the New Mexico Rules of Civil Procedure.

The pertinent facts in this case are set forth in the order of their occurrence. Wyrsch answered Morrison's complaint with a denial. Morrison served a request for admissions upon Wyrsch. Wyrsch filed what he called an amended answer which contained the same denial with the addition of a counterclaim and a jury demand. Wyrsch filed his answers to the request for admissions but failed to verify his response as required by N.M.R. Civ.P. 36(a), N.M.S. A.1978.

Morrison moved to strike Wyrsch's amended answer and the district court granted the motion. Wyrsch moved the court to reconsider and was granted 15 days in which to file "proper pleadings." The

court did not specify what it meant by "proper pleadings." Wyrsch thereupon filed an amended answer identical to that previously filed with a similar counterclaim, a jury demand and a verified response to the request for admissions. Morrison moved again to strike these pleadings and also moved for summary judgment. The court granted both of Morrison's motions.

A. *The Counterclaim*

In his amended answer, Wyrsch attempted to add a compulsory counterclaim—one which "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . ." N.M.R. Civ.P. 13(a), N.M.S.A.1978. Rules 7(a) and 13(a) of N.M.R. Civ.P., N.M.S.A.1978, provide that a counterclaim is to be part of the answer, and Rule 13(f) provides that if omitted, it may be added only when leave to amend has been granted by the court.

Wyrsch disputes whether Rule 13(f) alone governs amendments for the addition of counterclaims or whether N.M.R. Civ.P. 15(a), N.M.S.A.1978, is also applicable. He had relied upon Rule 15(a) in his first attempt to amend.

Rule 15(a) states that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . . ." But Rule 13(f) provides that "[w]hen a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment." We hold that Rule 13(f) alone governs the addition of counterclaims by amendment.

Of the federal courts which have dealt with this same question under the federal rules, most agree with our conclusion that Rule 13(f) governs counterclaim amendments exclusively. *See Stoner v. Terranella*, 372 F.2d 89 (6th Cir. 1967); *Goldlawr, Incorporated v. Shubert*, 268 F.Supp. 965 (E.D.Pa.1967). *But see A. J. Industries, Inc. v. United States Dist. Ct., C. D. of Cal.*, 503 F.2d 384 (9th Cir. 1974).

Under Rule 13(f) and pursuant to this holding, a counterclaiming party must demonstrate as a condition precedent for leave to amend that "oversight, inadvertence or excusable neglect" caused the counterclaim to be left out of the original pleading, or that "justice requires" its addition. This may be accomplished by motion to the court and, if necessary, the court should conduct a hearing on the matter.

The record shows that after his first unsuccessful attempt, Wyrsch did obtain leave of court to add the counterclaim by the second amendment and that he responded within the time allowed. Although the record does not disclose on what basis leave was granted, we may assume that it was granted for a reason set forth in Rule 13(f). It is not necessary, as Morrison argued, that Wyrsch also plead his "oversight, inadvertence or excusable neglect" in his amended pleading once the court has allowed the addition.

Wyrsch's first attempt to amend is not an issue. That amendment was properly stricken for failing to obtain consent of the court. However, the trial court erred in striking the second amended answer and in rendering summary judgment without considering the stricken pleading.

B. *The Jury Demand*

The record indicates that Wyrsch did not make a jury demand within ten days after his answer to Morrison's complaint as required by N.M.R. Civ.P. 38(a), N.M.S.A. 1978. Failure to demand a trial by jury in a timely manner will result in the waiver of a jury trial. Rule 38(d). Once waived, the right is not automatically revived by the filing of an amended pleading except as to new issues raised. *Griego v. Roybal*, 79 N.M. 273, 442 P.2d 585 (1968); *Davis v. Severson*, 71 N.M. 480, 379 P.2d 774 (1963).

Wyrsch has therefore waived his right to a jury trial on the issues raised in the complaint. As to any new issues raised by Wyrsch's counterclaim, he is entitled to a jury trial, for he had filed a jury demand within 10 days of filing his amended answer.

C. *Response to Request for Admissions*

Wyrsch failed to comply with Rule 36(a), in that his response to the request for admissions was not sworn to by him but only signed by his attorney. The rule provides:

> [e]ach of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than ten days after service thereof or within such longer or shorter time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters, or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper with a notice of hearing the objections at the earliest practicable time.

Morrison contends that each admission he requested was properly admitted because Wyrsch failed to comply with the requirements of Rule 36(a). We have previously held that an unexcused failure to file a timely, sworn response is the equivalent of filing no response and that all matters requested are thereby deemed admitted. *Robinson v. Navajo Freight Lines, Inc.*, 70 N.M. 215, 372 P.2d 801 (1962).

Although Wyrsch attempted to correct his default by filing a sworn statement, it was not filed within the time limits of the rule. He urges his own contrition and requests leniency so that he can have his day in court and receive a judgment on the merits and not one based upon a pleading technicality.

We hold that the district courts have discretion in this area. Although the rule does not provide for the particular situation presented by this case, we reaffirm the principle that the purpose of pleading is to facilitate proper decisions on the merits. *Hambaugh v. Peoples*, 75 N.M. 144, 401 P.2d 777 (1965). All pleadings should be construed so as to do substantial justice, N.M.R. Civ.P. 8(f), N.M.S.A.1978.

There is no record on appeal indicating that the district court considered whether Wyrsch's failure to verify his response was excusable. If the court properly considered this matter and then deemed as admitted all the matters requested by Morrison, there is "no genuine issue as to any material fact" and Morrison is "entitled to a judgment as a matter of law." N.M.R. Civ.P. 56(c), N.M.S.A.1978. As the record before us is silent on this issue, we must remand for further proceedings consistent with this opinion.

IT IS SO ORDERED.

EASLEY and FEDERICI, JJ., concur.

603 P.2d 298

STATE of New Mexico, Plaintiff-Appellee,

v.

Alan Charles COZZENS, Defendant-Appellant.

No. 3974.

Court of Appeals of New Mexico.

Sept. 25, 1979.

Jeff Bingaman, Atty. Gen., Lawrence A. Barela, Asst. Atty. Gen., Santa Fe, for appellee.

Dan B. Buzzard, Clovis, for appellant.

OPINION

HERNANDEZ, Judge.

Defendant appeals his jury conviction of possession of over eight ounces of marijuana contrary to Section 30–31–23(B)(3), N.M.S.A.1978. He alleges four points of error. His fourth point, which is dispositive of this appeal, is that the trial court erred in admitting statements made by defendant's wife over defendant's objection that they were privileged and hearsay.

The pertinent facts are these: On September 15, 1978, several police officers, including Officers Walker and Brown of the Portales Police Department, went to defendant's home to execute a search warrant. No one was at home when the officers first arrived but a few minutes later defendant's wife arrived and identified herself. Officer Walker testified that he asked defendant's wife who lived there and she stated that she and her family lived there. Officer David Brown, who knew defendant's wife, testified that shortly after she arrived she said to him: "David, I told him not to grow it. I told him that he would get in trouble."

Rule 801, N.M.R. of Evid. recites:

> " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

The state argues that as to the testimony of Walker it was not prejudicial. This argument is specious. This is the only evidence linking the defendant with the premises where the marijuana was seized at the time the warrant was executed. There was evidence that the defendant and his wife conveyed the premises several months after the warrant was executed. This witness testified that they were unable to discover a deed conveying the premises to the defendant and his wife.

As to the testimony of Brown, the trial court ruled that it was "permissible as part of the *res gestae*." Rule 803(2), N.M.R. of Evid. provides:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * * * * *
>
> (2) 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."

Clinard v. Southern Pacific Company, 82 N.M. 55, 475 P.2d 321 (1970):

"The difficulty of res gestae is always the same: its application to a particular situation * * * the particular facts of each case must control rather than rigid rules of exclusion which may keep out the truth.

* * * * * *

'Spontaneity', stated to be the most influential factor in determining admissibility under the doctrine of res gestae, is a product of stress. [Citation omitted.] Absent stress we question its 'spontaneity'."

Stahl v. Cooper, 117 Colo. 468, 190 P.2d 891 (1948) states:

"[A] statement, if part of the res gestae, must be in the nature of an exclamation, rather than an explanation; it must be spontaneous and instinctive rather than deliberate."

That is, if the tension resulting from the incident did not provoke the statement; but rather, it was the result of deliberation then it is not admissible as part of the *res gestae*. See *State v. Godwin*, 51 N.M. 65, 178 P.2d 584 (1947).

It is apparent from the statement that defendant's wife had been very concerned about what he was doing. Her comment can best be described as a narrative of a past occurrence rather than spontaneous exclamation produced by the stress of the moment. It is our opinion that the trial court erred in allowing the officers to testify about these statements, they were inadmissible as hearsay.

It is unnecessary to consider whether these statements were privileged.

We reverse and remand with instructions to grant the defendant a new trial.

IT IS SO ORDERED.

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

603 P.2d 300

Solon E. MINNERUP, Plaintiff-Appellee,

v.

STEWART BROTHERS DRILLING COMPANY, Employer and New Hampshire Insurance Company, Insurer, Defendants-Appellants.

No. 4050.

Court of Appeals of New Mexico.

Oct. 2, 1979.

Victor Roybal, Jr., Roybal & Crollett, Albuquerque, for plaintiff-appellee.

Joe L. McClaugherty, Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for defendants-appellants.

OPINION

WOOD, Chief Judge.

There are two issues in this workmen's compensation case: (1) propriety of a lump-sum award (a) where maximum compensation benefits were being paid and (b) there were unpaid medical benefits; and (2) attorney fees.

Lump-Sum Award

Authority for a lump-sum award has existed since the enactment of § 52–1–56(B), N.M.S.A.1978, in 1929. However, in 1959, the Legislature enacted a specific provision for lump-sum awards in cases involving total permanent disability or death. This specific provision, Laws 1959, ch. 67, § 9, was amended by Laws 1969, ch. 133, § 1 and Laws 1975, ch. 284, § 7. As currently worded, the specific provision appears as § 52–1–30(B), N.M.S.A.1978. The lump-sum award in this case involves § 52–1–30(B), supra, inasmuch as partial disability is not involved. See *Codling v. Aztec Well Servicing Co.,* 89 N.M. 213, 549 P.2d 628 (Ct.App. 1976).

The specific provision in cases involving total permanent disability or death has, throughout its legislative history, provided for the discharge of the employer's "liability" for compensation by the payment of a lump-sum. For liability to be discharged, the right to compensation must have been established. The right to compensation has been established (a) by a trial court judgment of total permanent disability, *Lamont v. New Mexico Military Institute,* 92 N.M. 804, 595 P.2d 774 (Ct.App.1979); compare *Lane v. Levi Strauss & Co.,* 92 N.M. 504, 590 P.2d 652 (Ct.App.1979); (b) by a stipulated settlement, *Livingston v. Loffland Brothers Co.,* 86 N.M. 375, 524 P.2d 991 (Ct.App.1974); and (c) by admissions of the employer, *Arther v. Western Company of North America,* 88 N.M. 157, 538 P.2d 799 (Ct.App.1975); see *Villegas v. American Smelting & Refining Co.,* 89 N.M. 387, 552 P.2d 1235 (Ct.App.1976).

Defendants attack the propriety of the lump-sum award in this case. We do not discuss the various contentions because the initial, and dispositive, question is whether the right to compensation could properly be decided. This question involves § 52–1–69, N.M.S.A.1978, which states:

> No claim shall be filed by any workman who is receiving maximum compensation benefits . . . .

It is undisputed that defendants had paid, and were paying, compensation benefits to plaintiff of $114.61 per week. In his opening statement, plaintiff claimed the "correct amount" should have been $124.97 per week. This claim was not established. The trial court found that: "Defendants have paid temporary total disability benefits to plaintiff at the applicable rate." The rate was $114.61 per week. Plaintiff has not challenged the trial court's finding and has not cross-appealed. Thus, it is established, for this appeal, that plaintiff was receiving maximum compensation benefits.

The complaint acknowledged payments of $114.61 per week, but nevertheless sought an award of total permanent disability and asked that the award be a lump-sum. Because plaintiff was being paid maximum compensation benefits, § 52–1–69, supra, barred his claim for total permanent disability. The consequence of the bar to the claim for total permanent disability, there being neither admission nor stipulation establishing total permanent disability, was that the trial court lacked authority to order a lump-sum award based on a total permanent disability.

We recognize that the opinions in *Briscoe v. Hydro Conduit Corporation,* 88 N.M. 568, 544 P.2d 283 (Ct.App.1975) and *Armijo v. Co-Con Const. Co.,* 92 N.M. 295, 587 P.2d 442 (Ct.App.1978), may have introduced uncertainty in this aspect of our workmen's compensation law. Any such uncertainty is resolved by recognizing that payment of maximum compensation benefits by the employer, without court order, makes § 52–1–69, supra, applicable and that so long as such maximum compensation benefits are being paid, a suit to establish the right to compensation is barred. When a suit to establish the right to compensation is barred, and there is neither admission nor stipulation establishing that right, there is no case of total permanent disability and no authority for a lump-sum award, based on total permanent disability, under § 52–1–30(B), supra.

We have pointed out that plaintiff was being paid maximum compensation benefits. We used "compensation" in the sense of payments to the workman for his disability. Such payments were being made to the workman in *Armijo v. Co-Con Const. Co.,* supra. In *Armijo,* plaintiff sought recovery for failure of defendants to provide safety devices and sought to use the safety device claim as a basis for a lump-sum award. This could not be done under the express provisions of § 52–1–69, supra; the effort to obtain a lump-sum award was premature.

In this case, plaintiff sought to utilize a claim for medical expenses as a method for obtaining a lump-sum award. In *Martinez v. Wester Brothers Wholesale Produce Co.,* 69 N.M. 375, 367 P.2d 545 (1961), the plaintiff unsuccessfully sought to utilize a failure to pay medical expenses as a method to litigate a claim for compensation benefits which had been prematurely filed. *Martinez,* supra, distinguished installment compensation benefits from medical benefits. *Valdez v. McKee,* 76 N.M. 340, 414 P.2d 852 (1966) states:

> [W]e have held that the "installments" [compensation benefits] to which the statute refers do not include the workman's medical benefits . . . [citations omitted]. It was not the intention of the legislature to make the medical benefits . . . subject to the limitations of § 59–10–13.5, N.M.S.A.1953 [now § 52–1–30, supra].

Under *Martinez* and *Valdez,* supra, a claim for medical benefits may not be utilized as a device to obtain a lump-sum award. This is so because medical benefits are not the same as installment compensation payments, and the right to installment compensation benefits must be established as a prerequisite to a lump-sum award. Compare *Nasci v. Frank Paxton Lumber Co.,* 69 N.M. 412, 367 P.2d 913 (1961). Section 52–1–69, supra, bars a suit to establish the right to compensation and, thus, bars a lump-sum award where maximum compen-

sation benefits are being paid. "Compensation" in § 52–1–69, supra, refers to payments of compensation for disability; "compensation" in § 52–1–69, supra, does not refer to medical benefits. So much was established prior to *Schiller v. Southwest Air Rangers, Inc.,* 87 N.M. 476, 535 P.2d 1327 (1975).

Schiller, supra, held that "medical expenses are compensation for the purpose of allowing attorney fees . . . ." That being the sole question considered, *Schiller* is not authority for allowing a suit to establish a total permanent disability when maximum benefits for that disability are being paid.

Summarizing: Where maximum compensation payments for disability are being paid, a suit to establish a right to compensation on the basis of total permanent disability is barred, and there is no authority to lump-sum a total permanent disability which has not been established. A corollary is that where maximum compensation benefits for disability are not being paid, a suit to establish disability may be brought, and if total permanent disability is established, a lump-sum may be awarded where exceptional circumstances warrant a departure from payment of compensation in installments. See *Lamont v. New Mexico Military Institute,* supra. Where maximum compensation benefits for disability are being paid, a suit for medical expenses does not provide a basis for deciding the question of total permanent disability in order to seek a lump-sum award.

The trial court erred in deciding plaintiff's disability because maximum compensation benefits were being paid for plaintiff's disability. Disability not being an issue for decision, the trial court erred in deciding that plaintiff was totally and permanently disabled, and in awarding a lump-sum for that disability.

Attorney Fees

Attorney fees can be awarded in a suit for medical expenses only. *Schiller v. Southwest Air Rangers, Inc.,* supra. The award of attorney fees in this case does not distinguish between attorney fees for securing payment of medical expenses and for obtaining the improper lump-sum award. Accordingly, the award of attorney fees is reversed.

The judgment awarding a lump-sum for total permanent disability is reversed. The cause is remanded for entry of a judgment limited to the recovery of medical expenses and to an award of attorney fees for securing payment of medical expenses.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

603 P.2d 303

Rose TRUJILLO, as Administratrix of the Estate of Ernest Trujillo, Deceased, Plaintiff-Appellant,

v.

The CITY OF ALBUQUERQUE, a Municipal Corporation, et al., Defendant-Appellee.

No. 3779.

Court of Appeals of New Mexico.

Oct. 11, 1979.

Thomas E. Jones, Albuquerque, for plaintiff-appellant.

Mark C. Meiering, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, Cornelius Finnen, Asst. City Atty., Albuquerque, for defendant-appellee.

OPINION

ANDREWS, Judge.

The question presented in this case is whether, prior to both the prospective abrogation of the doctrine of sovereign immunity by our Supreme Court in *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975), and the enactment of New Mexico's Tort Claims Act, § 41–4–1 et seq., N.M.S.A.1978, a municipality of this State could be sued for its failure to provide adequate police protection in a public park. The trial court found that such a suit could not be maintained. We affirm.

On June 22, 1975, plaintiff's decedent, Ernest Trujillo, along with a group of friends, was in Roosevelt Park, a park established and maintained by the City of Albuquerque. Earlier in the day, a rock concert had been held but Ernest and his friends went to the park after the concert was over. They were sitting on the grass when they were approached by, and had some kind of altercation with, another person who then left the park. Shortly thereafter, a second person approached Ernest and his group, accusing them of having "picked on" his brother, and drew a gun, firing it once or twice. Ernest and his friends then chased this person to the top of a knoll where a third person, Wilbert Miles, stood and fired a shotgun "into the ground", hitting and killing Ernest.

This action is brought by Ernest's mother for damages caused by the death of her son. Her first complaint alleged that the City maintained the park; that the maintenance of the park was a proprietary function of the City; that the City allowed the rock concert to be held in the park without proper police and security arrangements; that the City had a duty to secure the park and protect citizens using it, particularly a duty to protect Ernest's well-being; and that the City breached its duty and was therefore liable in damages.

The City moved to dismiss or for summary judgment and the motion was granted for failure to state a claim, with leave granted to amend. The first amended complaint alleged basically the same facts but noted that the park had been known as a "hot bed" for years and that, in failing to take measures to maintain the park as a safe place, the City had allowed it to become a nuisance. Further, the plaintiff alleged that the City's negligence in maintaining the nuisance resulted in Ernest's death and prayed for damages totalling $1,096,560.00.

The City again moved to dismiss for failure to state a claim or for summary judgment. The court granted the motion for summary judgment, finding as follows:

1. That characterizing the cause of action as a nuisance, or characterizing the cause of action as based upon park maintenance, does not change the true character of the action wherein the real complaint is that the City did not provide adequate police or other protection at Roosevelt Park.

2. The claim that the City inadequately provided police or other protection for the public from assault, battery and possible death, is a governmental function and the action having occurred before the doctrine of sovereign immunity was abrogated, results in the conclusion that the City is not subject to suit in this action.

The plaintiff appeals from the summary judgment, raising as her only point the existence of genuine issue of material fact, "namely, whether or not the manner in which Roosevelt Park was maintained on the 22nd of June, 1975, and prior thereto constituted a nuisance."

The trial court, as shown by its order, considered the action to be based on the City's failure to provide police protection to Ernest, that the provision of such protection was a governmental function and therefore one on which the City was immune to suit. These conclusions were correct.

While New Mexico courts have not had occasion to directly address the question of whether a city is liable for failure to provide adequate policing to protect one citizen from being assaulted by another citizen, it is clear that a municipality will neither be held liable for failure to carry out a statutory function, nor a governmental function. The City of Albuquerque was granted immunity in *Barnett v. Cal M, Inc.*, 79 N.M. 553, 445 P.2d 974 (1968), when it was held that the operation of a police department is a governmental function, and the City of Clayton was found to have no special duty beyond that owed to the public in general in *Doe v. Hendricks*, 92 N.M. 499, 590 P.2d 647 (Ct.App.1979).

In *Doe v. Hendricks*, a case we find consistent with the majority rule, *see Henderson v. City of St. Petersburg*, 247 So.2d 23 (Fla.App.), *cert. denied*, 250 So.2d 643 (Fla. 1971); *Riss v. City of New York*, 22 N.Y.2d 579, 293 N.Y.S.2d 897, 240 N.E.2d 860 (1968); Anno. "Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection", 46 A.L.R.3d 1084 (1972), the parents of a child brought an action for damages against the City and its police officers alleging that the child had been assaulted because the police, after having been called, failed to respond with sufficient speed to prevent the assault.

Judge Sutin found that liability for such failure would exist only if there had been a specific promise or protection by the police to the victim or if the police officer had affirmatively caused the damage of which the plaintiff was complaining, stating that the public duty owed by the City and its police officers will not support an action for damages by a single citizen harmed by the criminal action of another.

Thus, where there is no showing of a direct relationship or contact between the victim and the police creating a special duty, there is no liability on the part of the police and municipality. Plaintiff here has failed to establish that a special duty exist-

ed between the victim and the police, therefore there is no liability.[1]

Next, the plaintiff argues that the maintenance of a public park is a proprietary function which exposes the City to liability. In making this argument, plaintiff fails to distinguish between maintenance of physical facilities in a park such as was the case in *Murphy v. City of Carlsbad*, 66 N.M. 376, 348 P.2d 492 (1960) and the maintenance of law and order so as to prevent third persons from committing violent acts in a park. The distinction is decisive and controlling. For while maintenance of parks is a proprietary or private function, the maintenance of good order in a park, and the prevention of dangerous conditions there caused by imprudent conduct of individuals is a governmental function, in the exercise of which a municipality is not liable. *See Williams v. City of Longmont*, 109 Colo. 567, 129 P.2d 110, 142 A.L.R. 1337 (1942).

Finally, plaintiff contends that the lack of police protection for Roosevelt Park was a condition constituting a public nuisance, and that she has standing to abate such a nuisance under § 30–8–8(B), N.M.S.A.1978, which states:

> A civil action to abate a public nuisance may be brought, by verified complaint in the name of the state without cost, by any public officer or private citizen, in the district court of the county where the public nuisance exists, against any person, corporation or association of persons who shall create, perform or maintain a public nuisance.

We need not address the issue of whether the alleged conduct of the City constitutes a public nuisance because it is clear that the statute cited above imposes no duty on the city in connection with the alleged public nuisance. As stated in *Roberson v. District of Columbia*, 86 A.2d 536 (D.C.1952), where the plaintiff was injured by children playing on a city sidewalk:

> any duty of the District to prevent loitering, congregating and playing on public sidewalks is a public duty calling for the exercise of the government's police power, and the exercise of police power is strictly a governmental function. Moreover, the prevention of loitering involves either the making or enforcing of regulations governing the use of streets and the decisions generally are in accord that no liability may be imposed on a municipal corporation for its failure to enact or enforce ordinances. 86 A.2d 536.

Such reasoning is applicable here. As in *Roberson*, the alleged nuisance is not the condition of the land, the physical structures on the land or the activities of the landowners. The alleged nuisance is the acts of third persons who come on the land. *Accord Tennessee Coal Iron & Railroad Co. v. Hartline*, 244 Ala. 116, 11 So.2d 833 (1943); *Southern Ry. Co. v. State*, 130 Tenn. 261, 169 S.W. 1173 (1914).

To hold a municipality liable for the conduct of third persons, such as is alleged in the complaint before us, would, in our opinion, be contrary to sound public policy and create policing requirements difficult of fulfillment. As stated in *Doe v. Hendricks, supra*, 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.

WOOD, C. J., concurs.

SUTIN, J., dissenting.

SUTIN, Judge (dissenting).

I dissent.

The City of Albuquerque's motion for summary judgment was granted. Summary judgment was not based upon the

1. Immunity need not be discussed in view of the prospective holding in *Hicks v. State, supra*.

premise that no genuine issue of material fact existed. It was based upon two erroneous legal principles set forth in the majority opinion: (1) the real complaint of plaintiff's amended complaint is that the City did not provide adequate police or other protection at Roosevelt Park and (2) that police protection is a governmental function. Summary judgment should be reversed.

Before establishing reversible error, it is more important to me, if this opinion is not denied publication by the Supreme Court, to educate the uneducated appellate lawyer. Ofttimes, I prefer that certiorari be denied.

A. *Educating an uneducated appellate lawyer is important for the protection of a client.*

Trying to educate the appellate lawyer in the art of appellate practice is as effective as teaching a two year old child the art of becoming a grand master in chess. Rule 9(m)(5), Statement of Proceedings of the Civil Rules of Appellate Practice, provides that in the absence of trial before the court or jury, an appellant shall make "a concise statement or summary of each such ruling or action" of the trial court. This rule is applicable to summary judgments. See excellent Statement of Proceedings in City's Answer Brief.

Plaintiff's Statement of Proceedings, 5½ pages long, irrelevant and immaterial, proves that lawyers may have learned to read the English language, if the above rule was read, but do not understand it. This practice is common, intended, perhaps, to be a good psychological approach in which to attract appellate judges' attention to the issues in the appeal.

This criticism is not new. It has appeared in a host of opinions unknown, of course, to lawyers who will not read or study. Criticism of the remainder of plaintiff's Brief-In-Chief is better left unsaid. Our duty, however, is to protect the client, not the lawyer. Plaintiff's attorney should read this point to his client regardless of the publication or nonpublication of this dissent.

B. *The amended complaint was a substantial change in nature from the original complaint.*

In the original complaint filed, plaintiff claimed that the City *"had a duty to secure Roosevelt Park and protect the citizens"* who used the park, including decedent Ernest Trujillo, but the City "failed to carry out the duty. . . ." [Emphasis added.] This claim was dismissed with leave to amend.

The second count of plaintiff's amended complaint alleged that Roosevelt Park in Albuquerque was for many years a knowingly dangerous park, potentially dangerous to life and limb of persons who used the park; that the City was "beseeched and implored" to take some action *to abate this nuisance*, but it took no action; that the City failed to maintain the park in a safe and proper condition; that "By reason of the City of Albuquerque's *negligence in maintaining this nuisance* and by its acts and omissions *in failing to abate this nuisance*, the Plaintiff decedent [Ernest Trujillo] was wrongfully killed . . . ." [Emphasis added.]

After carefully studying the City's motion for summary judgment, the court wrote the parties:

> *I do not believe*, (1) by characterizing the cause of action as a nuisance, or (2) by characterizing the action by the place where the alleged incident occurred, i. e., a park, *one can change the nature of the action*. . . . [Emphasis added.]

The trial court then granted summary judgment because "the real complaint is that the City did not provide adequate police or other protection at Roosevelt Park" and that this claim is a governmental function and the City is not liable. The trial court was mistaken.

The amended complaint was not "double-talk" in the sense that it sought to "double-cross" the City by changing the nature of the action from "a duty to secure [persons in] Roosevelt Park," to "negligence in maintaining a nuisance" and "failing to abate a

nuisance." Plaintiff made a substantial change in the nature of the original action and stated a claim for relief.

C. *The definition and classification of "nuisance" in New Mexico do not entail police protection.*

Denney v. United States, 185 F.2d 108, 110 (10th Cir. 1950), absent citation of authorities, defines and classifies the term "nuisance":

> . . . Although the term "nuisance" defies universal definition, in legal contemplation it may fairly be said to be the *unreasonable, unwarranted,* or *unlawful use of property, which causes injury, damages,* hurt, inconvenience, annoyance or discomfort *to one in the legitimate enjoyment of his reasonable right of person* or property. Nuisances are classified as nuisances per se and nuisances in fact. A nuisance per se is generally defined as an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings, *while a nuisance in fact is commonly defined as an act, occupation or structure not a nuisance per se, but one which may become a nuisance by reason of circumstances, location or surroundings. But, in either case, once a nuisance is established strict liability is imposed,* unless an efficient intervening cause operates to insulate the defendant from liability. [Emphasis added.]

This definition has been adopted in New Mexico. *Koeber v. Apex-Albuq. Phoenix Express*, 72 N.M. 4, 380 P.2d 14 (1963); *Otero v. Burgess*, 84 N.M. 575, 505 P.2d 1251 (Ct.App.1973). *See, Huntsman v. Smith*, 62 N.M. 457, 312 P.2d 103 (1957) of which it has been said: "The court was mislead by a statement in 65 C.J.S. *Negligence* § 1 at 317 which distinguished nuisance from negligence on the theory that the former was an absolute and the latter a relative duty, whatever this means." Fink, *Private Nuisance in New Mexico*, 4 N.M.L. Rev. 127, 150, Note 79 (1974). *Huntsman* has not been followed. (As attorney for defendant, I could not convince the Supreme Court of its mistake).

Professor Fink points out that "nuisance is said to be either public or private." [id. 127.] Under Note 1, he states that "the definitions and distinctions used in the introductory part of this article are those generally expressed in the Restatement of Torts . . . . It must be recognized, however, that legislatures and courts in various states have defined 'nuisance' and types of nuisances in other senses than the one adopted by the Restatement. *Compare Denney v. United States*, 185 F.2d 108 (10th Cir. 1950) . . . ."

From Professor Fink's introductory note, it appears that *Denney's* definition and classification are applicable in New Mexico to both public and private nuisances. *Denney* was a public nuisance case. The definition and classification were adopted in private nuisance cases.

In May, 1979, the tentative Restatement draft of the law of nuisance became permanent. Restatement of the Law, Second, § 821 a, et seq. (1979). The adoption of this law rests in the Supreme Court.

As applied to the instant case, *Denney* means that if the use of Roosevelt Park was unreasonable, unwarranted or unlawful, it was a nuisance in fact, not a nuisance per se; that if the nuisance interfered with the enjoyment of decedent's legal rights in the park, the City was strictly liable to plaintiff for damages for the death of decedent, Ernest Trujillo.

D. *A nuisance, created and/or maintained, by a municipality, does not grant immunity to the City for acts done in performance of governmental functions.*

A city that creates and maintains a nuisance resulting in injury or death to persons subjects itself to civil liability for its acts whether or not the thing done or omitted constitutes negligence resulting in the nuisance. The city cannot escape liability therefore on the ground that in doing so it was exercising a "governmental function." *Barker v. City of Santa Fe*, 47 N.M. 85, 136 P.2d 480 (1943); 57 Am.Jur.2d *Municipal,*

Etc., Tort Liability, § 298 (1971); Annot. *Rule of municipal immunity from liability for acts in performance of governmental functions are applicable to personal injury or death as result of a nuisance*, 56 A.L.R.2d 1415 (1957); 63 C.J.S. *Municipal Corporations* § 770b (1950).

We must not confuse the concept of "nuisance" with that of "negligence." Where the city's conduct results in creating or maintaining a nuisance, it is an exception to the general rule to the effect that a city is not liable for negligence of its officers when acting in the performance of governmental functions. The gravamen of the offense is not necessarily negligence but nuisance, and is dealt with by the law of nuisance, whether the nuisance is negligently caused or otherwise. *Adams v. Arkansas City*, 188 Kan. 391, 362 P.2d 829 (1961).

Neither must we write essays on the liability of a city's governmental and proprietary activities. The measure of care required of a city arising out of the ownership of a park is the same as that which would have rested upon a private owner of the same property. *Stevens v. City of Pittsburgh*, 129 Pa.Super. 5, 194 A. 563 (1937), affirmed by adoption of lower court's opinion, 129 Pa. 496, 198 A. 655 (1938); *Ide v. City of St. Cloud*, 150 Fla. 806, 8 So.2d 924 (1942).

Stevens approaches the legal problem in the instant case. The City permitted a rifle club to establish a range in a well-defined area of a park. A boy was standing near his home on a neighbor's lawn which faced and was directly opposite the park. The fatal shot was fired by an older boy in the park, not a member of the rifle club, who shot at a tree stump and in some manner instantly killed the other boy. Witnesses testified that a continuous course of conduct in shooting by non-members lasted long enough to amount to implied or constructive notice to the City to afford it an opportunity to remedy the condition; that non-members of the rifle club were in the park with the City's knowledge and upon its implied invitation and permission to use the recreation facilities. The deceased boy's parents recovered judgment, but the trial court granted the City's motion N.O.V. In reversing the trial court, the following rule was enunciated:

> Promiscuous shooting in the park by the city's permitees or invitees was clearly a highly dangerous activity and such a use of the city's land as would be likely to cause injury to other persons, outside of as well as within the park. It cannot be questioned under the testimony that the city had notice of the manner in which the property was being used and had opportunity to suppress the nuisance.
>
> * * * * * *
>
> The breach of duty here was not the failure of the city as a subdivision of the state properly to police, as in the street cases, but rather a failure in its proprietary capacity as a landowner to abate a dangerous condition existing upon its property of which it had notice. *That the only way to abate the nuisance might incidentally be through the use of its police officers or other employees does not make the breach of duty essentially a failure to exercise a governmental function* [194 A. at 568–69.]

A similar case which followed *Stevens*, is *Gaines v. Village of Wyoming*, 147 Ohio St. 491, 72 N.E.2d 369, 372–3 (1947) in which the court said:

> A municipality, which by overt acts not only permits and encourages but also *provides the means for the violation of law by invitees upon public grounds owned by it within the municipality*, may be held liable for the creation and maintenance of a nuisance *even though in the proper exercise of police power such violation should have been suppressed* or offenders apprehended and punished. If it were otherwise, then a municipality . . . would be exempt from damages in an action based upon nuisance . . . while a municipality, which by reason of its mere negligence resulting in a condition properly denominated a nuisance, would be held liable for the damage thereby caused.
>
> * * * * * *

The maintenance of a nuisance is, of course, not sufficient to support a verdict and judgment. *It must also be shown by the evidence that the injury incurred was the proximate result of the maintenance of such nuisance.* . . . [Emphasis added.]

The incidental use of police to abate a nuisance does not transform a nuisance into a governmental function.

E. *Essentials for summary judgment for City for plaintiff's claim of damages by way of nuisance.*

Before the City can be awarded summary judgment, it must make a prima facie showing:

(1) That a nuisance in fact was not created or maintained by the City;

(2) The use of Roosevelt Park by persons invited and permitted to be present did not constitute a nuisance in fact that jeopardized the enjoyment by decedent of his legal rights in the park;

(3) That the City did not have knowledge, constructive or otherwise, that a nuisance in fact existed by reason of its implied invitation and permission of persons to use the park;

(4) That if a nuisance in fact existed, the City was not negligent in maintaining this nuisance and that the failure to abate the nuisance was not the proximate cause of decedent's death.

If this prima facie showing is made, the burden then shifts to plaintiff to establish a genuine issue of material fact.

603 P.2d 310

Helen AMADOR, Plaintiff-Appellant,

v.

Theresa R. LARA and Ben Lara, Defendants-Appellees.

No. 3784.

Court of Appeals of New Mexico.

Oct. 16, 1979.

Kenneth B. Wilson, Roswell, for plaintiff-appellant.

Robert E. Sabin, Atwood, Malone, Mann & Cooter, P. A., Roswell, for defendants-appellees.

OPINION

SUTIN, Judge.

Plaintiff, Helen Amador, appeals from a judgment in which the jury awarded her the sum of $2,500.00. We reverse.

For some unaccountable reason, Helen's Brief-In-Chief follows the Criminal Rules of Appellate Procedure, not the Civil Rules. No Statement of the Case or Statement of Proceedings appear. Other errors and omissions need not be mentioned.

A large percentage of appellate lawyers are oblivious to, or choose to ignore, our rules. Those who fail to read opinions in which criticism flows should receive as much respect from this Court as respect is shown for the rules. Poor briefs lead this Court to become independent advocates in a search for justice. Such briefs should be returned to lawyers. Penalties should be assessed. Whenever necessary, experts in appellate practice should be employed to brief appellate cases. "Now a style of work is a thing of value, and a good style is a pearl of price; but a style can bear only the load which can be lifted by the style." Llewellyn, The Common Law Tradition—Deciding Appeals, 415.

This case arises out of an automobile accident on April 21, 1976, in which Helen sustained personal injuries. Raymond, plaintiff's husband, was not a party to the suit.

During trial, Helen sought to introduce evidence to show that she and her husband lost income because she could no longer help him in the business. Defendant objected on the grounds that Helen was not employed at the time and was not an employee of Saladmaster; that Helen only accompanied Raymond on occasion to assist him in the "house party" events; that Raymond was not a party to the lawsuit and has not filed any cause of action for loss of wages; that Raymond alone was the proper party to assert the cause of action for loss of wages; that it is not relevant evidence since there was no claim for Raymond's loss of earnings and it would be prejudicial to allow this issue to go to the jury.

The trial court requested an offer of proof. Helen and Raymond testified as to the following facts:

Helen and Raymond were equal partners in a business venture. The income tax returns were filed as a partnership. Raymond was a distributor of stainless steel cookware for Saladmaster products which he sold on a commission basis. The checks for the commissions were received in Raymond's name. The manner in which the sales were customarily made was that of a "house party" in which cookware was used to prepare a meal for guests and a "sales-pitch" made for the product. The venture involved travelling. Helen occasionally accompanied Raymond on the trips and assisted in the preparation of meals and helped keep the financial books of the venture.

After the close of the offered testimony, the court sustained defendant's objection. It ruled that any loss of income was that of the husband; that he was not a party to the action and made no claim for his loss of income and that any testimony regarding Helen's activities in assisting her husband in performing his job was improper. The court was mistaken.

Prior to 1975, a married woman had the right in her own name to prosecute a cause of action against one who negligently inflicted bodily injuries upon her. She could recover damages for her physical injury, pain and suffering. The proceeds were her separate property. "The cause of action for the damages to the community for medical expenses, loss of services to the community, as well as loss of earnings, if any, of the wife still belongs to the community, and the husband as its head is the proper party to bring such an action against one who wrongfully injures the wife." *Soto v. Vandeventer*, 56 N.M. 483, 494, 245 P.2d 826, 833 (1952).

Effective July 1, 1973, Article II, Section 18 of the New Mexico Constitution was amended to include the following:

> . . . Equality of rights under law shall not be denied on account of the sex of any person.

In 1975, the legislature enacted § 40–3–7, N.M.S.A.1978. Its purpose was to conform the Community Property Act of 1973 to the constitutional amendment "by making the provisions of the Community Property Law of New Mexico apply equally

to all persons regardless of sex." Section 40–3–14 provides in pertinent part that "either spouse alone has full power to manage, control, dispose of and encumber the entire community personal property." Husband or wife alone may be the "head of the household" whenever matters arise concerning management, control, disposition and encumbrance of community personal property. Whatever action is taken by husband or wife binds the community. This opinion is limited to the power of the wife alone, not only to recover damages for her physical injury, pain and suffering, but the right to recover the entire community loss. We hold that she does. For this purpose, she is the "head of the household" with full power to manage and control personal community property.

The husband is neither a proper, necessary or indispensable party in this case.

Helen's injuries caused a loss of services to the community because she was unable to assist Raymond in the performance of his work. As a result Raymond suffered a loss of earnings which was also community property. Helen is entitled to recover the full amount of the loss to the community. This loss belongs to the community. Damages for Helen's physical injury, pain and suffering is her separate property.

■■ Defendants argue that if the business venture of Helen and Raymond was a true partnership, this became the fly in the ointment because the partnership itself was the proper party to bring the action. True, "A partner may not sue alone on a cause of action belonging to a partnership, and the action must be brought in the names of the partners." *Marx v. Lenske*, 263 Or. 90, 500 P.2d 715, 718 (1972); *Gustafson v. State*, 11 Ariz.App. 176, 462 P.2d 869 (1969); *White v. Jackson*, 252 S.Ct. 274, 166 S.E.2d 211 (1969). But a claim of a partner for personal injuries and damages is not a claim that belongs to the partnership. The right to recover for such injuries and losses would be in the partner, not the partnership. When a tortious act, committed by a defendant, proximately causes personal injuries to, and losses for, one partner, no legal relationship exists between the partnership and defendant, and the right to recover for such injuries and losses would be in the partner, not the partnership. A partnership can normally claim damages only for the joint injury sustained. *Loucks v. Albuquerque National Bank*, 76 N.M. 735, 418 P.2d 191 (1966); 60 Am.Jur.2d *Partnership*, § 327 (1972).

■ A partnership as a matter of law cannot state a cause of action for loss of earnings and profits of the partnership resulting from the negligent injury of one of the partners. *Sharfman v. State*, 253 Cal. App.2d 333, 61 Cal.Rptr. 266, 36 A.L.R.3d 1370 (1967); *Columbia Taxicab Co. v. Mercurio*, 236 S.W. 1096 (Mo.App.1921). *Sharfman* said:

> In the instant case, Sharfman may recover if he can support the first two causes of action, loss of income as a landscape architect. To establish such lost income, he may show what his share of partnership income had been in the past and how this share was diminished by his inability to work because of his injuries. [61 Cal.Rptr. at 36 A.L.R.3d at 1373].

■ A partner can recover his proportionate share of the compensation loss, but not the entire loss of the partnership. *Houghton v. Puryear*, 10 Tex.Civ.App. 383, 30 S.W. 583 (1895).

■ Under this theory, Helen cannot recover the whole partnership loss of earnings. Nevertheless, regardless of what husband and wife denominate their business relationship, the marital relationship in regard to the community estate is a marital partnership. *Smith v. Succession of Smith*, 298 So.2d 146 (La.App.1974); *Ackel v. Ackel*, 57 Ariz. 14, 110 P.2d 238, 133 A.L.R. 549 (1941); *Bortle v. Osborne*, 155 Wash. 585, 285 P. 425, 67 A.L.R. 1152 (1930); 41 C.J.S. *Husband and Wife* § 462, p. 986 (1944). In other words, the "community" is a partnership in a restricted sense in which the husband and wife own equal shares. It is founded upon principles of exact equality and justice as to the property rights of the spouses. *Schmidt v. Huppmann*, 73 Tex. 112, 11 S.W. 175 (1889).

We hold that Helen and Raymond are engaged in business as a marital partnership in which each has full power alone to manage and control the business.

Defendants rely on *Cooper v. Texas Gulf Industries, Inc.,* 513 S.W.2d 200 (Tex.1974) as a proper and logical method of resolving the problem. In *Cooper,* initially, the husband sued alone to rescind a purchase of property which had become community property subject to joint management. There was no writing authorizing the husband to represent the wife in the suit. The husband's suit was dismissed with prejudice. The husband and wife then sued. *Cooper* held that the wife's interest in the community property was untouched by the judgment of dismissal with prejudice of the husband's suit. In other words, the judgment of dismissal with prejudice of the husband's action was res judicata as to the husband but not with respect to the rights and claims of the wife. Of course, this case is inapplicable to the instant tort action by the wife.

Defendants argue that *Cooper* "protects the rights of both spouses to have a voice in litigation concerning community property, and it avoids some troublesome problems which could arise if one member of the community is permitted to assert claims for the community." Defendants put troublesome problems in question form:

> First, would a compromise settlement of the non-party spouse's claims be binding on him? Second, would litigation of such a claim be res judicata of that and other claims by the non-party spouse? Finally, would the discovery rules apply to the non-party spouse . . . ?

These are not troublesome problems of the community or the defendants. The only issue involved is recovery of damages suffered by the community. If either spouse settles or recovers for personal injuries and damages, which is separate property, the community is not bound. If either spouse settles or recovers for a community loss, the community is bound.

With reference to discovery rules on the issue of a community loss, the non-party spouse is a witness subject to the same discovery rules applicable to any other witness.

In the instant case, Raymond testified on behalf of Helen to allow her to recover for the community loss. Res judicata would be binding on him. We agree that the best method of solving the problem is to have both spouses join in the prosecution of a claim for community damages, but "the best method" is the better of two methods, and it should not be used as the only viaduct over which the law travels. In *Cooper,* the trial court recognized the right of the wife to assert her claim in a subsequent suit. We agree that to encourage additional litigation in the latter part of the 20th century adds fuel to the fire. Today, the courts seek to end litigation within all reasonable bounds.

What we find difficult to understand is this:

> In the instructions, the court allowed Helen to recover "The reasonable expense of necessary care, treatment and services received," etc., all of which constitute a community loss, and yet the court denied Helen the right to recover loss of services or earnings of the community, also a community loss. Both losses are in same category.

Helen also claims that the trial court erred in its written communication with the jury. We agree.

The foreman of the jury submitted the following written communication to the court:

> The jury needs the complete total medical expense, up to this date 7/13/78.

After consultation with attorneys and over objection of Helen, the court responded in writing:

> Under the evidence presented in this case the sum of $429.14 is the complete medical expense to date of July 13, 1978.

This response did not state the "complete *total* medical expense." The only medical expense proven was the sum of $429.14 due one doctor. The jury knew this fact. How-

ever, it was not the complete total medical expense to date. Helen did fail to introduce evidence of the amount of medical expenses due to three other doctors as well as other expenses of procedures testified to.

Helen relies on Rule 107 of the Rules of Evidence. It reads:

> The judge shall not comment to the jury upon the evidence or the credibility of the witnesses.

The parties took this issue lightly. No authority was cited. No argument was made upon the application of Rule 107 to communications with the jury during deliberations. It has received only passing fancy in New Mexico. For two cases of erroneous comment on the evidence, *see, Anderson v. Welsh,* 86 N.M. 767, 527 P.2d 1079 (1974); *Turrietta v. Wyche,* 54 N.M. 5, 212 P.2d 1041, 15 A.L.R.2d 407 (1949).

In other states, under constitutional provisions which forbid comments on the evidence, it has been held that "The judge 'comments' on the evidence when he expresses his opinion to the jury as to what the evidence shows or does not show, or when he assumes any particular fact, which has been disputed, as being in fact proven." *State v. Vann,* 11 Ariz.App. 180, 463 P.2d 75, 78 (1970); *Case v. Peterson,* 17 Wash.2d 523, 136 P.2d 192 (1943). "This prohibition applies equally to the judge's instructions to the jury and to comments made by the judge in the course of the trial." *State Highway Department v. Buzzuto,* 264 A.2d 347, 351 (Del.1970).

The only case found in which the jury sent a note to the court during deliberations is *Weber v. Kamyr, Inc.,* 269 Or. 617, 525 P.2d 1307 (1974). The jury requested the "number of the exhibit which was the contract between Kamyr and Boise Cascade." The court gave the wrong number, but when informed by the attorneys, the jury was called in and were given the correct number of the exhibit. Plaintiff argued that even if the number given had been correct, his statement would have been a comment on the evidence. The court said:

> We believe plaintiff is being hypercritical when he says that answering such a question of the jury correctly would be improper as a comment on the evidence. . . . The jury ultimately received the correct information and no harm was done. (id. 525 P.2d 1310).

It is important to state that "A court should be conscious of the fact that it is the dominant figure in the courtroom in any jury proceeding and that an inadvertent comment on the evidence, or its attitude or belief or disbelief can influence the jury." *Gabosch v. Tullman,* 21 Ill.App.3d 908, 316 N.E.2d 226, 230 (1974).

After submission of the cause to the jury all communications between the judge and the jury must take place in open court and in the presence of, or after notice to, the parties or their counsel. *Klesser v. Stone,* 201 S.E.2d 269 (W.Va.1973); *Boedges v. Dinges,* 428 S.W.2d 930 (Mo.App.1968); *Conrey v. McGehee,* 473 S.W.2d 617 (Tex. Civ.App.1971); *Wilson v. Hartley,* 365 Mich. 188, 112 N.W.2d 567 (1961); *Anderson v. Taylor,* 154 Ind.App. 217, 289 N.E.2d 781 (1972); 89 C.J.S. *Trial* § 473, p. 115 (1955); 75 Am.Jur.2d *Trial,* § 1001, p. 843 (1974).

This Court was firmly committed to the uniform rule that any communication between judge and jury, except in open court and in the presence of the accused and his counsel was reversible error. "Whatever fact the juror desires to communicate to the trial court relative to the case then on trial should be made from the jury box in open court and in the presence of the parties and likewise the answer of the judge thereto." *State v. Hunt,* 26 N.M. 160, 170, 189 P. 1111, 1115 (1920); *State v. Nelson,* 63 N.M. 428, 321 P.2d 202 (1958). This rule was applicable in civil cases.

We note that in *Hunt,* reliance was had on an early civil case in Massachusetts in which the judge urged the jury to agree on the verdict. The court concluded as follows:

> *Courts are a human institution, and we cannot expect mechanical perfection even in such vital areas as jury consideration. Errors will appear in every trial. It is fundamental that to eradicate a complet-*

ed adjudication of rights by granting a new trial the errors complained of must be prejudicial. [Emphasis added.] [201 S.E.2d at 274.]

Hunt has been modified to require error to be prejudicial. *State v. Beal,* 48 N.M. 84, 146 P.2d 175 (1944); *State v. Evans,* 48 N.M. 58, 145 P.2d 872 (1944); *State v. Clements,* 31 N.M. 620, 249 P. 1003 (1926).

To warrant a new trial, prejudicial error must have affected the verdict of the jury.

In the instant case, the trial court sent a written comment to the jury on the evidence relative to damages but not in open court. In open court, inquiry could have been made of the jury of the meaning of the phrase "the complete total medical expenses." After an explanation, the judge and opposing lawyers could then, in chambers, determine an appropriate answer, written in form to avoid ambiguity, and deliver the answer to the jury orally and in writing in open court. This procedure would accord the parties an atmosphere of impartiality, free of any suspicions of taint, confusion or misunderstanding.

The trial court erred in commenting on the evidence.

Liability of defendants for personal injury, pain and suffering was established by the judgment below. The only issue remaining is damages for loss of earnings suffered by the community.

We hold that plaintiff is entitled to a new trial limited solely to damages for loss of earnings actually caused the community by reason of Helen's injuries. This damage shall be in addition to the original award of $2,500.00.

Reversed.

IT IS SO ORDERED.

LOPEZ and ANDREWS, JJ., concur.

603 P.2d 316

P. V., Plaintiff-Appellee,

v.

L. W., Defendant-Appellant.

No. 4136.

Court of Appeals of New Mexico.

Feb. 12, 1980.

Farmington, for defendant-appellant.

David B. Pittard, Briones, Harrell & Wills, P.A., Farmington, for plaintiff-appellee.

OPINION

SUTIN, Judge.

A judgment was entered that defendant was the natural father of a male child born to plaintiff on February 18, 1978; that plaintiff recover from defendant the sum of $1,888.10 which represented defendant's obligations with respect to pregnancy and support to date of judgment, reasonable attorney fees in the sum of $2,100.00 and monthly payments for support of the child until he reaches the age of 18 years or sooner dies. Defendant appeals. We affirm.

Judgment was first entered on March 21, 1979. On March 26, 1979, defendant moved to vacate the judgment because the parties

had until March 26, 1979 to submit requested findings of fact and conclusions of law. On the same date defendant filed such requested findings and conclusions. Plaintiff filed her requested findings and conclusions on March 27, 1979. On March 29, 1979, the motion of defendant was sustained and the judgment of March 21, 1979 was vacated. On the same day, the court reentered its judgment before making any findings of fact and conclusions of law. Seven days later on April 5, 1979, the court filed its findings of fact and conclusions of law. This decision was mailed to attorneys of record on the same day. Notice of appeal was filed April 26, 1979.

It has been said that the findings "were filed too late and cannot be considered. The trial court had lost jurisdiction of the judgment for this purpose." *Damon v. Carmean*, 44 N.M. 458, 459, 104 P.2d 735 (1940); *Gilmore v. Baldwin*, 59 N.M. 51, 278 P.2d 790 (1955). This sentence means, of course, that the trial court lost jurisdiction upon filing of the notice of appeal, *Davis v. Westland Development Company*, 81 N.M. 296, 466 P.2d 862 (1970), or it lost jurisdiction if no motion was filed to vacate the judgment within 30 days from the entry thereof. Section 39-1-1, N.M.S.A.1978. Our rules contemplate that a written decision will be entered before entry of judgment, but defendant's failure to move for amendment of the judgment waives the error of the court. Rule 52B(a) of the Rules of Civil Procedure. *Kipp v. McBee*, 78 N.M. 411, 432 P.2d 255 (1967).

We point this out because defendant's lawyer did not challenge any of the findings of the trial court and defendant is bound by them.

Defendant raises three points on appeal, each of which will be discussed *seriatim*.

A. *Defendant waived his right to jury trial.*

Before trial, plaintiff specifically waived trial by jury. On the morning of trial, absent compliance with Rule 38 of the Rules of Civil Procedure, defendant orally objected to trial before the court. Defendant claimed he was entitled to a jury trial as of right. The objection was overruled. We agree.

This issue is a matter of first impression under the "Paternity" statute.

Section 40-5-9, N.M.S.A.1978 reads in pertinent part:

> Jurisdiction over proceedings to compel support and establish parentage of the child is vested in the district court of the county in which either parent permanently or temporarily resides, or is found.
>
> . . .
>
> Summons shall be issued and served as in other civil actions, *and the cause shall be tried by jury, unless jury trial be waived by the parties. The procedure shall be the same as in other civil actions.* [Emphasis added.]

The "unless" clause in § 40-5-9 "implies a condition, the non-happening of which prevents a right from arising." *In Re Wiegand*, 27 F.Supp. 725 (S.D.Cal.1939) and cases cited. Unless the condition be met, there is no right to jury trial.

We read the above emphasized language to mean:

> It is mandatory that a paternity suit be tried before a jury. This right does not arise, however, before the following condition is met: the parties must waive their right to a jury trial in accordance with Rule 38(d) of the Rules of Civil Procedure, a rule which applies to all other civil actions in which a jury trial is available to the parties.

Rule 38(d) reads:

> The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d), or to make the jury fee deposit as required, constitutes a waiver by him of trial by jury. A demand for trial by jury made as above provided may not be withdrawn without the consent of the parties.

If one party waives a jury trial, as plaintiff did, it does not deny the other party such as defendant, or any other parties, the right to a jury trial, provided, however, that defendant, or other parties do not waive this right, or, as stated affirm-

atively, defendant, or other parties demand a jury trial in accordance with Rule 38(a).

Defendant relies on Rule 38(a) of the Rules of Criminal Procedure. It reads:

> 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 rule is not comparable. There is a distinct difference between a "paternity" action and a criminal case. The "paternity" action carries no criminal penalty until parentage has been judicially established and either spouse then fails to support a child or fails to comply with a judgment for support of a child. Sections 40–5–20 and 40–5–21. Even so, this prosecution is not barred by civil proceedings to compel support. Section 40–5–22.

A paternity proceeding is a civil action to compel a putative father to support his child. *People ex rel. Yarn v. Yarn*, 73 Ill.App.3d 454, 29 Ill.Dec. 909, 392 N.E.2d 606 (1979); *Hepfel v. Bashaw*, 279 N.W.2d 342 (Minn.1979); *Bigsby v. Bates*, 59 Ohio Misc. 51, 391 N.E.2d 1384 (1978); *Thompson v. Thompson*, 285 Md. 488, 404 A.2d 269 (1979); Uniform Parentage Act, § 14 (1973).

Of course, when a paternity proceeding is an offense against the peace and dignity of a state, it is quasi-criminal in nature. *State v. Horton*, 373 So.2d 1093 (Ala.Civ.App.1979); *State v. Volz*, 156 Ohio St. 60, 100 N.E.2d 203 (1951). Defendant relies on *Volz*. *Volz* held that a bastardy proceeding was essentially a civil action, not a criminal proceeding, so as to require the concurrence of only three-quarters of the members of the jury in a verdict of conviction. The penalty imposed was to enforce defendant's duty to provide for the child's maintenance rather than to punish him for misconduct. In other words, a quasi-criminal proceeding like this one is almost universally held to be a civil proceeding and governed by rules of procedure applicable to civil actions. 10 Am.Jur.2d *Bastards*, § 75 (1963); 10 C.J.S. *Bastards* § 32 (1938). See, Annot., *Right to jury trial in bastardy proceedings*, 94 A.L.R.2d 1128 (1964).

Defendant having failed to demand a jury trial, waived his right thereto.

B. *Defendant lost his right to claim error on denial of directed verdict.*

At the close of plaintiff's case, defendant moved for a directed verdict. The motion was denied. Defendant put on his evidence. At the close of the whole case, defendant did not renew his motion for a directed verdict. Under Rule 50(a) of the Rules of Civil Procedure, defendant waived error, if any, as a result of the trial court's refusal to grant his motion for a directed verdict at the close of plaintiff's case. *Bondanza v. Matteucci*, 59 N.M. 354, 284 P.2d 1024 (1955). Defendant cannot, on appeal, raise any question concerning the legal sufficiency of the evidence to sustain the judgment. *Nally v. Texas-Arizona Motor Freight, Inc.*, 69 N.M. 491, 368 P.2d 806 (1962).

In passing, we point out that if the court believed plaintiff's testimony with reference to the time and place of sexual intercourse with defendant, her testimony standing alone, despite testimony and evidence to the contrary, is sufficient to support a finding of paternity. *Morgan v. Rocha*, 60 N.M. 499, 292 P.2d 992 (1956); *Dorsey v. English*, 283 Md. 522, 390 A.2d 1133 (1978). But, see, *Isaacson v. Obendorf*, 99 Idaho 304, 581 P.2d 350 (1978). It has often been said that the credibility of the witness rests exclusively with the trial court who listens to witnesses and observes their demeanor. Even though we might disagree, we cannot disturb the court's decision because we read from a cold record. We continue to repeat this rule so that the parties and the public will know what the duties are of an appellate court.

C. *Defendant did not challenge the award of plaintiff's attorney fees.*

Defendant claims the award of attorney fees should be reversed because plaintiff did not prove the attorney fees with competent evidence. At the close of the case, the court asked plaintiff's attorney the number of hours spent in the case. The response was more than 35 hours based on an hourly

rate of $60.00. Defendant did not object. The court orally awarded plaintiff an attorney fee of $2,100.00. In its decision, the court found that plaintiff was required to employ an attorney in bringing the action and that $2,100.00 was a reasonable fee. The defendant did not challenge these findings.

Section 40–5–15 provides that "In addition to the judgment for support, there may be a judgment for reasonable attorney fees." In a proceeding of this nature, it is rather difficult to separate the hours devoted to support and those devoted to paternity. Inasmuch as support depends upon the establishment of paternity, we hold that attorney fees awarded for support include work performed on paternity.

The findings of the court are not subject to review.

It appears that defendant had different attorneys who tried and appealed this case. These lawyers overlooked some of the "technical" judicial rules established by the Supreme Court. The deprivation of a jury trial may have affected the result in this case. In the trial of the case, a doctor's deposition was read by the court, but the deposition did not appear in the transcript of the proceedings, nor delivered to the Clerk of this Court. Alleged error in failing to direct a verdict was not preserved for review. Neither were the court's findings challenged in this case. The writer of this opinion does not believe that a client should suffer because of oversights of this nature. "Technical" judicial rules in trial and appellate procedure should not affect the merits of a trial and appeal, nor deprive a client of rights to which he is entitled. Such oversights should not be noted on appeal and the record should be corrected. However, we are bound by precedent and rules of the Supreme Court and we cannot find a way to grant defendant a new trial before a jury.

Affirmed.

IT IS SO ORDERED.

LOPEZ and ANDREWS, JJ., concurring in result.

603 P.2d 320

STATE of New Mexico, Plaintiff-Appellee,

v.

Peter CHACON and Orlando Chacon, Defendants-Appellants.

No. 4052.

Court of Appeals of New Mexico.

Dec. 4, 1979.

Rehearing Denied Jan. 8, 1980.

Writ of Certiorari Denied Feb. 19, 1980.

John B. Bigelow, Chief Public Defender, Santa Fe, Mark H. Shapiro, Asst. Appellate Defender, Raymond G. Sanchez, Albuquerque, for defendants-appellants.

Jeff Bingaman, Atty. Gen., Lawrence A. Barela, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendants Peter Chacon and Orlando Chacon were convicted by a jury of aggravated battery not resulting in great bodily harm contrary to § 30–3–5(B), N.M.S.A. 1978. Both defendants appeal. We hold that reversible error in one aspect of self-defense as to each defendant is dispositive of their appeal.

We find no merit in defendants' claim of conflict between their separate attorneys. In addition, we see no need to address the claim that the trial court abused its discretion in refusing to permit an undisclosed witness to testify because this cause will be remanded for a new trial. However, see *State v. Montoya*, 91 N.M. 752, 580 P.2d 973 (Ct.App. 1978) and *State v. Helker*, 88 N.M. 650, 545 P.2d 1028 (Ct.App. 1975).

A summary of the critical evidence is that both defendants were in Peter's car at a vacuum cleaning station at the victim's car wash. Annoyed that Peter had broken a glass bottle near the car wash, the victim shattered the front side window of Peter's car with a piece of angle iron. When Peter got out of his car the victim hit him three times on his back and Peter fell to the ground. Hereupon, Orlando got out of the car and took away the piece of angle iron from the victim and threw it away. Both defendants then began hitting the victim.

The only instructions pertaining to self-defense given the jury were N.M.U.J.I. Crim. 41.60, N.M.S.A. 1978:

> A person who is threatened with an attack need not retreat. In the exercise of his right of self-defense, he may stand his ground and defend himself.

and N.M.U.J.I. Crim. 41.61, N.M.S.A. 1978:

> Self-defense is not available to the defendant if he [started the fight] * * *.

The giving of U.J.I. Crim. 41.60 was erroneous as to both defendants. There was no evidence of a threat of an attack. The testimony justifying self-defense instructions shows an attack without warnings or threats.

Defendant Peter Chacon contends that refusal to grant a defense of property instruction was erroneous as to him. We disagree. Under the facts of this case, he was personally attacked before he could perform an act in defense of his automobile; and his defense of property theory would be subsumed under his defense of self instruction.

Although N.M.U.J.I. Crim. 41.51, N.M.S.A. 1978 was requested, this instruction delineating the elements of self-defense was not given. This was error as to

the defendant Peter Chacon. The giving of U.J.I. Crim. 41.61 was not a complete self-defense instruction. The Committee Commentary to U.J.I. Crim. 41.61 reads:

> In *State v. Pruett*, 24 N.M. 68, 172 P. 1044 (1918), the court stated that an instruction on this subject, or at least some part of it, is habitually given in New Mexico with instructions on self-defense * * *.

See also *State v. Harrison*, 81 N.M. 623, 471 P.2d 193 (Ct.App. 1970).

Additionally, we observe that the defendant Peter Chacon requested U.J.I. Crim. 41.51 with a draft that omits the "not" from the first sentence which reads:

> Evidence has been presented that defendant acted while defending himself from an attack which ordinarily would not have resulted in death or great bodily harm.

Use Note 1 to that instruction reads, "For use if defense from nondeadly attack or defense form deadly attack." Thus, it is clear that the "not" in the first sentence of this instruction is to be omitted if the victim assaulted the defendant with deadly force. See also *State v. Brown*, 93 N.M. 236, 599 P.2d 389 (Ct.App. 1979).

However, it would appear that when the "not" is omitted from the first sentence of U.J.I. Crim. 41.51, the bracketed paragraph 3, "[3. The force used by defendant ordinarily would not create a substantial risk of death or great bodily harm; * * *]" should not be included. *State v. Horton*, 57 N.M. 257, 258 P.2d 371 (1953) clearly permits a defendant assailed by a deadly force to defend himself with a force that would create "a substantial risk of death or great bodily harm."

Thus, defendant Peter Chacon's requested instruction which included paragraph 3 of U.J.I. Crim. 41.51 might have been technically deficient. However, under the circumstances of this case, he sufficiently alerted the trial court to the need for a self-defense instruction. Compare *Albertson v. State*, 89 N.M. 499, 554 P.2d 661 (1976); see also *State v. Heisler*, 58 N.M. 446, 272 P.2d 660 (1954).

Thus, as to defendant Peter Chacon, the giving of U.J.I. Crim. 41.60 was improper and the giving of U.J.I. Crim. 41.61 did not adequately present his self-defense theory to the jury.

Addressing ourselves to the defendant Orlando Chacon, we find that the refusal to instruct the jury on his theory of self-defense constitutes reversible error. Under the testimony at trial, the sole justification for a defense instruction as to defendant Orlando Chacon was defense of another. His request, pursuant to N.M.U.J.I. Crim. 41.52, N.M.S.A. 1978, was refused. The absence of an instruction on defendant Orlando Chacon's theory of self-defense constituted a failure of the court to perform its duty to instruct on all issues warranted by the evidence. *State v. Heisler, supra.*

As to both defendants, this case is reversed and remanded for a new trial.

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

ANDREWS, J., specially concurs.

ANDREWS, Judge (specially concurring).

I agree with the proposed opinion that the trial court erred in failing to give the jury the basic self-defense instructions. However, I think the opinion is incorrect insofar as it holds that the no duty to retreat instruction, U.J.I. Crim. 41.60, was improperly given in the case of *Peter*. It appears that there was substantial evidence to the effect that the victim smashed the front window on the driver's side and hit Peter on the back three times with an angle iron while Peter was either in the driver's seat or was getting into the car. To me this gives rise to the clear inference that Peter had the opportunities to retreat; immediately after the victim had shattered his car window and began to beat him he was sitting in the driver's seat of his car and had the option of avoiding further trouble simply by driving away. There are few situations in which instruction 41.60 are more clearly called for.

The proposed opinion simply states that "there was no evidence of a threat of an attack. The testimony justifying self-defense instructions shows an attack without warnings or threats." While it is true that Mace took aggressive action without making any initial threat, those actions, smashing the car window and beating Peter, constitute a threat of further injury. *See State v. Barber*, 93 N.M. 782, 606 P.2d 192 (N.M. Ct.App., 1979). Any other interpretation destroys the entire self-defense argument because Peter would have acted only after all the foreseeable damage had been done; such actions would have amounted to revenge rather than self-defense.

603 P.2d 323

Ernest ORTEGA et al., Plaintiffs-Appellants,

v.

Richard L. SHUBE and Transamerica Insurance Company, Defendants-Appellees.

No. 3959.

Court of Appeals of New Mexico.

Oct. 16, 1979.

Anita P. Miller, McCulloch, Grisham & Lawless, P.A., Albuquerque, for appellants.

Kathleen Davison Lebeck, Civerolo, Hansen & Wolf, P.A., Albuquerque, for appellees.

OPINION

LOPEZ, Judge.

Plaintiffs appeal a summary judgment against them granted by the district court in a case brought under the Workmen's Compensation Act, §§ 52–1–1 to 52–1–69, N.M.S.A.1978 and the New Mexico Occupational Disease Disablement Law, §§ 52–3–1 to 52–3–59, N.M.S.A.1978, hereafter referred to as the Occupational Disablement Law.

The issue on appeal is whether § 37–1–14, N.M.S.A.1978, which provides that a second suit may be deemed a continuation of a prior action, is applicable in workmen's compensation and occupational disablement cases.

Plaintiffs were employed by defendant Richard Shube from June to October, 1975. On July 20, 1976, plaintiffs filed suit requesting relief under the Occupational Disablement Law, the Workmen's Compensation Act, and with common law claims sounding in tort and products' liability. The district court dismissed the statutory claims without prejudice on December 23, 1976. Plaintiffs appealed to this court, and we dismissed the case on September 6, 1977, for lack of jurisdiction. *Ortega v. Transamerica Insurance Co.*, 91 N.M. 31, 569 P.2d 957 (Ct.App.1977). About three weeks after the district court dismissed their claims, plaintiffs filed a second suit, only alleging this time that they were entitled to compensation under the Workmen's Compensation Act and Occupational Disablement Law. Appellees moved for summary judgment, which was granted. The second suit was dismissed with prejudice by the district court on January 8, 1979, apparently because the statute of limitations had run before the suit was filed on January 13, 1977. Both the Workmen's Compensation Act and the Occupational Disablement Law have a one year statute of limitations. Sections 52–1–31 and 52–3–16, N.M.S.A.1978. Although first filed in July of 1976, the plaintiffs' statutory claims have not yet been heard on the merits.

Before turning to the issue in this case, we must consider appellees' contention that the order entered is not a final order, and so not appealable. Appellees maintain that summary judgment was not granted on all of the issues raised by appellants. They assert that appellants separately requested medical benefits and that this request was not mentioned in the summary judgment. This argument is without merit. Appellants never mentioned medical benefits in their complaint, but simply sought a determination of benefits under the Work-

men's Compensation Act and the Occupational Disablement Law. Summary judgment was entered, dismissing with prejudice both claims for benefits. Summary Judgment is a final order. *Pederson v. Lothman,* 63 N.M. 364, 320 P.2d 378 (1958), and final orders are appealable. N.M.R.Civ. App. 3(a)(1), N.M.S.A.1978. This suit is properly before us.

Appellants argue that § 37–1–14, a general continuation of actions statute, is applicable in workmen's compensation cases. That section states:

> If, after the commencement of an action, the plaintiff fail therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first.

This section is part of Laws 1880, ch. 5. The 1880 statute contains several sections providing time periods within which certain designated claims may be brought, but none of these relate to workmen's compensation or occupational disablement. Yet, but for another section of the 1880 law, § 37–1–14 would apply to cases brought under the Workmen's Compensation Act and Occupational Disablement Law. The other pertinent section of the 1880 statute is § 37–1–17, N.M.S.A.1978, which states:

> None of the preceding provisions of this chapter shall apply to any action or suit which, by any particular statute of this state, is limited to be commenced within a different time, nor shall this chapter be construed to repeal any existing statute of this state which provides a limitation of any action; but in such cases the limitation shall be as provided by such statutes.

The Workmen's Compensation Act provides a one year limitation on the commencement of an action.

> * * * [I]t is the duty of the workman insisting on the payment of compensation to file a claim therefor as provided in the Workmen's Compensation Act, not later than one year after the failure or refusal of the employer or insurer to pay compensation. . . . . [I]f the workman fails to file a claim for compensation within the time required by this section, his claim for compensation, all his right to the recovery of compensation and the bringing of any legal proceeding for the recovery of compensation are forever barred.

Section 52–1–31(A), N.M.S.A.1978. A similar provision is found in the Occupational Disablement Law. Section 52–3–16(A) and (B), N.M.S.A.1978.

While the issue of whether § 37–1–17 bars § 37–1–14 from application in workmen's compensation cases has not been decided previously, the Supreme Court has said that the statute of limitations of the Workmen's Compensation Act, quoted above, must be strictly construed.

> Where a statute grants a new remedy, and at the same time places a limitation of time within which the person complaining 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.

Swallows v. City of Albuquerque, 61 N.M. 265, 266, 298 P.2d 945, 946–47 (1956). In *Swallows,* the Court held that the statute of limitations in the Workmen's Compensation Act is not tolled by the adjudication and appeal of an initial claim under the Act which fail due to a technicality. The same result was reached in *Fresquez v. Farnsworth & Chambers Co.,* 238 F.2d 709 (10th Cir. 1956). While the federal district court in that case noted the existence of the general continuation of actions statute in New Mexico, it held that the one year statute of limitations in the Workmen's Compensation Act barred a second suit begun after the expiration of that year.

Section 37–1–17 prevents the other provisions of the 1880 law from applying to wrongful death actions. *Natseway v. Jojola,* 56 N.M. 793, 251 P.2d 274 (1952); *Perry v. Staver,* 81 N.M. 766, 473 P.2d 380 (Ct. App.1970). In *Perry,* this court held the general continuation of actions statute,

§ 37–1–14 (then codified as § 23–1–14, N.M.S.A.1953) was rendered ineffective by § 37–1–17 (formerly § 23–1–17, N.M.S.A.1953) in wrongful death suits. This result was necessitated by the existence of a specific statute of limitations in the Wrongful Death Act, § 41–2–2, N.M.S.A.1978 (formerly § 22–20–2, N.M.S.A.1953). Since there was no saving clause in the Wrongful Death Act which would allow the statute of limitations to be extended, § 37–1–14 could not be used in wrongful death actions.

We hold that § 37–1–17 prohibits § 37–1–14 from applying in workmen's compensation and occupational disablement cases. Both the Workmen's Compensation Act and the Occupational Disablement Law contain specific statutes of limitations, §§ 52–1–31 and 52–3–16 supra. Neither act provides a saving clause allowing for an extension of the specified time limit for filing a claim. The court is powerless to change the plain meaning of the statutes.

> * * * [T]he courts cannot provide a saving clause or create an exception where the statute contains none.

Natseway, supra at 798, 251 P.2d at 277.

The one year time period within which a claim must be brought under the Workmen's Compensation Act and the Occupational Disablement Law had elapsed by the time plaintiffs instituted this second suit on January 13, 1977. Because this time period is not extended by the general continuation of actions statute, the trial court correctly granted summary judgment dismissing the complaint. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. N.M.R.Civ.P. 56(c), N.M.S.A.1978, *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972).

Although the issue of the propriety of the trial court's dismissal without prejudice of the workmen's compensation and occupational disablement claims in the first case is not at issue on this appeal, we believe it appropriate to point out that our opinion in the first appeal, 91 N.M. 31, 569 P.2d 957, *supra*, did not reach the merits because there was no appealable order. We believe it is also appropriate to state that the district court proceeded incorrectly. Under Rule 18 of the New Mexico Rules of Civil Procedure, N.M.S.A.1978, plaintiffs had a right to join all of the claims arising out of their alleged injuries. *Cf. Sentry Insurance Co. v. Gallegos*, 87 N.M. 249, 531 P.2d 1222 (Ct.App.), *cert. denied*, 87 N.M. 239, 531 P.2d 1212 (1975) (allowing defendant-employee to counterclaim against plaintiff-employer for workmen's compensation benefits). N.M.R.Civ.P. 21, N.M.S.A.1978 permits multiple claims to be severed. The trial court erred in dismissing the statutory claims without prejudice in the first suit, when it merely should have severed them from the other claims. See dissent of Judge Sutin in the first appeal, 91 N.M. 31, *supra*, at 34, 569 P.2d at 960. The lengthy delay in hearing the merits of plaintiffs' case would have been avoided; and the intent of the workmen's compensation laws to adjudicate claims quickly, as evidenced by the short statutes of limitations in the Workmen's Compensation Act and the Occupational Disablement Law, would have been furthered.

Based upon the discussion concerning appellants' second suit, the only case now before us, the judgment of the trial court is affirmed.

IT IS SO ORDERED.

WOOD, C. J., concurs.

SUTIN, Judge (dissenting).

I dissent.

When workmen file claims for Workmen's Compensation and Occupational Disease benefits within the limitation period, and the claims flounder in the district and appellate courts for over three years and lose their way, our duty is not to rely upon the obvious erroneous legal argument relied upon by the workmen's attorneys. Our duty is to search for a viaduct over which workmen can walk into the courtroom to seek a determination of their claims on the merits.

Plaintiffs were employed by defendant from June to October, 1975. Their claims

were barred if suit was not filed by October, 1976. Sections 52–1–31(A) and 52–3–16, N.M.S.A.1978.

On *July 20, 1976,* within the statutory time, plaintiffs filed amorphous claims under the Workmen's Compensation Act and the Occupational Disease Act. *See, Ortega v. Transamerica Ins. Co.,* 91 N.M. 31, 569 P.2d 957 (Ct.App.1977), Sutin, J., dissenting. Any competent attorney knows how to draw a simple compensation claim. These claims were dismissed "without prejudice" on *December 23, 1976,* after the statutory period had passed. Plaintiffs filed *the present action* on January 13, 1977. However, plaintiffs appealed the judgment.

The first claims were filed within the statutory period. When these claims were filed, the statutory period of limitation was tolled during their pendency since commencement of an action arrests the running of the applicable statutory period. When plaintiffs' claims were dismissed without prejudice on December 23, 1976, they were not dismissed because the district court was without power to adjudicate the claims, but solely for the reason the claims were improperly stated and were joined with other common law claims and with one of products liability; that non-jury claims could not be joined with jury claims. The statutory period was tolled from July 20, 1976 to December 23, 1976, a period of five months thereafter. The claims filed on January 13, 1976 were not untimely.

"The purpose of the requirement that a suit be brought by the claimant within one year after the accident under the penalty of barring his recovery is of a three fold nature; (1) to enable the employer to determine when his potential liability for an accident would cease; (2) as a matter of public policy to prevent suits based on stale claims where the evidence might be destroyed or difficult to produce; (3) to fix a statute of repose giving rise to a conclusive presumption of waiver of his claims on the part of an employee where he fails to bring his suit within the fixed period." When none of the foregoing reasons for barring plaintiffs' claims covered the lapse of the statutory period, a second proceeding brought in a court of competent jurisdiction would prevent the running of the ordinary statute of limitations or the statutory period. The conclusion is that plaintiffs substantially complied with the statutes so as to keep alive their claims up to the time the claims were filed the second time, notwithstanding more than one year elapsed from the date of the accident to the date of filing the claims. *Harris v. Traders and General Ins. Co.,* 200 La. 445, 8 So.2d 289 (1942); *Nini v. Sanford Brothers, Inc.,* 276 So.2d 262 (La.1973); *Jarka v. Falleen Drop Forge Company,* 352 Mich. 620, 90 N.W.2d 699 (1958). This rule is not applicable when a workman's attorney voluntarily dismisses the claim. *DeMars v. Robinson King Floors, Inc.,* 256 N.W.2d 501 (Minn.1977). It has also been held that an employer waives the applicability of the statutory period by failure to file and submit a Form 7 settlement agreement for approval. *Apple v. State Insurance Fund,* 540 P.2d 545 (Okla.1975).

Furthermore, plaintiffs' first claims were dismissed by this Court on September 6, 1977. The period during which the statute is tolled includes the time consumed in an appeal. *Myers v. County of Orange,* 6 Cal. App.3d 626, 86 Cal.Rptr. 198 (1970); *Board of Ed. of Miami Trace Local Sch. Dist. v. Marting,* 185 N.E.2d 597 (Ohio Com.Pl. 1962); *Ripley v. Bank of Skidmore,* 355 Mo. 897, 198 S.W.2d 861 (1947). The statutory period was tolled from the date of the judgment until determined on September 6, 1977.

The statutory limitation period had not expired on the original claim.

To preserve plaintiffs' rights, how simple it would have been for plaintiffs to obtain consent of the court to file an amended claim, limited to Workmen's Compensation and Occupational Disease benefits. The other six counts, if meritorious, could have been re-filed as a separate action within the limitation period. How simple it would have been to request a severance.

In the present appeal, how simple it would be to declare that the fixed statutory period had not expired.

In *Swallows v. City of Albuquerque*, 61 N.M. 265, 298 P.2d 945 (1956), plaintiff's claim was prematurely filed. On appeal, the claim was dismissed. Thereafter, the workman commenced a new action. The court held that the new action commenced more than one year after failure or refusal of the employer to pay compensation was barred by limitations. *No claim had been filed within the statutory period.* In the course of the opinion, the court said:

> * * * *If one does not protect himself and his rights under the law as written it is his misfortune* * * *. [Emphasis added.]

To me, it is not judicious, wise, reasonable or fair to say that workmen themselves, unlearned in the law, must suffer the pangs of outrageous misfortune because their lawyers did not protect their rights prior to a hearing on the merits. Workmen protect their rights when they employ lawyers. The only alternative is to sue the lawyers for legal malpractice. This procedure has never been used, save once. The better way to protect workmen is to rule that when an appeal is taken upon a matter of law, the statutory limitation period is impliedly tolled. *Hoover v. Galbraith*, 7 Cal.3d 519, 102 Cal.Rptr. 733, 498 P.2d 981 (1972). We should not blindly allow a statutory period of limitation to be used as a sword rather than a shield against stale claims.

Some appellate judges believe that litigation should end when cases are appealed more than once; that the punishment should be inflicted upon the clients, not the lawyers; that justice is just a passing fancy when the rights of persons have been erroneously discharged. Statutes and rules of law are often rigidly followed because the function of the reviewing court is to see that justice is done according to law in the cases brought before it. The test for formal legal rationality should not be strict compliance with the law, but whether the determination made is fair and just according to law.

True, the legislature has been in regular session on many occasions since *Swallows* was decided and has not seen fit to amend the statute "for good and cogent reasons." *See, Selgado v. New Mexico State Highway Department*, 66 N.M. 369, 371, 348 P.2d 487 (1960). But this does not mean that appellate courts must "walk the plank" when relief can be found for workmen by application of concepts of "tolling" and "waiver."

To do "justice according to law" may be an "objective" mood that pervades one court and a "subjective" mood in another. But when the statute grants the right of workmen to assistance for the protection of families, we should not allow that right to be severed for the protection of an employer when none of the employer's rights have been prejudiced.

This case should be reversed.

603 P.2d 328

GETTY OIL COMPANY, a corporation, Appellant,

v.

TAXATION AND REVENUE DEPARTMENT of the State of New Mexico, Appellee.

No. 3723.

Court of Appeals of New Mexico.

Oct. 18, 1979.

Norman S. Thayer, Jr., Franklin Jones, Sutin, Thayer & Browne, Albuquerque, for appellant.

Jeff Bingaman, Atty. Gen., Richard M. Kopel, Sp. Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

HERNANDEZ, Judge.

This is an appeal from the Decision and Order of the Revenue Division of the Taxation and Revenue Department (Department) denying Getty Oil Company's (Getty) requested abatement of part of its state income taxes assessed for the calendar years 1972, 1973, and 1974.

Getty is an international company engaged in oil and gas exploration and production, and is also the parent company of a number of wholly-owned subsidiary companies. For the three years in question, Getty and its eligible subsidiaries filed consolidated federal income tax returns. However, for the same three years, Getty elected to file its state income tax returns as a separate corporate entity (excluding its subsidiaries), allocating and apportioning its taxable income pursuant to the Uniform Division of Income for Tax Purposes Act, Sections 7–4–1 to 7–4–21, N.M.S.A.1978. The Department audited the returns and issued an assessment for additional income tax and interest.

Getty raised only one issue at the administrative hearing. It argued that the Department should have audited and assessed its income taxes for the years in question on the basis of the consolidated income reported by Getty in its federal income tax returns, and not on the basis of the separate returns which it had filed. Getty claims that it erred when it filed the separate returns because, having elected to allocate and apportion under the Uniform Division of Income for Tax Purposes Act, *supra,* it was obligated to file its state tax returns on the same basis as its federal tax returns. In support of this contention, Getty argues that the state income tax is levied on "net income" which is defined in Section 7–2–2(T), N.M.S.A.1978 as adjusted "base income." "Base income" is defined by Section 7–2–2(S), N.M.S.A.1978, as follows: "S. 'base income' means that part of the taxpayer's income generally defined as federal taxable income and upon which the federal income tax is calculated."

The Department argues that once Getty elected to file separate entity returns rather than consolidated returns, it cannot decide retroactively to switch to reporting on a consolidated basis. In addition, it contends that "base income" as defined in Section 7–2–2(S) will only coincide with "federal taxable income and upon which the federal income tax is calculated" when the reporting entities are the same.

The pertinent parts of the Decision and Order of the Director of the Department are the following:

"5. The New Mexico Income Tax Act makes no specific reference to consolidated reports. The Act defines a 'person' to include a corporation. (Sec. 72–15A–2(E)); and a taxpayer is defined as an

individual or a corporation (Sec. 72–15A–2(L)). A literal reading of these provisions would lead one to believe that each separate corporate entity is subject to tax to the extent provided in § 72–15B–3.

6. A federal consolidated income tax return is a return of a consolidated group of corporations (Treasury Regulations § 1.1502–2 and 6). When the parent corporation files a consolidated return in the name of the parent and affiliates, it is the return of all of the corporations in the group. The parent is merely acting as the agent for all subsidiaries in the consolidated return. T.R. § 1502.77.

* * * * * *

11. The Bureau had—and apparently still has—a policy which permits corporate taxpayers to elect to file a New Mexico consolidated tax return if the taxpayer files a Federal consolidated tax return. A retroactive election is not permitted. This taxpayer has not elected to file New Mexico consolidated returns. It has not filed amended tax returns on a consolidated basis and it is not requesting leave to file amended returns.

12. This taxpayer had a right to elect to file consolidated New Mexico returns. However, it elected to file return [sic] on a separate corporate entity basis. It never has made an election to file returns on a consolidated basis. Under these circumstances, the Bureau was justified in refusing to recompute tax on a consolidated basis. *Cf. Radiant Glass Co. v. Burnet,* 54 F.2d 718 (1931).

* * * * * *

15. The Taxpayer's contentions that its tax liability for the three years must be computed on a consolidated basis are rejected and denied. On the only issue presented in this case, the position of the Bureau is sustained. The Taxpayer is liable for the corrected tax reflected in Exhibits 16 and 6."

We note that Getty did not seek to amend its return in the proceeding below and disavows any intention to do so here. We therefore do not consider that this is a question we are obliged to answer in spite of the fact that the Director in his Decision and Order elected to do so.

This matter then resolves itself into the following question: Was Getty obligated to file its State income tax return on the same basis as its Federal return? It is our opinion that the Decision and Order of the Director of the Department was correct when he held that Getty was not obligated to do so and that the audit and assessment on the basis that Getty did file was correct.

The only statutory provisions relating to the form in which a taxpayer must file his tax return are the following:

Section 7–1–13(B) and (C), N.M.S.A.1978 of the Tax Administration Act provides:

"B. Every taxpayer shall, on or before the date on which payment of any tax is due, complete and *file a return thereof in form prescribed and according to the regulations issued by the director.* An income tax return showing an amount withheld in excess of the income tax due shall also be treated as a claim for refund under the provisions of Section 7–1–26 NMSA 1978.

C. If any adjustment is made in the basis for computation of any federal tax, the taxpayer affected shall within thirty days file an amended return with the division. Payment of any additional tax due shall accompany the return." [Emphasis added.]

Section 7–2–12, N.M.S.A.1978 of the Income Tax Act provides:

"Every resident of this state and each person deriving income from any business transaction, property or employment within this state and not exempt from tax under the Income Tax Act, who is required by the laws of the United States to file a federal income tax return, *must file a complete tax return in form and content as prescribed by the commissioner.* Persons other than corporations shall file such returns with the bureau of revenue on or before the fifteenth day of the fourth month following the end of each taxable year. Corporations shall file such returns with the bureau of revenue on or

before the fifteenth day of the third month following the end of each taxable year. The tax imposed on individuals under this Income Tax Act is due and payment is required on or before the fifteenth day of the fourth month following the end of the taxable year. The tax imposed on corporations under this Income Tax Act is due and payment is required on or before the fifteenth day of the third month following the end of the taxable year." [Emphasis added.]

As can be seen, the matter of the form of returns is left to the discretion of the Director or Commissioner.

Also, as can be seen from these sections and § 7–2–2(S) *supra*, New Mexico has, as have many other states, linked the income tax reporting provisions to those of the federal government. This is done for the convenience of the taxpayer, as a savings to the State, and to provide the State with a means of verifying the accuracy and honesty of a taxpayer's return.

With this in mind, we look to the meaning of the phrase "federal taxable income and upon which the federal income tax is calculated" as contained in § 7–2–2(S), *supra.*

As the Director noted in paragraph 6 of his Decision and Order, federal regulations permit the filing of consolidated returns. And we find the following in 8A Mertens, *Law of Federal Income Taxation,* § 46.01 (1978 revision):

"A consolidated return is an income tax return which reports the income and deductions of a parent corporation and its subsidiaries. The actual return form used is the regular Form 1120 used by corporations generally.

Although the word 'consolidated' might be considered as implying that each item of income and deduction for all the corporations included in the return is computed on a combined basis, nevertheless, as the principles governing consolidated returns have developed, this concept has been rejected. Instead, for most items *there are separate computations for each corporate entity, the taxable incomes so computed then being combined to arrive at consolidated taxable income.* Actual 'consolidation' is limited to certain specified items which are aggregated for all the members of the group of corporations included in the return and to the elimination of most transactions occurring within the group.

Consolidated returns were originally instituted as an administrative measure (without explicit statutory authorization) to prevent avoidance of excess profits taxes by manipulations among taxpaying entities owned by the same interests." [Emphasis added.]

Mr. Charles W. Giles, Tax Manager of Getty's Houston Office, testified in part as follows:

Q. In preparing the separate corporate entity return to file with the State of New Mexico, then, were the entries in that return hypothetical entries?

A. Well, the entries on the Getty Oil Company parent return are the same as the entries that went into the consolidated return for just Getty Oil Company by itself.

* * * * * *

Q. Well, let me clear that up. Is it correct to say that the portion of the federal consolidated return that covered Getty Oil Company as a separate entity contained the same figures as the separate entity return you filed with the State of New Mexico?

A. Yes.

Therefore, one could determine what the "federal taxable income" of Getty was by examining its federal consolidated return.

Getty argues that since the state income tax forms prescribed by the Director instruct the taxpayer to report "Federal taxable income as shown on Federal Form 1120, Line 30 or if separate accounting is used, attach schedule," the amount entered on that line is the amount "upon which the federal income tax is calculated." We do not believe that this instruction compels

this conclusion. The record reveals that the majority of corporations filing New Mexico returns file on a separate entity basis. We assume that this is so because the majority have no subsidiary corporations. We also assume the Director adopted this form because it fits the situation of the majority. It is our opinion that had the Director intended this conclusion, he would have so stated in explicit terms. It is our further opinion that the phrase "federal taxable income and upon which the federal income tax is calculated" is unambiguous and self-explanatory. And, in instances such as this, no matter where the "federal taxable income" of the entity reporting in New Mexico might be found in its consolidated federal return, that figure is the one intended to be shown on the New Mexico return as its base income.

Summarizing: There is no issue concerning allocation and apportionment under UDITPA, Getty Oil Company allocated and apportioned its income on *its* tax return. Getty Oil Company claims that *its* tax return was in error, that *its* tax return should have been a consolidated return, which included its subsidiaries. Such an error has not been established. What has been established is that a consolidated return is permitted, not required. What has also been established is that Getty Oil Company's return was also a permitted return under the New Mexico statutes. In an attempt to show error, Getty Oil Company claims that its base income should have been the income shown on the consolidated return to the federal government, but the consolidated return was a different reporting group. The federal return included subsidiaries not included in the New Mexico return. The facts show that the assessment was based on the income of Getty Oil Company reported on the federal return. Thus, there was no violation of § 7–2–2(S), supra.

We affirm the Order and Decision of the Director.

IT IS SO ORDERED.

WOOD, C. J., and WALTERS, J., concur.

603 P.2d 332

TIFFANY CONSTRUCTION CO., INC., Plaintiff-Appellant,

v.

BUREAU OF REVENUE, State of New Mexico, Defendant-Appellee.

No. 3777.

Court of Appeals of New Mexico.

Oct. 18, 1979.

Anita P. Miller, McCulloch, Grisham & Lawless, P. A., Albuquerque, for plaintiff-appellant.

Jeff Bingaman, Atty. Gen., Gerald B. Richardson, Sp. Asst. Atty. Gen., Santa Fe, for defendant-appellee.

OPINION

LOPEZ, Judge.

Plaintiff appeals an adverse judgment in the district court denying its claim for refund of gross receipts taxes. We affirm.

Two issues are raised on appeal: (1) whether plaintiff has waived its right to claim a refund under § 7–1–26, N.M.S.A. 1978 (Supp.1979) by having already protested and litigated under § 7–1–24, N.M.S.A. 1978 (Supp.1979) the penalty imposed for failure to pay the New Mexico Gross Receipts and Compensating Tax; and (2) whether the State of New Mexico can impose this tax on a non-Indian, non-resident contractor working exclusively on an Indian reservation in the State.

Tiffany is a non-Indian, Arizona corporation with its principal place of business in Arizona. For approximately one year, it worked on the New Mexico portion of the Navajo Reservation, grading and draining a road. No work was done off the reservation. The evidence is uncontroverted that all of Tiffany's employees were either residents of Arizona or Navajo Reservation Indians. The Arizona employees always entered and left the reservation through the Arizona side; and they did not use New Mexico health, educational, or law enforcement services. The approximate amount of the construction project was $1,681,740.00. The Bureau of Revenue of the State of New Mexico assessed a tax levy in the amount of $78,583.03 on Tiffany as gross receipts taxes on this project under the State Gross Receipts and Compensating Tax Act: Sections 7–9–1 to 7–9–81, N.M.S.A.1978.

In June, 1975, Tiffany was informed that it owed $32,343.02 in gross receipts taxes, including a penalty for nonpayment and interest. Plaintiff protested, and an administrative hearing followed, pursuant to § 7–1–24. The Bureau denied plaintiff's protest. This court affirmed its decision in *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977). Tiffany paid the tax, penalty, and interest. Thereafter, it paid an additional $46,240.01 in monthly assessments. In November, 1976, Tiffany brought suit in the district court for a refund of $78,583.03, the total amount of gross receipts taxes, including penalty and interest, assessed and paid on its Navajo project.

Because the second issue is dispositive of this appeal, we will discuss only that issue.

Tiffany's construction work in New Mexico was properly taxed under the New Mexico Gross Receipts and Compensating Tax Act. The imposition of this tax does not violate the Fourteenth Amendment of the United States Constitution. Due process requires a taxable event occur in the state that wishes to impose its tax. *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267 (1940). The taxable event in the instant case is the performance of construction work within the state of New Mexico. Any individual or company performing construction work in this state is subject to gross receipts tax on that work. The Gross Receipts Tax is levied on services performed in New Mexico. Section 7–9–3(F), N.M.S.A.1978. " 'Service' includes construction activities * * *." Section 7–9–3(K), N.M.S.A.1978. Tiffany has been taxed for having performed construction work in New Mexico. The purpose of the Gross Receipts Tax is "to provide revenue for public purposes by levying *a tax on the privilege of engaging in certain activities* within New Mexico * *." (Emphasis added.) Section 7–9–2, N.M.S.A. 1978. A tax on the "privilege of doing business" in a state is Constitutional. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

Being on the New Mexico portion of the Navajo Reservation, Tiffany's entire construction project was located within the boundaries of the state of New Mexico. Although Indian reservations occupy a peculiar position in that they are self-governing entities, they are, nevertheless, part of the state in which they are located. Of the state's power to tax a non-Indian on the Mescalero Reservation, a federal judge wrote:

> While it may be true that the Tribe has the power to grant the privilege of engaging in business on the reservation, it is also true that the state has power to tax business conducted in the state. The Mescalero Reservation is not located by itself on another planet. It is situated in New Mexico * * *.

Mescalero Apache Tribe v. O'Chesky, 439 F.Supp. 1063, 1073 (D.N.M.1977). The right to vote in New Mexico is predicated upon residency in the state, and reservation Indians are eligible to vote in state elections. *Montoya v. Bolack*, 70 N.M. 196, 372 P.2d 387 (1962). Moreover, construction activities on an Indian reservation are activities within the state for purposes of the Gross Receipts Tax. *See G. M. Shupe, Inc. v. Bureau of Revenue*, 89 N.M. 265, 550 P.2d 277 (Ct.App.), *cert. denied*, 89 N.M. 321, 551 P.2d 1368 (1976); *Mescalero Apache Tribe, supra.* Consequently, while constructing the Navajo road, Tiffany was doing business in the state of New Mexico and was subject to the New Mexico Gross Receipts Tax.

Tiffany claims that it must receive benefits in New Mexico in order for the State to constitutionally impose a tax upon it. It argues that it obtained no benefits from the State and so cannot be taxed. This argument is without merit.

There is substantial evidence in the record to support the trial court's finding that Tiffany enjoyed the use of roads located on the reservation but maintained by the State, and that it benefitted from the New Mexico Environmental Improvement Agency's regulation of air pollution from the Four Corners Power Plant.

Tiffany next contends that, even if it did receive some benefits in New Mexico, the tax imposed is disproportionate to those benefits, and so unconstitutional. This argument, too, is without merit.

The Fourteenth Amendment does not require taxes be levied according to the benefits received by the person or entity taxed. *Missouri Pacific Railroad v. Road District*, 266 U.S. 187, 45 S.Ct. 31, 69 L.Ed. 237 (1924); *see also Dane v. Jackson*, 256 U.S. 589, 41 S.Ct. 566, 65 L.Ed. 1107 (1920).

> A tax is not an assessment of benefits. * * * The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. * * Any other view would preclude the levy-

> ing of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good. * * This court has repudiated the suggestion, whenever made, that * * * [a taxpayer] can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him.

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 522–23, 57 S.Ct. 868, 878–879, 81 L.Ed. 1245 (1937).

Even if Tiffany had received no other benefits from the State, it would be subject to the State tax from the simple fact of having engaged in business here. A tax on the privilege of engaging in business in a state is Constitutional. *Brady, supra.* The lack of benefits argument is frivolous when a company is able, through its presence in a state, to carry on a valuable business there. *Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975).

Tiffany came into New Mexico for its own benefit. It conducted business here worth approximately $1,681,740.00 and employed 100 persons on this project. It had sufficient minimal contacts with the State to justify the imposition of a state tax. In *Standard Steel, supra*, the United States Supreme Court upheld a state gross receipts tax on a foreign corporation that had only one employee in the state. Tiffany enjoyed the privilege of engaging in business in New Mexico and was properly taxed for this privilege.

The judgment of the district court is affirmed.

IT IS SO ORDERED.

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

603 P.2d 335

STATE of New Mexico, Plaintiff-Appellant,

v.

Reba SANCHEZ, Defendant-Appellee.

No. 4263.

Court of Appeals of New Mexico.

Oct. 23, 1979.

Jeff Bingaman, Atty. Gen., Santa Fe, for plaintiff-appellant.

John B. Bigelow, Chief Public Defender, Michael Dickman, Asst. App. Defender, Santa Fe, for defendant-appellee.

OPINION

HENDLEY, Judge.

The defendant was charged in one count of trafficking in Percodan and Valium. At trial defendant moved to dismiss because Percodan and Valium are not listed in the statutory schedules of controlled substances. Additionally, defendant claimed that prosecution under the indictment would be based on unconstitutional legislative delegation to the Board of Pharmacy and, furthermore, that classification by the Board did not give fair notice.

The State conceded the dismissal as to Valium, but appealed as to Percodan.

We assigned the case to the summary calendar with reversal proposed because at trial the State submitted the definition of Percodan in the Physician's Desk Reference. The principal ingredient of Percodan is oxycodone which is derived from the opium alkaloid, thebaine. That definition brings Percodan within the purview of a controlled substance under § 30–31–7(A)(2), N.M.S.A. 1978. (Compare the definition in 1979 Supplement § 30–31–7(A)(2)(p).) See also *State v. Yanez*, 89 N.M. 397, 553 P.2d 252 (Ct.App.1976).

The defendant filed a memorandum in opposition requesting a different calendar setting as to two other issues in the appeal, but not as § 30–31–7(A)(2), *supra*. However, the two other issues need be discussed only if Percodan were not included in § 30–31–7(A)(2). Percodan is a Schedule II controlled substance as defined by the Legislature. This is dispositive of the appeal.

This case is reversed and remanded with instructions to reinstate the indictment.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

603 P.2d 708

Louise B. SPINGOLA,
Plaintiff-Appellant,

v.

Lawrence J. SPINGOLA,
Defendant-Appellee.

No. 12367.

Supreme Court of New Mexico.

Oct. 24, 1979.

On Rehearing Dec. 12, 1979.

Perry S. Key, William H. Carpenter, Albuquerque, for plaintiff-appellant.

Atkinson & Kelsey, David H. Kelsey, Albuquerque, for defendant-appellee.

OPINION

SOSA, Chief Justice.

This is an appeal from the district court's proceedings pursuant to a remand from a previous appeal in this same case. *Spingola v. Spingola*, 91 N.M. 737, 580 P.2d 958 (1978) (hereafter *Spingola I*). In *Spingola I*, we set forth criteria to be used by the trial court in making a determination of child support obligations of divorced parents. In

this opinion we discuss the following issues: (1) whether the trial court has jurisdiction to retry issues and hear new evidence concerning Mr. Spingola's child support obligations for the same time period considered in the first appeal; and (2) whether the trial court has jurisdiction to enter an order concerning post-minority educational expenses of the children. We hold that the trial court must enter new findings of fact and conclusions of law based only on the evidence at the first trial. We also hold that the district court has no power in these circumstances to enter an order regarding the post-minority educational expenses of the children.

I. Jurisdiction on Remand

On June 5, 1978, this Court decided *Spingola I*, in which we reversed the trial court and remanded the case "for further action consistent with the holdings herein and for entry of appropriate findings of fact and conclusions of law." In the opinion we instructed the trial court to consider ten criteria in determining what the child support obligations of the parents should be. On remand, rather than entering new findings of fact and conclusions of law based upon the evidence already presented, the trial court conducted an entire new hearing.

In *Varney v. Taylor*, 79 N.M. 652, 655, 448 P.2d 164, 167 (1968), this Court stated that "it is the settled law of this jurisdiction that upon remand the district court has only such jurisdiction as the opinion and mandate of this court confer. [Citations omitted.]" The district court, on remand, should act in strict compliance with the appellate court's opinion and mandate. Mr. Spingola argues that the trial court could not properly consider the ten criteria set out in our opinion without hearing new evidence. We do not agree. The evidence already taken was sufficient to allow the court to enter appropriate findings using the ten criteria set forth. There was no order to the district court, or inference in the opinion, that the court should hear new evidence. Even if that was not clear, the matter is not left to the discretion of the trial court unless the opinion and mandate so direct. Rather, "[i]t is within the power, and it is the duty, of this court to construe its own mandate in case there is any ambiguity in the same. [Citation omitted.]" *State ex rel. Bujac v. District Court*, 28 N.M. 28, 32, 205 P. 716, 718 (1922).

II. Post-minority Child Support

The separation agreement between the parties provided that they would share equally the expense of sending their children to college. This agreement was incorporated into, and became merged with, the divorce decree. As such, it was subject to amendment by the court. *Scanlon v. Scanlon*, 60 N.M. 43, 287 P.2d 238 (1955). The district court amended this provision at the hearing on remand from the first appeal to provide that Mr. Spingola pay the entire higher educational costs of the children. This was to be accomplished by requiring him to pay into a trust fund while the children are still minors, and having the funds disbursed to the children after they reach the age of majority. Mr. Spingola agreed to this modification, but Ms. Spingola (now Ms. Morris) challenges it on the basis that the childrens' present support has been decreased in contemplation of future support.

Ms. Morris contends that the district court does not have the requisite subject matter jurisdiction to make provisions for the children past the age of majority. She relies principally on § 40–4–7, N.M.S.A. 1978, which provides in pertinent part:

> 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 goes on to provide that any funds remaining on hand when the children reach majority may be "disposed of by the court as it may deem just and proper." This Court, in *In re Coe's Estate*, 56 N.M. 578, 247 P.2d 162 (1952), interpreted § 25–

706, N.M.S.A. (1941 Comp.), which was a predecessor to § 40–4–7, N.M.S.A. 1978, and contained very similar language. This Court stated:

> Clearly, this statute only confers power on the district court to provide for the children during their minority, and when they reach the age of 21 years all power over them ceases. It will be noted the district court must at this latter time make disposition of any property or funds created for the maintenance and education of such children.

56 N.M. at 580, 247 P.2d at 163.

We believe that § 40–4–7 precludes the district court from retaining control of any provision in decrees providing funds for post-minority education. When the children reach majority, the court must dispose of and relinquish control over any of the remaining funds created for their education.

A few courts have allowed decrees which permit funds accumulated during a child's minority to be used for post-minority educational expenses, even in the face of statutes similar to ours. *Stoner v. Weiss*, 96 Okl. 285, 222 P. 547 (1924); *Underwood v. Underwood*, 162 Wash. 204, 298 P. 318 (1931); *see also Maitzen v. Maitzen*, 24 Ill.App.2d 32, 163 N.E.2d 840 (1959). A majority, however, would not do so. *E. g., Spence v. Spence*, 266 A.2d 29 (D.C. Cir. 1970); *Allison v. Allison*, 188 Kan. 593, 363 P.2d 795 (1961). *See* Washburn, *Post-Majority Support: Oh Dad, Poor Dad*, 44 Temp.L.Q. 319 (1971).

Some courts have also upheld post-minority support decrees where the supporting parent has agreed to the provision in a settlement agreement. *Martin v. Martin*, 511 P.2d 1097 (Okl. 1973); *Robrock v. Robrock*, 167 Ohio St. 479, 150 N.E.2d 421 (1958). We do not believe, however, that the subject matter jurisdiction of the court can be extended by agreement of the parties. *State ex rel. Overton v. New Mexico State Tax Com'n*, 81 N.M. 28, 462 P.2d 613 (1969). Whether an agreement to support can be enforced under a contractual theory is not an issue here, as we are only determining the jurisdiction of the court to enforce child support provisions in a divorce decree after the children have reached majority.

III. Other Issues

Subsequent to the first appeal, Ms. Morris filed a petition to modify child support became of changed circumstances since June 3, 1977. She now contends that the court failed to distinguish between changed circumstances prior to the first appeal and changed circumstances subsequent to June 3, 1977. We do not reach this question because the lower court, on remand, must enter new findings of fact and conclusions of law as to her first petition for modification based on the evidence taken at the first hearing. The court may then determine whether there were any changed circumstances since June 3, 1977 and enter findings of fact and conclusions of law as to her second petition based on evidence taken at the second hearing.

This matter is reversed and remanded to the district court for further action consistent with the holdings herein and for entry of appropriate findings of fact and conclusions of law.

IT IS SO ORDERED.

EASLEY and FELTER, JJ., concur.

ORDER ON REHEARING

SOSA, Chief Justice.

Appellant sought and was granted a rehearing on the question of her entitlement to costs and attorney's fees for services rendered by her attorneys at the trial on remand and on the two appeals in this case.

We did not award attorney's fees in the first appeal, though we did award costs in favor of Ms. Morris. The decision to award costs on appeal is within the discretion of this Court, § 39–3–30, N.M.S.A. 1978, and is final.

The trial court did not award attorney's fees for the hearing on remand. The

determination of whether or not attorney's fees should be awarded is within the sound discretion of the trial court. *Corliss v. Corliss*, 89 N.M. 235, 549 P.2d 1070 (1976). We do not believe that the court abused its discretion. Nor do we believe that an effective presentation of Ms. Morris' case is dependent upon an award of attorney's fees as was the case in *Burnside v. Burnside*, 85 N.M. 517, 514 P.2d 36 (1973).

Section 39–3–30, N.M.S.A. 1978 provides that the prevailing party shall recover costs against the other party unless good cause is shown. The court did not award costs for the hearing on remand. In our review of the record, we have not found good cause for the court's decision not to award costs for the second trial. The costs of that hearing, therefore, should be assessed against Mr. Spingola.

We will treat the fees and costs of the second appeal in the same manner as the first. Each party shall bear their own attorney's fees incurred in the second appeal, costs having already been assessed.

IT IS SO ORDERED.

EASLEY and FELTER, JJ., concur.

603 P.2d 711

The CITY OF BELEN, Ross Lovato and Ernest Montano, Petitioners,

v.

Ameilia HARRELL, as Personal Representative for Paul P. Harrell, Respondent.

No. 12555.

Supreme Court of New Mexico.

Oct. 29, 1979.

Rehearing Denied Nov. 26, 1979.

Gallagher, Casados & Martin, David R. Gallagher, J. E. Casados, Albuquerque, for petitioners.

Turner W. Branch, Stephen A. Slusher, Albuquerque, for respondent.

OPINION

FEDERICI, Justice.

This is a wrongful suicide death case in New Mexico and one of first impression in this Court. It was filed in Valencia County and plaintiff-respondent, as personal representative for the deceased, Paul Harrell, recovered judgment against the City of Belen and others, defendants-petitioners, for the suicide death of decedent. The trial court entered judgment for plaintiff and defendants appealed. A majority of the panel in the Court of Appeals affirmed the judgment of the trial court, Sutin, J., dissenting. We reverse the Court of Appeals and the trial court.

While wrongful suicide death is a novel issue in New Mexico, the questions presented on appeal and those necessary for decision here are not. As such, a lengthy history of wrongful suicide death actions is not deemed warranted.

The defendants contend that the trial court erred in failing to submit to the jury appropriate instructions on: (1) whether Paul's suicide was an independent intervening cause; and (2) whether Paul's action in taking his own life, and decedent's conduct after he had been incarcerated, amounted to contributory negligence. We agree with defendants.

The facts of this case are such that a fairly detailed recitation is warranted. Interspersed with our own language and authorities, we have adopted in large part numerous portions of the majority as well as the dissenting opinions from the Court of Appeals.

Plaintiff's deceased son, Paul, was apprehended by the Belen police for armed robbery and taken to jail. Paul was seventeen years old. Plaintiff was notified of her son's arrest, and shortly thereafter, arrived at the jail. She was taken to an office where Paul was present with Officer Gabaldon. She was given permission to speak privately with him in a glass enclosed room.

Plaintiff testified that Paul said that "he wasn't going to the penitentiary, that they wouldn't take him there alive . . . ." She informed Assistant Chief Montano of Paul's statement "that he'd die before he would go [to the penitentiary], he would kill himself . . . ." As plaintiff was leaving the area she saw Paul attempting to slash his wrist with a flip top from an aluminum can. She told Montano of this and both returned to the restraining area where plaintiff took "the flip top and gave it to Montano and [plaintiff] got Paul's wrist and turned it and Montano walked out."

As a result of this incident, Officer Ortega came in to sit with plaintiff and Paul. He claimed he was there to "baby-sit." Later, as plaintiff was leaving, she told Paul she would be back in the morning. He answered, "don't come back because you

won't see me alive anyway." Plaintiff then told Montano, "you take care of him, he's going to try to kill himself."

Plaintiff testified that Montano assured her of Paul's safety by stating that "we'll take good care of him" and "there's nothing there for him to hurt himself." Based upon the policeman's assurances and the belief that there was nothing else she could do, plaintiff went home.

After plaintiff left, Montano gave instructions to Lovato, the dispatcher, to watch and check Paul every few minutes. The juvenile cell was located near the dispatcher's desk and had a window from which the cell could be observed. Lovato testified that he turned off the lights in the cell and checked on Paul every 10 to 15 minutes.

When Paul was first booked he was stripped of all clothes except his undershorts and placed in the juvenile cell. When his mother arrived, he was given his shirt and pants and removed to a glassed-in area where they spoke. When his mother left, he was placed in the juvenile cell but was not again stripped.

Approximately forty-five minutes later, Paul was found dead hanging from a vent in the cell by his long-sleeved shirt.

Plaintiff's expert psychologist stated that a person in a suicidal state usually has to be in a state of depression. Such person has lost sight of what life is all about; that his/her reasoning is so impaired that self-destruction is a solution to some of life's problems. In lay language, this person has to be beside himself, not of his normal mind, and unreasonable. Impulses take over and control the person's behavior more than reason does. The expert also stated that the police should have called the Crisis Center, a suicide prevention organization, because, hypothetically, Paul was, in his opinion, a high risk for suicide; that a trained person should have been called, and that if he had been transferred to the Bernalillo County Medical Center, the suicide could have been prevented; and that an ordinary person could have detected all this. However, the expert also testified that he had not done any studies and was neither familiar with any requirements relating to jails or the incarceration of accused felons, nor with requirements relating to the standards for jails or standards relating to the detention of juveniles.

Officer Montano testified that they had never had a suicide in the jail before and as such he had no reason to anticipate or believe that plaintiff's decedent could have committed suicide in the cell.

A party is entitled to a jury instruction upon his theory of a case if it is supported by substantial evidence. *Martinez v. Schmick,* 90 N.M. 529, 565 P.2d 1046 (Ct. App.1977), *cert. denied,* 90 N.M. 637, 567 P.2d 486 (1977); *Mantz v. Follingstad,* 84 N.M. 473, 505 P.2d 68 (Ct.App.1972).

When one party is in the custodial care of another, as in the case of a jailed prisoner, the custodian has the duty to exercise reasonable and ordinary care for the protection of the life and health of the person in custody. *Thomas v. Williams,* 105 Ga.App. 321, 124 S.E.2d 409 (1962); *Porter v. County of Cook,* 42 Ill.App.3d 287, 355 N.E.2d 561 (1976); *compare Warner v. Kiowa County Hospital Authority,* 551 P.2d 1179 (Okl.App.1976). Knowledge on the part of the custodian that the charge may injure himself unless precautionary measures are taken is an important factor to be considered by the judge and jury in determining whether the custodian exercised reasonable care. *Thomas, supra*; *Porter, supra.* The defendants had a duty to exercise reasonable care for the life of decedent, as they were the persons responsible for placing him in the custodial setting; whether they properly exercised that duty is a matter for the jury to determine.

Such a duty, however, does not always make the custodians liable for the health and safety of those in their custody. *See Vistica v. Presbyterian Hospital & Medical Center,* 67 Cal.2d 465, 62 Cal.Rptr. 577, 432 P.2d 193 (1967); *cf. Orcutt v. Spokane County,* 58 Wash.2d 846, 364 P.2d 1102 (1961). *Contra, Hunt v. King County,* 4 Wash.App. 14, 481 P.2d 593 (1971).

In New Mexico, "independent intervening cause" is defined, in *Thompson v. Anderman,* 59 N.M. 400, 411–412, 285 P.2d 507, 514 (1955), as:

> that * * * act or omission of a wrongdoer * * * which interrupts the natural sequence of events, turns aside their cause, prevents the natural and probable results of the original act or omission, and produces a different result, that could not have been reasonably foreseen.

The applicable jury instruction for independent intervening cause is N.M.U.J.I. Civ. 13.15, N.M.S.A.1978, as follows:

> A negligent act or omission cannot be said to be a proximate cause of an injury if, between the time of the negligent act or omission and the time of the injury in question there occurs an "independent intervening cause" of such injury.
>
> An "independent intervening cause" is an act or omission which interrupts the natural sequence of events following from the first act or omission, turns aside its course, prevents the fulfillment of the natural and probable result of the original act or omission, and produces a different result that could not have been reasonably foreseen to have been a result of the original act or omission.
>
> Directions for Use
>
> When the evidence presents an issue with regard to an intervening cause the foregoing instruction is proper and applicable.

However, it cannot be said that in every case suicide is an independent intervening cause as a matter of law. *See Scheffer v. Railroad Co.,* 105 U.S. (15 Otto.) 249 (1881); *Salsedo v. Palmer,* 278 F. 92 (2d Cir. 1921); *Lucas v. City of Longbeach,* 60 Cal.App.3d 341, 131 Cal.Rptr. 470 (1976); *Tate v. Canonica,* 180 Cal.App.2d 898, 5 Cal.Rptr. 28 (1960); *Stevens v. Steadman,* 140 Ga. 680, 79 S.E. 564 (1913); *Waas v. Ashland Day & Night Bank,* 201 Ky. 469, 257 S.W. 29 (1923); *Daniels v. New York, N.H. & H.R. Co.,* 183 Mass. 393, 67 N.E. 424 (1903); *Cauverein v. De Metz,* 20 Misc.2d 144, 188 N.Y.S.2d 627 (1959); *Runyon v. Reid,* 510 P.2d 943 (Okl.1973); *Lancaster v. Montesi,* 216 Tenn. 50, 390 S.W.2d 217 (1965); *Jones v. Stewart,* 183 Tenn. 176, 191 S.W.2d 439 (1946); *Orcutt v. Spokane County, supra.*

Contributory negligence and independent intervening cause are questions for the jury, unless, as a matter of law, there is no evidence upon which to submit the issue to the jury. *Stephens v. Dulaney,* 78 N.M. 53, 428 P.2d 27 (1967); *see Thompson v. Anderman, supra; Whitfield Tank Lines v. Navajo Freight Lines,* 90 N.M. 454, 564 P.2d 1336 (Ct.App.1977); *Romero v. Melbourne,* 90 N.M. 169, 561 P.2d 31 (Ct.App.1977); *Kelly v. Montoya,* 81 N.M. 591, 470 P.2d 563 (Ct.App.1970). *See also Lopez v. Southern Pacific Company,* 499 F.2d 767 (10th Cir. 1974). Under the facts here, plaintiff's decedent's capacity to exercise reasonable care and, of necessity, his capacity to be contributorily negligent, was a question for the jury. *Hunt v. King County, supra.*

The trial court erred in refusing to instruct on the issue of whether or not plaintiff's decedent's actions constituted an independent intervening cause, or contributory negligence.

Several other issues were presented on appeal by defendants and were disposed of by the majority opinion of the Court of Appeals. The specific issues raised concerned: (a) a defense objection to Instructions Nos. 11, 12 and 13; (b) a defense objection to the admission of the "Minimum Standards" for juvenile detention facilities; (c) a defense objection to the introduction of a color photograph of decedent's body; (d) a defense objection to a hypothetical question, put to plaintiff's expert, regarding what would have been reasonable action for the police to have taken in order to prevent decedent's suicide; and (e) a defense objection to the reliance on police officer depositions by plaintiff's expert psychologist. We agree with the Court of Appeals' resolution of these issues against defendants.

This cause is reversed and remanded to the district court for a new trial consistent with this opinion.

IT IS SO ORDERED.

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

603 P.2d 715

STATE of New Mexico, Petitioner,

v.

Bobby JAMES, Respondent.

No. 12430.

Supreme Court of New Mexico.

Nov. 30, 1979.

Rehearing Denied Dec. 10, 1979.

Jeff Bingaman, Atty. Gen., Janice Marie Ahern, Asst. Atty. Gen., Santa Fe, for petitioner.

Cynthia H. Heller, Navajo Legal Aid & Defender Service, Window Rock, Ariz., for respondent.

OPINION

PAYNE, Justice.

Defendant was charged in district court with homicide by vehicle. He moved to dismiss the charge, contending that prior proceedings in the municipal court on lesser included offenses barred a subsequent prosecution for the greater offense. The dis-

trict court denied the motion, and defendant brought an interlocutory appeal to the Court of Appeals. The Court of Appeals held that jeopardy had attached at the municipal court level. It reversed the district court and held that the charges against defendant should be dismissed. We granted a writ of certiorari and now affirm the district court and hold that jeopardy had not attached.

This case presents two issues for resolution:

(1) Does defendant's attendance at the Alcohol Related Offenses (ARO) school support a finding of a DWI conviction and cause jeopardy to attach?

(2) Is there a jurisdictional exception to the lesser included offense rule which is applicable in this instance?

A vehicle driven by defendant was involved in a head-on collision which resulted in the death of the other driver. Defendant was cited for driving while under the influence of intoxicating liquor (DWI), reckless driving, and failure to illuminate headlamps, all three offenses being violations of the Gallup City ordinances. The City instituted proceedings against defendant for these offenses. The State independently filed a criminal complaint against defendant in the Magistrate Court of McKinley County alleging homicide by vehicle on the grounds that defendant had driven his vehicle in an unlawful and reckless manner, and had done so while under the influence of alcohol in violation of Section 66–8–101, N.M.S.A.1978.

Five days after the filing of the criminal complaint, defendant was found guilty of reckless driving and driving without headlamps in municipal court. The circumstances surrounding the disposition and effect of the DWI charge against defendant have been the subject of some confusion.

The Court of Appeals held that defendant had pled guilty to the DWI charge and that the district court must necessarily have accepted the plea. This, the Court of Appeals reasoned, must have been the case or the court would not have utilized the ARO school provision permitting the removal of a DWI conviction from the record of defendant upon the successful completion of the course.

The record, however, shows that defendant pled "not guilty" to all charges in municipal court, and that the DWI charge was dismissed following defendant's voluntary attendance at the ARO school. The record does not show a plea of guilty or a trial to determine guilt or innocence on the DWI charge. This circumstance does not rise to the level of a conviction for purposes of double jeopardy, and defendant has not been so prejudiced by these proceedings that jeopardy can be said to have attached. *State v. Rhodes*, 76 N.M. 177, 413 P.2d 214 (1966).

Jeopardy is said to attach at that point when a jury is impaneled, *State v. Rhodes, supra; State v. Sedillo*, 88 N.M. 240, 539 P.2d 630 (Ct.App.1975), or, in a non-jury situation, when the State presents at least some evidence, *State v. Ferris*, 80 N.M. 663, 459 P.2d 462 (Ct.App.1969). The record does not indicate that proceedings concerning the DWI charge reached this point. A conviction cannot be assumed by virtue of defendant's voluntary attendance at the ARO school.

We hold that jeopardy did not attach by virtue of the DWI charge so as to preclude the State from prosecuting the felony charge. To hold otherwise would pave the way for defendants to evade vehicular homicide prosecutions simply by volunteering for ARO school, or paying a nominal fine for a lesser charge in municipal court and claiming double jeopardy at trial on the greater offenses.

We also reassert the jurisdictional exception to using a lesser included offense as a bar to prosecution of the greater offense. This exception was set forth in *State v. Goodson*, 54 N.M. 184, 186, 217 P.2d 262, 263 (1950), where the Court quoted the following language from 1 F. Wharton, *Criminal Law* § 394 (12th ed.):

> And a conviction of a lesser offense bars a subsequent prosecution for a greater offense, in all those cases where the less-

> er offense is included in the greater offense, and vice versa. But a former trial and acquittal or conviction will not be a bar to a subsequent prosecution, unless the defendant could have been convicted on the same evidence in the former trial, of the offense charged in the subsequent trial. An acquittal or conviction for a minor offense included in a greater will not bar a prosecution for the greater if the court in which the acquittal or conviction was had was without jurisdiction to try the accused for the greater offense.

This exception was recognized in the specially concurring opinion of Justice Sosa in *State v. Tanton*, 88 N.M. 333, 337, 540 P.2d 813, 817 (1975):

> I would hold that conviction bars prosecution of a greater offense, subject to one exception: If the court does not have jurisdiction to try the crime, double jeopardy cannot attach. Double jeopardy requires that a court have sufficient jurisdiction to try the charge.

This exception does not conflict with the United States Supreme Court decision in *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970). The *Waller* decision stands for the proposition that two courts within a state—district and municipal—cannot each try a person for the same crime. However, the Supreme Court recognized the possible existence of exceptions to this rule. *Id.* at 395, n. 6, 90 S.Ct. 1184. In *Ashe v. Swenson*, 397 U.S. 436, 453, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), Mr. Justice Brennan specified and elaborated upon several of these exceptions in his concurring opinion. He stated: "Another exception would be necessary if no single court had jurisdiction of all the alleged crimes." *Id.* at 453, n. 7, 90 S.Ct. at 1199, n. 7.

It is clear that the municipal court in this case was acting pursuant to its authority to punish defendant for his traffic infractions, but it is equally clear that it had no authority to prosecute for vehicular homicide. Consequently, under the jurisdictional exception the State's felony prosecution against defendant may proceed. The cause is remanded to the district court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

SOSA, C. J., and EASLEY, FEDERICI and FELTER, JJ., concur.

603 P.2d 717

STATE of New Mexico, Plaintiff-Appellee,

v.

John David DORSEY, Defendant-Appellant.

No. 12094.

Supreme Court of New Mexico.

Dec. 4, 1979.

Reginald J. Storment, Santa Fe, Thomas J. Hynes, Randall Roberts, Farmington, for defendant-appellant.

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

OPINION

PAYNE, Justice.

Defendant was convicted of first-degree murder. He appeals, alleging two grounds for reversal: (1) the trial court failed to direct a verdict of not-guilty by reason of insanity, and (2) the trial court failed to direct a verdict of not-guilty because there was insufficient evidence of a deliberate intention to kill. Each allegation turns on whether there was sufficient evidence to go to the jury. We affirm the trial court.

Defendant and a passenger were driving on a highway in San Juan County. They had consumed a few beers and had smoked some marijuana. The defendant began driving at a very high rate of speed in order to catch some companions in another car. When the passenger asked defendant to slow down, defendant hit him with a beer bottle and tried to push him out of the moving vehicle. The passenger turned off the ignition to stop the car. When the car came to a stop, defendant jumped out, ran across the highway median, and flagged down a truck driven by Billy Craven. Craven did not know defendant, but gave him a ride. After several miles, defendant seized a large knife in the cab of the truck and began plunging it into Craven. The truck careened off the highway onto the shoulder. Craven staggered from the truck with defendant in pursuit. Defendant chased Craven some 100 yards or more, knocked him down in the middle of the highway, straddled him, and again stabbed him repeatedly. Several passersby subdued defendant, but not before Craven had been mortally wounded.

At trial, defendant pled not-guilty by reason of insanity. To rebut the evidentiary presumption of sanity, defendant presented the expert testimony of two psychologists and one psychiatrist. Each stated that defendant suffered from latent schizophrenia, a long-standing disease of the mind, which prevented defendant from knowing the nature of his deadly act, or from forming the requisite deliberate intent to kill.

The State did not present any psychiatrists or psychologists to counter defendant's expert witnesses. The State did present lay witnesses who observed defendant at the time of the offense. They testified that the defendant acted cooly and deliberately before and during the commission of the homicide. Two medical witnesses for the State testified that if defendant was insane, the insanity resulted from a functional and not a structural abnormality.

Defendant argues that because there was no expert psychiatric or psychological evidence as to defendant's sanity at the time of the crime, the trial court erred in refusing to direct a verdict of not-guilty by reason of insanity. We disagree.

The trial court found the evidence sufficient to justify submitting the issue of insanity to the jury. The court instructed the jury on the effect which mental disease has upon a defendant's ability to form a "deliberate intention to kill." Crim. 2.00, N.M.S.A.1978 (Supp.1978). The jury found defendant guilty of first-degree murder.

In New Mexico, the standards governing the defense of insanity are well established. This Court said in *State v. White,* 58 N.M. 324, 330, 270 P.2d 727, 731 (1954), that in order for a jury to find an accused blameworthy for his acts, it must be satisfied that:

> the accused, as a result of disease of the mind . . . (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it.

State v. White, supra, attempts to draw a clear dichotomy between those defendants who are sane and those who are insane. Requiring such an all or nothing decision often makes it difficult to apply sophisticated psychiatric evaluations and theories to legal formulations.

The conflict between legal and psychiatric principles is made more understandable when the premises and purposes of each is realized. The purpose of psychiatry is to diagnose and cure mental illnesses, but not to assess blame for acts resulting from those illnesses. The law seeks to find facts and assess accountability. One author has stated the problem thusly:

> Psychiatry evaluates individual behavior with the aid of standards of the most general and flexible nature such that each individual may receive special consideration for his unique characteristics. (Footnote omitted.) The inherent vagueness and lack of predictability in such a method of evaluation is foreign to the necessity, in making legal judgments about individual behavior, that a standard of evaluation be uncomplicated and uniform.

Comment, *A Punishment Rationale for Diminished Capacity,* 18 U.C.L.A.L.Rev. 561, 571 (1971). Although it may be difficult to apply, we do not hold that psychiatric testimony may not be used in determining accountability. Conversely, we cannot accept the premise that it outweighs all other evidence that bears upon a person's sanity.

We express no opinion as to the relative weight to be accorded to lay or expert testimony. This is a matter for the jury to decide.

> The doctrine of criminal responsibility is such that there can be no doubt "of the complicated nature of the decision to be made—intertwining moral, legal, and medical judgments," (Citations omitted.) [J]ury decisions have been accorded unusual deference even when they have found responsibility in the face of a powerful record, with medical evidence uncontradicted, pointing toward exculpation. (Footnote omitted.) The "moral" elements of the decision are . . . defined . . . by the totality of underlying conceptions of ethics and justice shared by the community, as expressed by its jury surrogate.

United States v. Brawner, 153 U.S.App.D.C. 1, 14, 471 F.2d 969, 982 (D.C. Cir. 1972).

Defendant contends that because he was insane according to the unanimous opinion of the psychiatrist and psychologists, this established his insanity as a matter of law and the jury should never have been allowed to consider this as a factual issue. The trial court held that the evidence was sufficiently conflicting to go to the jury. Only in those instances where the trial court has clearly abused its discretion will this Court reverse it. *State v. Moore,* 42 N.M. 135, 76 P.2d 19 (1938).

Our opinion should not be construed to say that insanity as a matter of law cannot exist. The evidence in this case, however, was not uncontroverted. An eyewitness testified that defendant was acting cooly and deliberately at the time he was stabbing Craven, as though he were "skinning a deer." The physician who conducted the autopsy testified that the "overkill" type of wounding to the victim was consistent with that done by one who is sane. The arresting deputy sheriff testified that defendant was calm and lucid on the way to and at the station house. A military witness testified that, upon defendant's induction into the army reserve, he had no past history of mental illness. An osteopathic physician who examined defendant within hours after the incident testified that defendant acted

calmly and coherently. The testimony of these and other witnesses justified the trial judge in allowing the sanity issue to go to the finder of fact.

This Court stated in *State v. Moore, supra*: "[w]e cannot supplant the conclusions of experts, though unanimous, which unanimity is rare, for the conclusion of the jury's verdict. The jury can reject all the testimony, and we must respect their action unless clearly erroneous." 42 N.M. at 160, 76 P.2d at 34.

Defendant asserts that the jury, because of the bizarre and heinous circumstances of this killing, could not and did not reasonably and dispassionately consider the evidence presented. To accept this argument would be to repudiate a fundamental principle of American criminal justice—that twelve ordinary citizens can determine such issues reasonably and dispassionately. Nothing has been submitted suggesting impropriety in jury selection or conduct.

Defendant's second argument for reversal is that he did not have a "deliberate intention" to kill Billy Craven. Defendant again relies upon the testimony of experts to support his defense that he had not formed the requisite deliberate intention or mens rea for first-degree murder. When the trial judge determined that the question of defendant's sanity was a jury issue, a critical part of the jury's determination became whether defendant had formed the deliberate intent to kill. The trial court, therefore, cannot be said to have erred, as defendant contends, in refusing to direct a verdict to the effect that defendant could not have formed a deliberate intention to kill Billy Craven.

The jury was properly instructed as to the definition of "deliberate intention." Crim. 2.00. This instruction states:

> A deliberate intention may be inferred from all of the facts and circumstances of the killing. The word deliberate means arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action. A calculated judgment and decision may be arrived at in a short period of time. A mere unconsidered and rash impulse, even though it includes an intent to kill, is not a deliberate intention to kill. To constitute a deliberate killing, the slayer must weigh and consider the question of killing and his reasons for and against such a choice.

The jury was also instructed as to the elements of first-degree murder and charged that defendant could not be convicted of first-degree murder unless he was found to have formed a deliberate intention to take the life of another.

The jury found that defendant had killed Billy Craven with deliberate intent. We cannot say that sufficient facts were not in existence from which a jury could reasonably infer that defendant had formed such an intent.

The matter is affirmed.

IT IS SO ORDERED.

SOSA, C. J., and EASLEY, J., concur.

603 P.2d 720

Ira ROBINSON, District Attorney, Second Judicial District, et al., Petitioners-Appellees,

v.

William A. SHORT, Magistrate Judge, Division V, Respondent-Appellee,

and

Irene Lujan, Intervenor-Appellant.

No. 12411.

Supreme Court of New Mexico.

Dec. 7, 1979.

John L. Walker, Albuquerque, for intervenor-appellant.

Jeff Bingaman, Atty. Gen., Ralph W. Muxlow, II, Asst. Atty. Gen., Santa Fe, C. Reischman, Asst. Atty. Gen., Albuquerque, for petitioners-appellees.

OPINION

SOSA, Chief Justice.

The issue we decide in this appeal is whether the crime of falsely obtaining unemployment benefits, contrary to Section 51–1–38, N.M.S.A.1978, has an applicable statute of limitations of one year or three years. We find it to be one year.

Intervenor-appellant Lujan was charged with forty counts of falsely obtaining unemployment benefits. All counts were filed in magistrate court more than one year, and less than three years after the offenses were allegedly committed. The magistrate judge indicated that prosecution of the cause was barred by a one-year statute of limitations. The district attorney, Robinson, appellee herein, sought a writ of prohibition forbidding the magistrate judge from dismissing the case. The district court issued the writ, and ruled that the applicable statute of limitations is three years. Ms. Lujan was an intervenor in the petition for the writ, and now appeals.

The arguments of the parties center around the meaning of Section 30–1–8, N.M.S.A.1978 (current version at Section 30–1–8, N.M.S.A.1978, Cum.Supp.1979). It provides in pertinent part:

> 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:
>
> * * * * * *
>
> F. for a petty misdemeanor, within two years from the time the crime was committed;
>
> G. for any crime against or violation of the revenue laws of this state, within three years from the time the crime was committed; and
>
> H. for any crime not contained in the Criminal Code, *or where a limitation is not otherwise provided for*, within three years from the time the crime was committed. (Emphasis added.)

It is uncontroverted that the crimes with which Ms. Lujan is charged are not contained in the Criminal Code. What we concern ourselves with is whether a limitation is "otherwise provided for."

Ms. Lujan argues that a limitation is otherwise provided for by sub-section F above. The crimes with which she is charged carry an authorized penalty of imprisonment for not longer than thirty days, or a fine of not over one hundred dollars or both. § 51–1–38. The statute does not delineate the degree of the crime, but Section 30–1–6(C), N.M.S.A.1978 states that "[a] crime is a petty misdemeanor if it is so designated by law or if upon conviction thereof a sentence of imprisonment for six months or less is authorized." She argues therefore, that the crimes with which she is charged are petty misdemeanors which carry a one-year statute of limitations under Section 30–1–8(F). We agree with this interpretation.

In *State v. Herrera*, 86 N.M. 224, 522 P.2d 79 (1974), we read various criminal statutes in *pari materia* in order to give effect to the legislative intent in a consistent and reasonable manner. We do the same in this case. Section 30–1–6, which specifies the degree of a crime according to its authorized penalty, would be purposeless unless read togeth-

er with other criminal statutes. When Section 30–1–6(C) is read together with Section 51–1–38, it is clear that the crimes Ms. Lujan is charged with are petty misdemeanors. The statute of limitations for a petty misdemeanor is one year. § 30–1–8(F).

The appellees in this case argue that a limitation is not "otherwise provided for" because the statute under which Ms. Lujan was charged does not expressly state the degree of the crime. § 51–1–38. It is their contention that unless the penal statute expressly specifies the degree of the crime, then subsections (A) through (G) of Section 30–1–8 do not apply to limit the time within which a criminal action may be commenced.

To interpret the statutes in the manner suggested by the appellees would result in an inconsistency we do not believe the Legislature intended. Crimes with an authorized maximum penalty of less than six months which do not expressly state the degree of the crime would have the same length of limitation as a third or fourth degree felony. § 30–1–8.

Appellees additionally contend that the Unemployment Compensation Law is a "revenue law." Section 30–1–8(G) provides for a three-year statute of limitations for any crime in violation of a revenue law. We disagree with the appellees' contention. The Unemployment Compensation Law requires that employers contribute to a "special fund, separate and apart from all public money, or funds of this state * * *." § 51–1–19, N.M.S.A.1978. Thus, the contributions required to be paid under the provisions of the law are not "revenues" to the state, and are not within the meaning of Section 30–1–8(G). *Cf. Howell v. Division of Employment Security Etc.*, 358 Mo. 459, 215 S.W.2d 467 (1948) (Unemployment Compensation Law not a revenue law for purpose of conferring jurisdiction on Supreme Court). We therefore hold that the statute of limitations applicable to an action brought under Section 51–1–38(A) is one year.

IT IS SO ORDERED.

PAYNE and FELTER, JJ., concur.

603 P.2d 722

Amelia HARRELL, as Personal Representative for Paul P. Harrell, Plaintiff-Appellee,

v.

The CITY OF BELEN, Ross Lovato and Ernest Montano, Defendants-Appellants.

No. 3453.

Court of Appeals of New Mexico.

May 15, 1979.

As Amended July 18, 1979.

Turner W. Branch, Stephen A. Slusher, Branch, Coleman & Perkal, P. A., Albuquerque, for plaintiff-appellee.

David R. Gallagher, J. E. Casados, Gallagher, Casados & Martin, Albuquerque, for defendants-appellants.

OPINION

HENDLEY, Judge.

Plaintiff recovered judgment in a wrongful death action involving her son who committed suicide while in police custody. Defendants appeal asserting several grounds for reversal: (1) refusal to give certain instructions; (2) the giving of certain instructions; (3) admitting certain items in

evidence; and (4) permitting an expert to express an opinion. We affirm.

Facts

Plaintiff's deceased son, Paul, was apprehended by the Belen police for armed robbery and taken to jail. Paul was seventeen years old. Plaintiff was notified of her son's arrest, and shortly thereafter, arrived at the jail. She was taken to an office where Paul was present with Officer Gabaldon. She was given permission to speak privately with him in a glass enclosed room.

Plaintiff testified that Paul said that "he wasn't going to the penitentiary, that they wouldn't take him there alive . . . ." She informed Assistant Chief Montano of Paul's statement ". . . that he'd die before he would go [to the penitentiary], he would kill himself . . . ." As plaintiff was leaving the area she saw Paul attempting to slash his wrist with a flip top (as is found on cans of cola). She told Montano of this and both returned to the restraining area where plaintiff took "the flip top and gave it to Montano and I [plaintiff] got Paul's wrist and turned it and Montano walked out."

As a result of this incident, Officer Ortega came in to sit with plaintiff and Paul. He claimed he was there to "baby-sit." Later, as plaintiff was leaving, she told Paul she would be back in the morning. He answered, "don't come back because you won't see me alive anyway." Plaintiff then told Montano, "you take care of him, he's going to try to kill himself."

Plaintiff testified that Montano assured her of Paul's safety stating that "we'll take good care of him" and "there's nothing there for him to hurt himself." Based upon the policeman's assurances and the belief that there was nothing else for her to do, plaintiff went home.

After plaintiff left, Montano gave instructions to Lovato, the dispatcher, to watch and check Paul every few minutes. The juvenile cell was located near the dispatcher's desk and had a window from which the cell could be observed. Lovato testified that he turned off the lights in the cell and checked on Paul every 10 to 15 minutes.

When Paul was first booked he was stripped of all clothes except his undershorts and placed in the juvenile cell. When his mother arrived, he was given his shirt and pants and removed to the glassed in area where they spoke. When his mother left, he was placed in the juvenile cell but was not again stripped.

Approximately three hours after his apprehension by the police, Paul was found dead hanging from a vent in the cell by his long-sleeved shirt.

Refusal to Instruct

Defendants claim that the trial court erred in failing to submit to the jury whether Paul's suicide was an independent intervening cause and whether Paul's action in killing himself and plaintiff's action in not remaining with her son after he had been incarcerated amounted to contributory negligence. Both of these contentions are unfounded.

■ A party is entitled to a jury instruction upon his theory of the case if it is supported by substantial evidence. *Martinez v. Schmick*, 90 N.M. 529, 565 P.2d 1046 (Ct.App.1977); *Mantz v. Follingstad*, 84 N.M. 473, 505 P.2d 68 (Ct.App.1972). The allegation that Paul's act of suicide was an independent intervening cause cutting off defendants' liability is simply an incorrect statement of the law.

■ When one party is in the custodial care of another, as in the case of a jailed prisoner, the custodian has the duty to exercise reasonable and ordinary care under the circumstances for the life and health of the charge. *Thomas v. Williams*, 105 Ga.App. 321, 124 S.E.2d 409 (1962); see *Porter v. County of Cook*, 42 Ill.App.3d 287, 355 N.E.2d 561 (1976); compare *Warner v. Kiowa County Hospital Authority*, 551 P.2d 1179 (Okl.App.1976). Knowledge on the part of the custodian that the charge may injure himself unless precautionary measures are taken is an important factor in determining whether the custodian exer-

cised reasonable care. *Thomas, supra,* and *Porter, supra.*

The Belen police, then, had the duty to exercise reasonable care for the life and health of Paul, as they were the persons responsible for placing him in the custodial setting. Their duty was heightened by their knowledge that Paul had made repeated threats of and had once even attempted to commit suicide.

This duty, moreover, contemplates the reasonably foreseeable occurrence of a self-inflicted injury regardless of whether it is the product of the charge's volitional or negligent act. *Hunt v. King County,* 4 Wash.App. 14, 481 P.2d 593 (Ct.App.1971). It is public policy which necessitates the negation of the charge's duty for self-care for:

> [a]ny other rule would render the actor's duty meaningless. The rule would in the same breath both affirm and negate the duty undertaken or imposed by law. The wrongdoer could become indifferent to the performance of his duty knowing that the very eventuality that he was under a duty to prevent would, upon its occurrence, relieve him from responsibility. 481 P.2d at 598.

Since Paul committed the very act that defendants were under a duty to prevent, Paul's conduct, although reasonably foreseeable, is irrelevant on the issue of proximate cause. *Hunt, supra.* Since public policy absolves Paul from any duty of due care under these circumstances, he could not by definition be contributorially negligent. *Hunt, supra.* The trial court, then, did not err in refusing to submit whether Paul's suicide was an independent intervening force and whether his act of killing himself was contributorially negligent.

The foregoing, however, does not answer the issue of whether the trial court erred in refusing to instruct on the contributory negligence of plaintiff. See *Baca v. Baca,* 71 N.M. 468, 379 P.2d 765 (1963). That answer is factual. There is simply no evidence of her contributory negligence. She repeatedly told the authorities of Paul's suicide threats and attempted suicide, and was assured that defendants would watch out for him. She had no duty to stay with Paul in jail and, in fact, did everything that she could reasonably be expected to do to protect her jailed son. Under the facts of this case, to impose a further duty on plaintiff would have the effect of lessening the duty of the defendants. This we will not do. The trial court properly refused the requested instruction on plaintiff's contributory negligence.

The foregoing discussion answers defendants' point regarding refusal to instruct on duty to exercise ordinary care since there is no issue of contributory negligence.

Instruction Nos. 11, 12 and 13

Defendants objected to instruction nos. 11, 12 and 13 on grounds different than those briefed on appeal. To preserve an objection for appeal, the objection must point out the specific defect. *Morris v. Dodge Country, Inc.,* 85 N.M. 491, 513 P.2d 1273 (Ct.App.1973). Since defendants failed to allege the specific defect at trial, they lost their right to do so on appeal. Objections to instruction nos. 11, 12 and 13 were not preserved for appeal.

Juvenile Standards

Defendants objected to the admission of the "Minimum Standards" for juvenile detention on the grounds that "the so-called 'standards' had no place in this lawsuit whatsoever" since they relate to "detention facilities of a permanent nature" rather than to "temporary police custody of a juvenile." This allegation is without merit.

Section 2.01 of the standards defines a detention facility as "a place where a child may be detained pending court hearing and does not include facilities for the care and rehabilitation of delinquent children." A general reading of the standards indicates that they set a minimum standard

for juvenile detention which "assures more uniform and sound practices for the detention of the delinquent child." The Belen jail, then, was a detention facility as contemplated by the standards. As such, the standards were relevant and admissible on the issue of the minimum level of detention to which the City of Belen had to comply.

Photograph

Plaintiff's Exhibit 8 is a color photograph of Paul's torso taken shortly after death. Defendants objected to its admission on grounds of irrelevancy.

Rule of Evidence 401 defines relevancy as that evidence which has the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The photograph here depicted the scene of the incident, and was taken as part of the official investigation. It shows the cut marks on Paul's wrist and the bruises on his neck from the hanging. The fact that a photograph may be cumulative of other evidence does not necessarily render it inadmissible so long as it serves to corroborate other evidence. *State v. Sedillo*, 76 N.M. 273, 414 P.2d 500 (1966). The photograph here tended to corroborate other evidence and was, therefore, admissible as relevant evidence.

Expert Witness

Plaintiff's expert, a clinical psychologist with an expertise in suicide, was asked a hypothetical question regarding what would have been reasonable action for the police to have taken in order to prevent Paul's suicide. Defendants contend this question invaded the province of the jury to decide what is "reasonable." We disagree.

The Court gave N.M.U.J.I.Civ. 15.1, N.M.S.A.1978, which states that the jury is free either to give an expert opinion whatever weight they think it deserves or to reject it entirely. As such, the opinion of the expert does not "preclude the jury on the ultimate question for their deliberation." N.M.U.J.I. Civ. 15.1, "Directions for Use."

Defendants also contend on appeal that the use of depositions of the police officers, as required by Rule of Evidence 703, were not of the kind reasonably relied upon by psychologists in the field. However, defendants did not make this specific objection at trial as required by *Higgins v. Hermes*, 89 N.M. 379, 552 P.2d 1227 (Ct. App.1976). Since defendants failed to properly object at trial, they lost their Rule 703 objection on appeal.

Affirmed.

IT IS SO ORDERED.

WOOD, C. J., concurs.

SUTIN, J., dissenting.

SUTIN, Judge (dissenting).

I dissent.

Paul P. Harrell, 17 years of age, while incarcerated in the city jail in Belen, committed suicide. He had been apprehended by the city police in the commission of a burglary of a business establishment in Belen, armed with a gun. After being taken to jail, he was visited by his mother. Paul did not talk much. He was afraid of going to the penitentiary. He cried. He had tried to cut his wrist or arm with the flip top of a can, and told his mother not to return because he would not be there. When his mother left, she told the officers to take care of him or he would kill himself. She did not consider Paul insane or mentally disturbed.

When originally booked, Paul had all outer clothing taken from him and was put in a juvenile cell. When his mother came, his clothes were given back to wear. When his mother left at 1:00 a. m., she was calm and Paul was normal. Paul was returned to his cell wearing his clothes. At 1:43 a. m., approximately 45 minutes later, by use of his shirt, an overhead grate in a vent, and

by stepping off the toilet, Paul hung himself.

The jailer checked Paul every ten to fifteen minutes by looking through the glass window in the door of the cell. While the lights were off in the cell, sufficient light came through this window for him to observe Paul.

Plaintiff's expert psychologist stated that a person in a suicidal state usually has to be in a state of depression. Such person has lost sight of what life is all about; that reasoning is so impaired that self-destruction is a solution to some of life's problems. In lay language, this person has to be beside himself, out of his mind, and unreasonable. Impulses take over and control more than reason does. The expert also stated that the police should have called the Crisis Center, a suicide prevention organization because hypothetically, Paul was, in his opinion, a high risk for suicide; that a trained person should have been called, and that if he had been transferred to the Bernalillo County Medical Center, the suicide could have been prevented; that an ordinary person could have detected all this.

However, the expert testified that he had not done any studies and was not familiar with any requirements relating to jails or the incarceration of accused felons, *nor requirements relating to the standards for jails or standards relating to the detention of juveniles.*

Suicide is self-destruction. It was a felony at common law. The only justification for retaining it as a crime was to provide a basis centuries later for punishing a person who aids, abets or assists another to do so. It was achieved in New Mexico and in other states by a statutory provision without the need to retain suicide as a crime. Section 30–2–4, N.M.S.A.1978. For a history of suicide, see, Barry, Suicide and the Law, 5 Melbourne Law Review 1 (1964); *Tate v. Canonica*, 180 Cal.App.2d 898, 5 Cal.Rptr. 28 (1960). To avoid a host of cases on this subject matter, we must narrow the crucial issues to the facts of this case.

First, this is not an intentional tort in which the claim for relief is predicated upon an intentional infliction of physical and mental injury by defendants that directly caused Paul to lose control of his mind or to become mentally irresponsible. "The law has for a long time recognized a distinction between intentional and negligent torts, and has generally recognized fewer defenses, and been more inclined to find that defendant's conduct was the legal cause of harm complained of, where the tort is intentional." *Tate, supra.* [5 Cal.Rptr. at 33.] *See, Liability of one causing physical injuries as a result of which injured party attempts or commits suicide*, 77 A.L.R.3d 311 (1977).

Second, this is not a case where a jailer caused, aided, assisted or led Paul to self-destruction. The jailer's conduct was passive. During the 45 minute interval, he did not remove Paul's outer clothing, keep a constant vigil or seek outside medical assistance. These complaints by plaintiff did not relate to the reasons for Paul's suicide. Paul voluntarily and intentionally took his own life.

Third, a jail is not a mental institution or hospital in which a patient is a suicide risk wherein the patient must be provided with proper standards of medical and hospital care and closely watched, a situation which demands greater supervision. *See, Dinnerstein v. United States*, 486 F.2d 34 (2nd Cir. 1973); *Smith v. United States*, 437 F.Supp. 1004 (E.D.Pa.1977); *Adams v. State*, 71 Wash.2d 414, 429 P.2d 109 (1967); *Meier v. Ross General Hospital*, 69 Cal.2d 420, 71 Cal.Rptr. 903, 445 P.2d 519 (1968).

Yet mental institutions have not been held liable under various circumstances. *O'Connor v. State*, 58 A.D.2d 663, 395 N.Y.S.2d 715 (1977) where the State checked every hour. The State was not required to provide a 24-hour supervision to suicidal patients; *Payne v. Milwaukee Sanitarium Foundation, Inc.*, 81 Wis.2d 264, 260 N.W.2d 386 (1977) where the patient's cheerfulness

was not alone sufficient to trigger more strict supervision than that ordered by a psychiatrist; *Broussard v. State Through Div. of Hosp.*, 356 So.2d 94 (La.App.1978) where it was not unreasonable to permit the patient to be with other patients though he might thereby obtain a robe tie with which to hang himself. *See*, Annot., *Liability of hospital, other than mental institution, for suicide of patient*, 60 A.L.R.3d 880 (1974); *Fernandez v. Baruch*, 52 N.J. 127, 244 A.2d 109 (1968) where jail authorities were not sued.

Fourth, this is not a case where a jailer is obligated by law to have knowledge of medicine, medical care, insanity or self-destruction in the supervision of juvenile inmates. He is not equipped to recognize and analyze severe emotional problems of persons charged with crimes.

Fifth, this is not a case where an inmate has had a history of mental illness. *See, Porter v. County of Cook*, 42 Ill.App.3d 287, 355 N.E.2d 561 (1976).

Sixth, this is not a case where a person arrested is physically or mentally impaired so as to require the arresting officers to seek medical attention.

A. *The jailer had no duty to prevent Paul from suicide.*

Failure to prevent suicide is the focal point of this appeal. Plaintiff states:

> The theory relied upon by Mrs. Harrell is pure and simple tort law, not involving any allegations of infliction of mental suffering. The theory is simply that of duty, breach of duty and consequential harm. *The duty is that of taking reasonable steps to prevent the suicide of Paul Harrell when the City of Belen knew, or in the exercise of reasonable care, should have known that he was suicidal.* . . . [Emphasis added.]

No cases were cited that support plaintiff's theory.

In *Lucas v. City of Long Beach*, 60 Cal. App.3d 341, 131 Cal.Rptr. 470, 474 (1976), the court said:

> The general rule is that a jailer is not liable to a prisoner in his keeping for injuries resulting from the prisoner's own intentional conduct. [Citations omitted.] *Absent some possible special circumstances a jailer is under no duty to prevent the latter from taking his own life.* [Emphasis added.]

"A prisoner is not allowed to recover from his custodian for a self-inflicted injury on the ground that the custodian was at fault in failing to prevent the prisoner from inflicting the injury upon himself," 60 Am. Jur.2d, *Penal and Correctional Institutions*, Section 29 (1972) and see supplement.

At the base of every tort case in which liability is imposed on defendant, there must be a duty. A duty is that required by one's station or occupation. *City of Clovis v. Archie*, 60 N.M. 239, 290 P.2d 1075 (1955). The scope of defendant's duty depends upon how far the law's protection will be extended to him. "The determination of the issue of duty and whether it includes the particular risk imposed on the victim ultimately rests upon broad policies which underline the law. Those policies may be characterized generally as morality, the economic good of the group, practical administration of the law, justice as between the parties and other considerations relative to the environment out of which the case arose." Green, *Duties, Risks, Causation Doctrines*, 41 Tex. L.Rev. 42, 45 (1962).

What duty does a city jailer owe a juvenile inmate charged with a felony? What is a jailer's duty when he is informed of the juvenile's intention to commit suicide? No duty is imposed upon the jailer by statute, rules or regulations. Generally speaking, the duties of a jailer are those defined by statute and limited as provided by law. 72 C.J.S. *Prisons* § 11 (1951); *Anderson v. Nosser*, 438 F.2d 183 (5th Cir. 1971). "There are no inherent duties of city jailers except

as provided by statute." *Howell v. City of Ashland*, 239 Ky. 349, 39 S.W.2d 468, 470 (1931). "The duties of the jailer are those prescribed by statute and such as were recognized at common law." *Gowens v. Alamance County*, 216 N.C. 107, 3 S.E.2d 339 (1939). Of course, there is diversity of judicial opinion on the subject. Annot., *Civil liability of sheriff or other officer charged with keeping jail or prison for death or injury of prisoner*, 14 A.L.R.2d 353 (1950) and later case service.

A jailer does not have a duty (1) to see that the cell is so constructed as to avoid any method of self-destruction, (2) to have knowledge of every method by which a juvenile might commit suicide, (3) be present at all times to prevent a juvenile from self-destruction, or (4) seek medical assistance.

The only duty that arises is that which occurs at the time of arrest. Section 32–1–23(A)(3) of the Children's Code. It reads in pertinent part:

> A. A person taking a child into custody shall, with all reasonable speed:
>
> * * * * * *
>
> (3) deliver the child . . . to a medical facility *if the child is believed to be suffering from a serious physical or mental condition or illness which requires either prompt treatment or prompt diagnosis.* [Emphasis added.]

When taken into custody by the police, Paul appeared to be and acted like a normal young man.

Defendants owed Paul no duty to prevent him from self-destruction.

B. *No standard of care for jail was proven by plaintiff.*

If we assume that the juvenile is entitled to reasonable care and attention for his safety as his mental and physical condition, if known, may require, the plaintiff is still required to prove that defendants failed to conform to the standard required. *Maricopa County v. Cowart*, 106 Ariz. 69, 471 P.2d 265 (1970). Under a similar set of facts, a young teenager confined in the Maricopa County Detention Home hung himself with a bed sheet in a six foot by eight foot room constructed of reinforced concrete, having one steel door with a small peep slot and with one window covered by a steel plate except for one or two inches at the top. Omitting citations, the court said:

> . . . Since the duty in this case is imposed because of the type of institution involved, the standard required for the protection of juveniles placed in its custody is that the institution exercises the skill and knowledge normally possessed by like institutions in similar communities handling juveniles. Just as a general hospital would have a different standard of care for its patients with mental disorders than a hospital specializing in mental disorders, a home for wayward juveniles would have a different standard of care than that imposed upon a general hospital which might have patients with mental disorders. [471 P.2d at 267–268.]

For failure of plaintiff to prove a standard of care, plaintiff's judgment was reversed and remanded with direction to enter judgment for defendant.

The Belen jail was a detention home. It had the same standard of care for juveniles as a detention home. A standard is essential. Jails in small towns without physicians employed would have a different standard of care than jails in large cities with a physician on duty. Where a physician is on duty, the standard of care in medical malpractice applies. *Shea v. City of Spokane*, 17 Wash.App. 236, 562 P.2d 264 (1977). The standard of care in jails would have a different standard than that exercised in prisons. Each institution should meet the standard of care for mentally ill juveniles or potential suicide inmates that similar communities exercise. This is the general rule established for hospitals, mental institutions, medical and legal malpractice, and any other institution or professional field where the extent of care bears upon liability.

To except the city jail is to frustrate the purpose for its existence.

C. *Defendants were not negligent.*

In *Lucas v. City of Long Beach, supra,* Stephen, a 17 year old son of plaintiff was booked in the city jail for intoxication. The officers were of the opinion that Stephen was under the influence of a drug. At about 2:00 a. m., Stephen was placed in a cell in the juvenile detention facilities. At about 4:55 a. m., a police officer, while making an inspection, found Stephen hanging by his neck with a noose constructed of a strip of cloth torn from a mattress cover. Stephen was dead. There was no evidence that Stephen suffered from any psychosis or other mental illness.

State regulations governing the administration of juvenile detention facilities required that inmates be observed by a custodian at least once each hour. The police officer did not comply with this regulation. Judgment for plaintiff was reversed.

The *Lucas* court said:

> The "cause" of Stephen's death was his own act in hanging himself. *No act or omission of Sergeant Riley produced the mental condition which prompted Stephen to do what he did.* . . . [Emphasis added.] [131 Cal.Rptr. at 474.]

The jailer was not negligent. All other matters which the plaintiff urges in the instant case were resolved against plaintiff in *Lucas.* The court dismissed these events as a matter of law.

For a collection of cases on the subject matter, *see* Annot., *Civil liability of prison or jail authorities for self-inflicted injury or death of prisoner,* 79 A.L.R.3d 1210 (1977).

In the instant case, there was no evidence that Paul suffered from any psychosis or other mental illness at the time of his confinement in the city jail. Neither is there any evidence that the jailer failed to exercise reasonable care during a 45 minute interval. Fault rests not with the jailer but with those social forces during his life, including the family, which led Paul to end his life. For this tragedy, the family has no legal right to seek damages from the defendants.

D. *Suicide, as an intervening cause, was at least a question of fact for the jury.*

The court refused to instruct the jury on intervening cause. It was reversible error. Defendants were entitled to a directed verdict.

For plaintiff to recover damages for the negligence of defendants, plaintiff must prove that the negligence of defendants was the proximate cause of Paul's self-destruction. If the chain of causation is broken by an unforeseeable intervening cause, defendants are not subject to liability. It is important to note that an intervening cause is one that comes into operation *after* the defendant's negligent act or omission to act. The failure of the jailer to act did not cause the suicide to occur. It did not cause a psychosis or mental illness which led to Paul's self-destruction. It did not cause a state of mind or an irresistible impulse resulting in Paul's suicide. The suicide which followed the omission of the jailer to act was an intervening cause of Paul's death. He took his own life.

In *Maricopa County,* the court said:

> . . . In those cases in which a *specific* duty of care is absent, that is cases involving a wrongful act by the defendant and a subsequent suicide by the injured party, the almost universal rule is that the suicide by the injured party is a superseding cause which is neither foreseeable nor a normal incident of the risk created and therefore relieves the original actor from liability for the death resulting from the suicide. [Emphasis by court.] [471 P.2d 267.]

It cannot be said that suicide is an independent intervening cause as a matter of law in every case that breaks the chain of causation, but it cannot be gainsaid that it is not a question of fact. To establish the development of the rule and its realistic approach would require long quotations. To avoid this recitation of a universally accepted rule as well as the overwhelming weight of authority, *see Tate v. Canonica, supra; Cauverien v. De Metz,* 20 Misc.2d 144, 188 N.Y.S.2d 627 (1959); *Lancaster v. Montesi,* 216 Tenn. 50, 390 S.W.2d 217

(1965); *Runyon v. Reid*, 510 P.2d 943 (Okl. 1973); *Jones v. Stewart*, 183 Tenn. 176, 191 S.W.2d 439 (1946); *Waas v. Ashland Day & Night Bank*, 201 Ky. 469, 257 S.W. 29 (1923), 35 A.L.R. 1441 (1925); *Lucas, supra*; *Scheffer v. Railroad Co.*, 105 U.S. 249, 26 L.Ed. 1070 (1881); *Salsedo v. Palmer*, 278 F. 92 (2nd Cir. 1921), 23 A.L.R. 1262 (1923); *Stevens v. Steadman*, 140 Ga. 680, 79 S.E. 564 (1913), 47 L.R.A. (N.S. 1009); *Daniels v. New York, N.H. & H.R. Co.*, 183 Mass. 393, 67 N.E. 424 (1903), 62 L.R.A. 751; *Orcutt v. Spokane County*, 58 Wash.2d 846, 364 P.2d 1102 (1961).

The voluntary, willful act of suicide is a new or intervening agency that breaks the chain of causation. This intentional act is a superseding cause of harm and relieves the defendant of liability unless such act of suicide was reasonably foreseeable or the failure to foresee such act was a factor in the original negligence. In *Maricopa County*, suicide is neither foreseeable nor an incident to the risk. Other authorities cited hold that foreseeability is a question of fact. There are differences in opinion. For example, *see Orcutt.*

In the instant case, all the evidence tended to show that Paul, with deliberate purpose, planned to take his own life; that he so stated to his mother; that he stated he did not want to go to the penitentiary; that he had planned and devised a method of taking his own life with use of a shirt, an overhead grate in a vent, and by stepping off the toilet in a matter of minutes. There is no evidence that he acted without volition under an uncontrollable impulse, or that he did not understand the physical nature of his act. This was an intervening cause. His conduct had no relationship to the claimed acts of the jailer's omission to act. Foreseeability, within the concept of reasonable care, is so inapplicable that reasonable minds cannot disagree.

The intervening act broke the chain of causation as a matter of law.

E. *The trial court erred in instructing the jury.*

Defendants established compliance with the minimum standards of the Children's Code and the statute itself. The trial court committed reversible error in giving instructions No. 11 and 12 relative to violations of §§ 9.04 and 8.01 of the regulations of the Children's Code and in giving instruction No. 13 based upon § 32–1–23. To approve negligence per se upon inapplicable provisions of the Children's Code and regulations is an affront to fair play. It borders on being farcical.

Even where minimum municipal jail and lockup standards are promulgated, the failure to comply with self-imposed regulations does not necessarily impose upon municipal bodies and their employees a legal duty to prisoners nor does the failure to comply with such regulations make a case of prima facie liability to a prisoner or his estate. Where such regulations provide that a prisoner with a known history of mental disorder or mental defect shall be immediately referred for appropriate professional study and diagnosis or be immediately examined by a physician, the regulations are helpful in simply suggesting a body of knowledge of which the authorities should be aware. *Dezort v. Village of Hinsdale*, 35 Ill.App.3d 703, 342 N.E.2d 468 (1976).

Judgment should be entered for defendants.

603 P.2d 731

STATE of New Mexico,
Plaintiff-Appellee,

v.

Jane DOE, a child, Defendant-Appellant.

No. 4101.

Court of Appeals of New Mexico.

Oct. 4, 1979.

Mary Jo Snyder, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Lawrence A. Barela, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

LOPEZ, Judge.

Jane Doe appeals a judgment of the children's court revoking her probation and committing her to the Girl's Welfare Home for a period not to exceed one year. We reverse.

Two issues are presented on appeal. They are: (1) whether a special master appointed by a judge of the children's court without prior approval of the New Mexico Supreme Court has authority to try a case on the merits; and (2), if he does not have this authority, and the district judge does not act on the case until after the statutory time limits in Children's Ct. Rule 46, must the case be dismissed with prejudice? Unless otherwise indicated, references to rules in this opinion are to the Children's Court Rules, N.M.S.A. 1978.

The third issue in the docketing statement was not briefed and has been abandoned. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct.App. 1977).

On March 30, 1978, appellant was found guilty of burglary after a trial in the children's court. She was placed on probation for one year, beginning in June 1978. In October 1978, her probation was extended one year. A petition to revoke probation was filed on March 27, 1979 in Bernalillo County. The petition indicated that appellant had been in detention since March 23, 1979. A hearing on the petition was held on April 11, 1979, before Mr. Budagher, an Albuquerque attorney, despite appellant's objection. The children's court judge, being involved in a jury trial that day and unable to find any other district judge to help him, had appointed Mr. Budagher as special master to hear the probation revocation petition. At the dispositional hearing on April 30, 1979, the judge adopted the special master's findings and ordered appellant committed to the Girl's Welfare Home.

Point 1. The special master lacked authority to hear the probation revocation petition.

The parties dispute the propriety of the procedure followed in appointing Mr. Budagher as special master in the children's court. Section (a) of Rule 11 provides for the appointment of special masters.

> In judicial districts having a population over two hundred thousand, *with prior approval of the New Mexico Supreme Court* a special master may be appointed by a children's court judge pursuant to the provisions of this rule in any children's court proceeding upon the showing that:
>
> (1) the children's court judge is unable to expeditiously dispose of pending children's court cases; or
>
> (2) some exceptional condition requires the appointment of a special master to assist the children's court judge. (Emphasis added.)

Appellant claims, and we agree, that since prior approval of the Supreme Court was not sought, the appointment of Mr. Budagher was without effect. Rule 11 is ambiguous in that there are two possible constructions: either (1) prior approval is necessary each time the district court seeks to appoint a special master; or (2) an approval which would be continuing, must be sought initially. The record does not indicate that prior approval of the Supreme Court for Mr. Budagher to act as special master to the children's court in Bernalillo County was *ever* sought, either immediately prior to the present case, or at some time more remote in the past. Hence, under either construction of the rule, the appointment of Mr. Budagher was improper.

Appellee asserts that the appointment of Mr. Budagher was a proper exercise of the inherent power of a district judge to appoint a special master. The judge of the children's court stated at the dispositional hearing that he did not appoint the special master under Rule 11, but under his inherent power as a district judge.

Judicial power can only be conferred upon a person by the authority of the law. *State v. Doe*, 91 N.M. 57, 570 P.2d 595 (Ct.App. 1977), *rev'd on other grounds, Doe v. State*, 91 N.M. 51, 570 P.2d 589 (1977). The power at issue is the power to act as a children's court judge. The children's court is a division of the district court and the judges of the children's court are, in fact district judges. Section 32–1–4 (A), N.M. S.A. 1978, *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968). In *State v. McGhee*, 41 N.M. 103, 104, 64 P.2d 825, 826 (1937), the Supreme Court stated that:

> It is the public policy of this state, as evidenced by its Constitution and laws, that regularly elected or appointed district judges shall preside over its district courts . . . .

Nevertheless, it is generally recognized that the district court has inherent power to appoint special masters. This is an inherent power of the judiciary. *See McCann v. Maxwell*, 174 Ohio St. 282, 189 N.E.2d 143 (1963). *See generally Railroad Co. v. Swasey*, 90 U.S. 405 (23 Wall. 405), 23 L.Ed. 136 (1874). In *In re Peterson*, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920), the Supreme Court elaborated upon the inherent power to appoint special masters in the federal courts.

> Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. . . . This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties as they may arise in the progress of a cause.

Id. at 312, 40 S.Ct. at 547. This power has been recognized in New Mexico. *See Johnson v. Gallegos*, 10 N.M. 1, 60 P. 71 (1900). In *Johnson*, the court noted:

> A master in chancery is an officer appointed by the court to assist it in various proceedings incidental to the progress of a cause before it . . . . The information which he may communicate by his findings in such cases, upon the evidence presented to him, is merely advisory to the court, which it may accept and act upon or disregard in whole or in part . . . .

Id. at 4, 60 P. at 72. *See generally Security State Bank v. Clovis Mill & Elevator Co.*, 41 N.M. 341, 68 P.2d 918 (1937).

The issue, then, is whether Rule 11 limits the inherent power of the district court to appoint a special master in children's court cases. We hold that it does.

The New Mexico Supreme Court has superintending control over inferior courts. N.M.Const., Art. VI, § 3. It has the power to promulgate rules of procedure in the state courts. *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). Pursuant to this power, the Supreme Court adopted the Rules of Procedure for the Children's Court in April 1976, and amended them in November 1978. The Rules are intended to govern all procedures involving certain classes of juveniles.

> These rules govern the procedure in the children's courts of New Mexico in all matters involving children alleged to be delinquent, in need of supervision or neglected, as defined in the Children's Code.

Rule 1 (a).

The New Mexico Rules of Civil Procedure also provide for the appointment of a special master. N.M.R.Civ.P. 53(a) N.M.S.A. 1978 states: "The court in which any action is pending may appoint a special master therein. . . ." There is no limitation in this rule that the master be approved by the Supreme Court. Clearly, the Supreme Court wanted to supervise the appointment of special masters in the children's court, whereas it left the matter entirely to the discretion of the district judge in civil cases. At the very least, Rule 11 enables the Supreme Court to insure the qualifications of the master and the propriety of his appointment.

Rule 11 limits the inherent power of a district judge to appoint a special master in children's court. Otherwise, the procedural requirements of the rule would be meaning-

less. If the Supreme Court had not thought special rules were necessary in the children's court, it would not have promulgated them.

Appellee argues that the Committee Commentary to Rule 11 indicates that the Rule is not intended to abrogate the inherent power of the judiciary to appoint a special master. This argument is irrelevant, because the court is not bound by the interpretations of the Commentaries. *State v. Zamora*, 91 N.M. 470, 575 P.2d 1355 (Ct. App. 1978), *cert. denied*, 91 N.M. 491, 576 P.2d 297 (1978), *State v. Benavidez*, 87 N.M. 223, 531 P.2d 957 (Ct.App. 1975).

Point 2. The children's court did not hear the petition within the required time limit.

Since the special master lacked authority to hear the petition, the court was without jurisdiction at the hearing on April 11, 1979. If the presiding officer does not have the authority to hear the case before him, the court lacks jurisdiction to try the matter. *Heckathorn v. Heckathorn*, 77 N.M. 369, 423 P.2d 410 (1967). *See State v. Doe, supra, Moruzzi v. Federal Life & Casualty Co.*, 42 N.M. 35, 75 P.2d 320 (1938).

The hearing on the petition to revoke probation began and ended on April 30, 1979 when the district judge disposed of the case. That was 34 days after the petition was filed and 37 days after the child was taken into custody. The applicable time limit is 30 days. Rule 46 (a) states:

> If the respondent is in detention, the adjudicatory hearing shall be commenced within thirty days from whichever of the following events occurs latest:
>
> (1) the date the petition is served on the respondent . . . .

The date the petition was served on the child, March 27, 1979 is the applicable date in this instance. This was 34 days before the hearing on April 30th.

Although Rule 46 pertains to petitions alleging delinquency or that a child is in need of supervision, the time limit is made applicable to probation revocation hearings by Rule 51 (a) which states that, with a few exceptions irrelevant in this case:

> Proceedings to revoke probation or parole shall be conducted in the same manner as proceedings on petitions alleging delinquency or need of supervision, and the respondent whose probation or parole is sought to be revoked shall be entitled to all rights that a respondent alleged to be delinquent or in need of supervision is entitled to under law and these rules . . . .

A similar provision appears in the Children's Code, § 32–1–43, N.M.S.A. 1978. *State v. Doe*, 90 N.M. 249, 561 P.2d 948 (Ct.App. 1977). While § 32–1–28 N.M.S.A. 1978 of the Children's Code provides a time limit different from Rule 46, the rule controls. Where there is a conflict between a statute and a procedural rule, the rule prevails. *State v. Doe*, 90 N.M. 568, 566 P.2d 117 (Ct.App. 1977).

The district court did not comply with Rule 46 (a). Consequently, the probation revocation petition should be dismissed with prejudice. This is the proper remedy when a proceeding in the children's court is not begun within the required time limit. *State v. Doe*, 93 N.M. 31, 595 P.2d 1221 (Ct.App. 1979), *State v. Doe*, 91 N.M. 393, 574 P.2d 1021 (Ct.App. 1978), *Doe v. State*, 88 N.M. 644, 545 P.2d 1022 (Ct.App. 1976). Moreover, Rule 46 (e) specifically provides:

> If the adjudicatory hearing on any petition is not begun within the times specified in . . . this rule . . . the petition shall be dismissed with prejudice.

The children's court's judgment and disposition are reversed. The cause is remanded with instructions to dismiss the petition with prejudice.

IT IS SO ORDERED.

WALTERS, J., concurs.

HENDLEY, J., specially concurring.

HENDLEY, Judge (specially concurring).

I concur in the result reached by the majority in point one, but on different grounds.

Under the first point the answer is simply that we do not have authority to change a Supreme Court rule and particularly when under any construction the appointment would be improper. Any discussion beyond this is not germane.

I agree with the majority in point two.

603 P.2d 736

Leonella TRUJILLO,
Plaintiff-Appellant-Cross-Appellee,

v.

Virginia CHAVEZ, Executrix of the Estate of A. T. Montoya, Deceased, Defendant-Appellee-Cross-Appellant.

No. 3526.

Court of Appeals of New Mexico.

Oct. 30, 1979.

E. Douglas Latimer, K. Gill Shaffer, Shaffer, Butt, Jones, Thornton & Dines, P. C., Albuquerque, for plaintiff-appellant-cross-appellee.

Robert J. Tonos, Robert C. Hanna & Associates, William P. Snead, Ortega & Snead, Michael P. Watkins, Oldaker, Oldaker & Watkins, Charles C. Spann, Albuquerque, for defendant-appellee-cross-appellant.

OPINION

LOPEZ, Judge.

This action was brought in the District Court of Bernalillo County to recover damages resulting from an automobile accident. After a jury trial, a verdict was returned denying recovery both on plaintiff Leonella Trujillo's complaint and defendant Virginia Chavez' counterclaim. Chavez is the executrix of the estate of A. T. Montoya; Montoya died in the accident. Judgment was entered dismissing both the complaint and the counterclaim with prejudice. Both Trujillo's and Chavez' motions for judgment n.o.v. or, in the alternative, for a new trial were denied. Trujillo and Chavez appeal from the judgment and orders denying their motions. We reverse and remand.

Trujillo presents one point for reversal: the trial court erred by submitting U.J.I. 9.7, the guest statute instruction, to the jury. Chavez presents two points: (1) the court erred in submitting two instructions concerning the presumption arising from ownership of an automobile to the jury; and (2) the court erred in admitting testimony concerning a statement made by an unknown bystander. We shall discuss each appeal separately.

Trujillo Appeal

Trujillo argues that the court erred by submitting U.J.I. 9.7, the guest statute instruction, to the jury. This instruction was numbered 26A and reads:

> A person transported in a vehicle as a guest without payment for such transportation cannot recover damages against the owner of the vehicle in case of accident unless the accident was intentional or was caused by willful and wanton misconduct of the owner.

In *McGeehan v. Bunch,* 88 N.M. 308, 540 P.2d 238 (1975), our Supreme Court held that the guest statute was unconstitutional. In arriving at this holding, the court stated:

> After due deliberation, it is the opinion of this court that the decision holding our guest statute unconstitutional shall be given modified prospectivity. That is, this newly announced rule shall apply to the case at bar, *all similar pending actions* and all cases which may arise in the future. (Emphasis added.)

Id. at 314, 540 P.2d at 244. The court's decision was reached on September 23, 1975. The complaint in the present action was filed August 20, 1975. The present action, therefore, was pending when the Supreme Court reached its decision. Accordingly, we hold that the court erred in submitting instruction no. 26A to the jury. However, in order for this error to be grounds for reversal, the submission of the instruction must have been prejudicial to Trujillo. *Jewell v. Seidenberg,* 82 N.M. 120, 477 P.2d 296 (1970). A reading of the instruction itself and the record reveals that Trujillo's burden of proof was increased by the submission of the instruction. We thus conclude that Trujillo was prejudiced by its submission.

We are aware that Chavez claims that it was the duty of Trujillo to object specifically to the instruction so that the court could have an opportunity to correct it. *Lucero v. Torres,* 67 N.M. 10, 350 P.2d 1028 (1960). Relying upon the existence of this duty, Chavez contends that the judgment should be affirmed since Trujillo

failed to object to the instruction on the grounds that the guest statute was unconstitutional or that it was inapplicable based upon the ruling in *McGeehan v. Bunch, supra.* The record discloses that the court considered the *McGeehan* decision before it decided to submit the instruction to the jury. The court was, therefore, advised of those errors which might possibly result from the instruction's submission. Accordingly, the court had the opportunity to correct the instruction. In this situation, we rule that Chavez' contention is without merit. In addition, we do not agree that the court committed merely harmless error in submitting the instruction to the jury. The fact that the jury denied recovery to both parties does not necessarily mean, as Chavez asserts, that the jury found both parties negligent. The denial of recovery could also have resulted from the decision that Trujillo failed to carry her burden of proof. We have already indicated that Trujillo's burden was increased by the submission of the instruction. Therefore, we conclude that its submission may have affected the outcome of the case. Under these circumstances, we rule that the court did not commit harmless error.

Based upon the foregoing, we reverse the judgment and order of the court denying Trujillo's motion for a new trial and remand this cause for a new trial.

Chavez Appeal

Chavez argues that the court erred in submitting two instructions to the jury concerning the presumption arising from ownership of an automobile. These instructions were numbered 25 and 26 and read:

> 25. If after considering the evidence, you are unable to determine based upon credible and substantial evidence who was driving the automobile at the time of the accident, then the law provides that the owner is presumed to be the operator of the vehicle. Therefore, if you are unable to decide that there is sufficient evidence to allow a reasonable mind to accept is [sic] adequate to support a conclusion concerning who was driving the vehicle, you may accept the legal presumption that the Defendant, decedent, being the owner of the vehicle was the driver of the vehicle.
>
> 26. The presumption referred to in the last instruction disappears and ceases to exist if you find credible and substantial evidence which would support a contrary finding.

Until the adoption of the Rules of Evidence in 1973, the law in New Mexico was that a presumption ceases to exist upon the introduction of evidence which would support a finding of its nonexistence. *Hartford Fire Insurance Co. v. Horne,* 65 N.M. 440, 338 P.2d 1067 (1959); *Morrison v. Rodey,* 65 N.M. 474, 340 P.2d 409 (1959); *Morris v. Cartwright,* 57 N.M. 328, 258 P.2d 719 (1953); *Payne v. Tuozzoli,* 80 N.M. 214, 453 P.2d 384 (Ct.App.1969). This theory of presumptions, known as the "bursting bubble" theory, is not proper under the Rules of Evidence adopted by the New Mexico Supreme Court. According to the Commentary to Rule 301 of the Advisory Committee which prepared and submitted the proposed federal rule of evidence (which New Mexico adopted), the "bursting bubble" theory is inconsistent with Federal Rule of Evidence 301.

> The so-called "bursting bubble theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too "slight and evanescent" an effect.

"The disappearance of the presumption upon the presentation of contrary evidence was eliminated, however, when the 1973 Rules of Evidence were adopted." *State Farm Mutual Automobile Insurance Co. v. Duran,* No. 3678, 93 N.M. 489, 601 P.2d 722 (Ct.App. 1979). The cases listed above, to the extent they are contrary to Evidence Rule 301, are no longer applicable.

Instruction 26 directs the jury that the presumption disappears if there is credible and substantial evidence to support its nonexistence. This is a proper formulation of the "bursting bubble" theory of pre-

sumptions. Since this theory is no longer applicable in New Mexico, the instruction is erroneous.

N.M.R.Evid. 301, N.M.S.A.1978 states:

> In all cases not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

The effect, then, of Evidence Rule 301 is to shift the burden of persuasion.

> Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it.

Advisory Committee's Note to Federal Evidence Rule 301.

Although New Mexico Evidence Rule 301 is silent on whether the jury is to be instructed concerning presumptions, it is logical that the jury should be informed who has the burden of persuasion, as it is in other instances where presumptions are not involved. This is also the opinion of the draftsmen of the New Jersey Evidence Code, which contains a rule similar to our Rule 301 giving presumptions the effect of shifting the burden of persuasion. The New Jersey Committee suggests that "the instructions would be phrased entirely in terms of assuming facts and burden of proof." New Jersey Supreme Court Committee on Evidence 51 (1963), *quoted in* 1 Weinstein, Evidence, ¶ 301[02] 301–32 (1978).

The jury must also be informed of the presumption, if it is to give the presumption any effect. Insofar as evidence against a presumed fact must be weighed for its credibility, the jury must be informed of the presumption in order that it may be given effect if it rejects the evidence in question. Annot., 5 A.L.R.3d 19 at 45 (1966). However, to avoid unduly influencing the jury, the word "presumption" should be avoided.

> [T]he specific instruction should avoid using the word "presumption" because of the danger that the jury will mistakenly attribute effects to this term other than those described by the judge and prescribed by Rule 301.

Weinstein, *supra,* 301–34.

This does not mean that a reversal is warranted because a court mentions the dreaded word "presumption." Weinstein, *supra,* at 301–28. The complaining party would still have to demonstrate prejudice by use of the word. However, because "presumption" is such a technical term, the better practice is to describe the presumption in terms of assumed facts and burden of proof.

In Civil cases the effect of a presumption that is not rebutted is disputed. The states are split on whether, once evidence establishing the presumption has been introduced, and in the absence of persuasive evidence to the contrary, the jury *must,* or *may,* find the presumed fact true. The view in New Mexico is that the jury must find the presumed fact true if evidence to the contrary has not been introduced. *Hartford Insurance Co., supra.*

Rule 301 does not change the requirement that the jury must find the presumed fact true, in certain circumstances. It merely changes the circumstances in which this finding must be made. Formerly, the jury was required to find the presumed fact true only when no credible and substantial evidence which would support a contrary finding was introduced. *Hartford, supra.* Under Evidence Rule 301, the jury is required to so find, only when the party against whom the presumption operates fails to persuade the jury that the nonexistence of the presumed fact is more probable than its existence.

The view that the jury should be required to find the presumed fact, if sufficient evidence to the contrary is not adduced, is implicit in the jury instructions suggested by the New Jersey Supreme Court Committee on Evidence.

> Where the existence of the basic facts is to be determined by the jury, "the judge must instruct that if the jury finds the basic fact, they *must* also find the presumed fact unless persuaded by the evidence that its nonexistence is more probable than its existence" Morgan, supra at 42 . . . . (Emphasis added.)

Quoted in Weinstein, *supra* at 301–32. This view is also implicit in the instructions suggested by Weinstein and Prof. Morgan. *See generally,* Weinstein, *supra;* Morgan, Instructing the Jury upon Presumptions and Burden of Proof, 47 Harv.L.Rev. 59 (1933). There is no constitutional infirmity in requiring the jury, in civil cases, to find the presumed fact true if it has not been controverted by a showing that its nonexistence is more probable than its existence. *Dick v. New York Life Insurance Co.,* 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959).

From this discussion, four considerations emerge. (1) The effect of a presumption, under Evidence Rule 301, is to place the burden of proof on the party against whom the presumption operates. The jury should be instructed where the burden of proof lies. (2) The failure of the party on whom the burden of proof has fallen to show that it is *more probable than not* that the presumed fact does *not* exist results in the presumption becoming effective. The jury is the body that weighs the evidence and decides if this party has met his burden. (3) The use of the word "presumption" is to be avoided as it is more likely to confuse than to aid the jury. (4) The jury must find the presumed fact true if, (a) the jury is persuaded of the existence of the basic fact from which the presumed fact is inferred, and (b) the party against whom the presumption operates has failed to show that the nonexistence of the presumed fact is more probable than its existence.

Instruction 25 does not properly instruct on presumptions under Evidence Rule 301. It fails to explain that the burden of proof is on Chavez to show that it is more probable than not that Montoya, the undisputed owner of the car, was not driving at the time of the accident; and it does not clearly inform the jury of the consequences of Chavez' failure to show this. Also, the jury was instructed that it *might* find the presumption to be true, whereas the law in civil cases in New Mexico is that the jury *must* find the presumption true if the party opposing the presumption has not met his burden of proof. Instructions 25 and 26 were erroneous. A better instruction for this case would have been:

> Because the evidence is undisputed that Montoya was the owner of the car in which he was riding at the time of the accident, you must find that Montoya was the driver unless Montoya's estate has proved that it is more probable that he was not driving than that he was driving. The proof required of Montoya's estate in this instruction is in addition to the burden of proof placed on the parties in other instructions.

Chavez also contends that the trial court erred in admitting testimony concerning a statement made by an unknown bystander. This statement was offered to prove that Montoya was driving at the time of the accident. Chavez claims that the statement was hearsay and not admissible under any of the exceptions to the hearsay rule. She argues that the court, in admitting this testimony, committed reversible error. We agree.

Trujillo asserts that the testimony of the unknown bystander was not hearsay, and was properly admitted under Rule 804(b)(2) of the New Mexico Rules of Evidence, N.M. S.A.1978.

That rule reads:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . . .
>
> (2) *Statement of recent perception.* A statement, not in response to the instigation of a person engaged in investigating, litigating or settling a claim, which narrates, describes or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated liti-

gation in which he was interested, and while his recollection was clear.

The unknown bystander's testimony is admissible under this exception to the hearsay rule only if the declarant is unavailable. However, Section (a) of Evidence Rule 804 limits unavailability of a declarant to five specific situations. The only situation relevant to this appeal is defined as follows:

"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.

N.M.R.Evid. 804(a)(5), N.M.S.A.1978. Evidence Rule 804(a)(5) requires that the proponent of the unavailable witness' testimony attempt to procure the attendance of the witness before trial. Absent evidence of this attempt, the court does not consider the witness unavailable, and evidence of his testimony is inadmissible as hearsay. *Madrid v. Scholes*, 89 N.M. 15, 546 P.2d 863 (Ct. App.), *cert. denied*, 89 N.M. 206, 549 P.2d 284 (1976); *State v. Mann*, 87 N.M. 427, 535 P.2d 70 (Ct.App.1975). There is no evidence in the record before us that any attempt was made to locate the unidentified bystander. Consequently, his testimony was hearsay and should not have been admitted.

Since proper objection to the admission of this testimony was made at this trial before a jury, the inadmissible hearsay was reversible error. *Sayner v. Sholer*, 77 N.M. 579, 425 P.2d 743 (1967).

Based upon the foregoing, we reverse the judgment and order of the court denying Chavez' motion for a new trial, and we remand this cause for a new trial.

IT IS SO ORDERED.

HENDLEY, J., concurs.

WOOD, C. J., specially concurs.

WOOD, Chief Judge (specially concurring).

I concur in Judge Lopez's opinion. This special concurrence goes only to Evidence Rule 301 and its practical effect.

1. The Estate appealed, challenging the propriety of the presumption instructions. It relied on the New Mexico law prior to the adoption of Evidence Rule 301. Under that prior law, the instructions should not have been given because there was credible and substantial evidence which would have supported a finding that Montoya was not driving the car. With this evidence, the presumption disappeared. *Hartford Fire Insurance Company v. Horne*, 65 N.M. 440, 338 P.2d 1067 (1959). Evidence Rule 301, however, changed the law. Under Evidence Rule 301, the Estate had a burden of persuasion which it did not have prior to adoption of the evidence rule. The Estate is in no position to complain of the instructions given because those instructions imposed less of a burden on the Estate than should have been imposed pursuant to Evidence Rule 301. Significantly, Judge Lopez does not hold that the erroneous instructions amounted to reversible error.

2. Judge Lopez's opinion points out that the fact finder, in this case the jury, must decide whether the party against whom the presumption is directed has proved that the nonexistence of the presumed fact is more probable than its existence. Evidence Rule 301. This rule does not change the trial judge's function of deciding whether there is sufficient evidence for the jury to determine whether this burden has been met. The standard for determining whether the evidence is sufficient to raise a jury issue is the same standard used in determining whether a verdict should be directed. 1 Weinstein's Evidence (1978) ¶ 301[02], page 301–30. Thus, if there are conflicts in the evidence going to the probability of the nonexistence of the presumed fact, it is for the jury to determine whether the burden has been met. See *Hayes v. Reeves*, 91 N.M. 174, 571 P.2d 1177 (1977); *Skyhook Corp. v. Jasper*, 90 N.M. 143, 560 P.2d 934 (1977).

3. In this case the evidence that Montoya owned the car was uncontradicted. In a case where the evidence of ownership was conflicting, a factual determination of own-

ership would have to be made. Until it was determined as a fact that an occupant of the car was the owner, the presumption would not be applicable. Where the evidence of ownership is conflicting, the jury must be instructed that the presumption (or assumed fact) does not exist until the basic fact of the presumption has been found to exist. Since such an instruction would go only to a part of the case, will the jury be confused in applying it?

4. In this case, the "burden" of Evidence Rule 301 does not add to the Estate's problems of persuasion because the Estate counterclaimed. Under the counterclaim, the Estate was required to prove that Trujillo was the driver. But what if there were no counterclaim and no affirmative defense which involved the question of who was the driver? The defense would have a burden of proof under Evidence Rule 301, and the jury instructions would have to distinguish between the burdens on plaintiff and defendant. No matter how carefully instructed, the allocation of different burdens has the potential for confusing the jury, particularly so when one of the burdens involves proof of the probability of a negative.

5. Another problem, settled in New Mexico concerning the presumption of validity of marriage, see *Panzer v. Panzer*, 87 N.M. 29, 528 P.2d 888 (1974), involves conflicting presumptions. If other conflicting presumptions should arise, and I suspect they will, see Wood, *The Community Property Law of New Mexico* (1954) § 27 and *Myers v. Kapnison*, 93 N.M. 215, 598 P.2d 1175 (Ct.App.1978) how are they to be handled under Evidence Rule 301? Weinstein, supra, ¶ 301[03] suggests the question is an open one.

6. Evidence Rule 301 was not discussed in *Archibeque v. Homrich*, 88 N.M. 527, 543 P.2d 820 (1975). Compare opinion of Judge Hernandez in the same case, 87 N.M. 265, 531 P.2d 1238 (Ct.App.1975). The facts of *Archibeque* suggest a case for application of the presumption involved in this case; however, res ipsa loquitur was involved. Gausewitz, *Presumptions in a One-Rule World*, 5 Vand.L.Rev. 324 at 333 (1952) states: "Since a presumption is by definition mandatory, a verdict must be directed that the presumed fact exists if the presumption is not rebutted. One instance of a departure may be the case of *res ipsa loquitur*." Is the res ipsa doctrine an exception to Evidence Rule 301? The rule does not state any exceptions.

7. New Mexico appellate decisions have recognized the change effected by the adoption of Evidence Rule 301. *Panzer v. Panzer*, supra; *State Farm Mutual Automobile Ins. Co. v. Duran*, 93 N.M. 489, 601 P.2d 722 (Ct.App.1979). However, compare *Garmond v. Kinney*, 91 N.M. 646, 579 P.2d 178 (1978). Although a burden of persuasion approach is the "rule" in New Mexico, alongside that rule is a decision giving evidentiary effect to the presumption of insanity. *State v. Wilson*, 85 N.M. 552, 514 P.2d 603 (1973). See *State v. Santillanes*, 91 N.M. 721, 580 P.2d 489 (Ct.App.1978) where this special evidentiary effect was recognized, but where the presumption rule for criminal cases, Evidence Rule 303, was not discussed. Compare *Trefzer v. Stiles*, 56 N.M. 296, 243 P.2d 605 (1952) with *Hartford Fire Insurance Company v. Horne*, supra. Weinstein, supra, page 301–5 indicates that giving a presumption an evidentiary effect is "obvious nonsense." My point in this paragraph, simply, is that Evidence Rule 301 may not be "*the* rule" where the presumption of insanity is involved.

8. Eminent writers have supported the burden of persuasion approach adopted in Evidence Rule 301. I, of course, must apply that rule. *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973). Paragraphs 3 through 7 raise, for me, the question of whether the logic of the various writers, see Weinstein, supra, pages 300–1 to 301–17, has led to the adoption of a rule which causes more problems than it solves, which has the potential of causing the most careful trial judge to err in the instructions given, and which has the potential to confuse a jury. New Mexico adopted, as its rule, the wording proposed by the drafting committee. Both Houses of Congress rejected the same language. See Weinstein,

supra, pages 301–1 to 301–13. The evidence rule enacted by Congress follows the bursting bubble approach; that is, the approach used in New Mexico prior to the adoption of Evidence Rule 301, Rule 301, 28 U.S.C.A. (1975) page 66.

9. Evidence Rule 301 may have been improvidently adopted; at least, it should be reconsidered. Compare *State v. Howell*, 93 N.M. 64, 596 P.2d 277 (Ct.App.1979).

603 P.2d 744

STATE of New Mexico, Plaintiff-Appellant,

v.

Mark Allen CHOUINARD, Defendant-Appellee.

No. 4198.

Court of Appeals of New Mexico.

Nov. 8, 1979.

Jeff Bingaman, Atty. Gen., Santa Fe, James F. Blackmer, Asst. Atty. Gen., Sasha Siemel, Asst. Dist. Atty., Albuquerque, for plaintiff-appellant.

John B. Bigelow, Chief Public Defender, Michael Dickman, App. Defender, Santa Fe, Nancy Hollander, Asst. Public Defender, Albuquerque, for defendant-appellee.

OPINION

LOPEZ, Judge.

The state appeals the dismissal of one count of a criminal indictment charging the defendant with using a firearm in the commission of a felony, pursuant to § 40A–29–3.1, N.M.S.A.1953 (Supp.1975). We affirm.

The only issue before us is whether possession of a firearm during the commission of a felony constitutes "use" of a firearm under the New Mexico firearm enhancement statute, § 40A–29–3.1, N.M.S.A.1953 (Supp.1975) [which is, for purposes of this appeal, essentially the same as § 31–18–16, N.M.S.A., 1978 (Supp.1979) in the current codification].

The State's allegations, not disputed on this appeal, are as follows. The defendant and co-defendant were arrested before completing the sale of eight ounces of cocaine to an undercover agent of the Albuquerque Police Department. At the time of his arrest, the defendant was armed with a

loaded semi-automatic pistol in his belt. The co-defendant also had a pistol in his belt and a magnum revolver wrapped up on the seat behind him within his reach. The co-defendant waited in his vehicle while the defendant went into the agent's apartment to conduct the negotiations for the sale. Neither defendant ever drew or pointed his gun at the police officers at any time during the negotiations or the arrests. Among other charges, the State accused the defendant of using a firearm in the trafficking of cocaine. The trial court dismissed this count before trial. Although the State objected to dismissal of this accusation at a pre-trial hearing, the procedural issue was not briefed on appeal and is thus waived. *State v. Vogenthaler*, 89 N.M. 150, 548 P.2d 112 (Ct.App.1976).

The New Mexico firearm enhancement statute under which Chouinard was charged reads:

> A. When a separate finding of facts by the court or jury shows that a firearm *was used* in the commission of:
>
> (1) any felony except a capital felony, the minimum and maximum terms of imprisonment prescribed by the Criminal Code shall each be increased by five [5] years . . . . (Emphasis added.)

§ 40A–29–3.1, N.M.S.A.1953 (Supp.1975).

While this court has previously held that the idea of "use" in this statute should be construed broadly to include the use of a gun as a club, *State v. Trujillo*, 91 N.M. 641, 578 P.2d 342 (Ct.App.), *cert. denied*, 91 N.M. 751, 580 P.2d 972 (1978), we do not stretch the meaning of "use" to include "non-use". The starting point in every case involving construction of a statute is the language itself. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975). Statutes are to be given effect as written. When free from ambiguity, there is no room for construction. *State v. Elliott*, 89 N.M. 756, 557 P.2d 1105 (1977). "Use" is different from "possession". This court has previously noted this distinction with respect to firearms. *See Trujillo; State v. Duran*, 91 N.M. 38, 570 P.2d 39 (Ct.App.), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977), U.S. *cert. denied*, 435 U.S. 972, 98 S.Ct. 1615, 56 L.Ed.2d 65 (1978). The use of a firearm is something beyond mere possession of it. As the California Supreme Court wrote when interpreting the meaning of "use" in part of the California firearm enhancement statute [1]:

> By employing the term "uses" instead of "while armed" the Legislature requires something more than merely being armed. . . . [T]he use of a firearm connotes something more than a bare potential for use . . . .

People v. Chambers, 7 Cal.3d 666, 672, 102 Cal.Rptr. 776, 779, 498 P.2d 1024, 1027 (1972). In that case, the court found that the defendant "used" a gun when he pointed it at the victim and demanded money. In the case before us, neither Chouinard nor his co-defendant ever pulled a gun or in any way threatened the police with a firearm.

If the Legislature had intended the firearm enhancement provision to apply whenever a person committing a felony was armed, it would have written such a provision into the statute. Compare the New Mexico armed robbery statute, § 30–16–2, N.M.S.A. (1978) (applicable to anyone who "commits robbery while armed with a deadly weapon"); 18 U.S.C. § 924(c) (1970) (penalty for using or carrying a firearm during the commission of a felony); Cal.Penal Code § 12022(a) (West Cum.Supp.1979) (enhancement for attempt or commission of felony while armed); Mich.Comp.Laws Ann. § 750.277b (Cum.Supp.1979–1980) (carrying a firearm at commission of a felony is in itself a felony).

The state brings three federal cases to our attention: *United States v. Moore*, 580 F.2d 360 (9th Cir.), *cert. denied*, 439 U.S. 970, 99 S.Ct. 463, 58 L.Ed.2d 430 (1978);

1. The court was interpreting Cal.Penal Code § 12022.5 (West 1970) which read: "Any person who uses a firearm in the commission or attempted commission of [certain felonies] . . . shall . . . be punished by imprisonment . . . for . . . not less than five years. . . .

United States v. Grant, 545 F.2d 1309 (2nd Cir. 1976), *cert. denied*, 429 U.S. 1103, 97 S.Ct. 1130, 51 L.Ed.2d 554 (1977); *United States v. Brant*, 448 F.Supp. 781 (W.D.Pa. 1978). *Moore* involved a firearm enhancement of an attempted armed robbery. The court held there that the gun in defendant's waistband was "used" as much as the gloves and ski mask he wore in his attempted bank robbery. The court was construing 18 U.S.C. § 924(c)(1) which provides an enhancement for "use" of a firearm in the commission of a federal felony.[2] Since an attempt to commit a bank robbery is such a felony and the gun was an integral part of the attempt, the holding can be rationalized. Our enhancement statute also covers the situation where a firearm was "used" in a felony. However, evidence is lacking in the instant case to permit construction of our statute as was done in *Moore*. There is simply no evidence that either defendant used *or threatened to use* a firearm during the sale negotiations or subsequent arrests. *Brant* was decided under 18 U.S.C. § 924(c) generally.[3] Subsection (2) provides that the *possession* of a firearm during the commission of a felony is punishable by an enhanced sentence. Since the court in *Brant* may have used this subsection as the basis for its decision, the case is inapposite because the New Mexico firearm enhancement statute contains no such provision. In *Grant*, the second circuit interpreted 18 U.S.C. § 924(c)(1)[4] to include the situation where guns were found hidden on the premises where cocaine was sold. We do not find the reasoning of this case compelling, and decline to apply it in reading our statute.

The New Mexico firearm enhancement provision specifically states that it applies when a finding is made that the defendant *used* a firearm in the commission of a noncapital felony. We decline to extend the ordinary meaning of "use" to include mere possession. Since the State does not contend that either defendant ever showed his gun or threatened to use it during the alleged sale of cocaine, the trial court could properly dismiss the count of the indictment charging that a firearm was "used" in the commission of a felony.

The order of the trial court is hereby affirmed.

IT IS SO ORDERED.

SUTIN and WALTERS, JJ., concur.

2. See note 3 *infra*.

3. 18 U.S.C. § 924(c) (1970) reads in part:

(c) Whoever—

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall . . . be sentenced to a term of imprisonment for not less than one year nor more than ten years. . . .

4. *Id.*

603 P.2d 1094

In the Matter of Eugene E. KLECAN.

No. 12452.

Supreme Court of New Mexico.

Nov. 28, 1979.

Klecan & Roach, Mark J. Klecan, Albuquerque, for Eugene E. Klecan.

Jeff Bingaman, Atty. Gen., Albert Joseph Alarid III, Deborah A. Moll, Asst. Attys. Gen., Santa Fe, for State of New Mexico.

OPINION

FEDERICI, Justice.

This case arises out of an order by Bernalillo County District Judge Gerald R. Cole, finding appellant, Attorney Eugene E. Klecan, in contempt of court. The parties agree that the alleged contempt was criminal rather than civil in nature. The issue in this case is whether the actions of appellant were in disobedience of a court order and as such constituted criminal contempt.

Appellant was summarily held in contempt and fined during his cross-examination of a witness in a personal injury suit. The pertinent portion of the colloquy went as follows:

MR. E. KLECAN: We would offer in Defendant's Exhibit 3, which is the Answer to Interrogatory 38. The Interrogatory says, "See attached—let me read the question for the Court."

THE COURT: Are you offering that exhibit?

MR. E. KLECAN: Yes.

THE COURT: I have read the question.

MR. E. KLECAN: All right. Could I, for the benefit of the Jury, read the question, your Honor?

THE COURT: Not if you are offering the exhibit. If you are going to ask her a question, fine, but for offering the exhibit, I can read the question.

MR. E. KLECAN: Well, I will ask her the question in Interrogatory Number 38 as a preliminary—"If you are claiming lost wages as a result—"

MR. NORVELL: Objection, Your Honor, the—

MR. E. KLECAN: "—of the accident in question, please state the amount of the alleged lost wage claim and your basis for arriving at that figure. Answer: See statement attached."

Which is being offered in evidence.

THE COURT: Ladies and Gentlemen, I will ask you to retire to the Jury Room.

. . . . . .

THE COURT: Mr. Klecan, I find that your actions are willful and wanton disregard to the Court's direction, and I find you in contempt of Court, and I find [sic] the sum of five hundred dollars, to be paid within twenty-four hours.

You may post an appeal bond in the amount of one thousand dollars, and you may take it to the Supreme Court, if you care to. If you do that again, I will put you in jail, sir.

MR. E. KLECAN: Let me explain, why—

THE COURT: I don't want an explanation. I feel that at this time, Mr. Norvell, that I have become so involved in this case that I cannot fairly try it, and I will declare a mistrial. Would you bring the Jury in.

The contempt order was filed under a miscellaneous cause number and assigned to another district judge. Thereafter, Judge Cole had the case reassigned to himself. Appellant's requests for withdrawal of the contempt order and for a hearing on the matter were denied.

Pursuant to § 34–1–2, N.M.S.A. 1978, a court may "preserve order and decorum, and for that purpose to punish contempts by reprimand, arrest, fine or imprisonment, being circumscribed by the usage of the courts of the United States." This statute is declaratory of the common law. *State v. Clark*, 56 N.M. 123, 241 P.2d 328 (1952).

Contempts of court are classified as civil or criminal and as direct or indirect. The major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised. Civil contempts are those proceedings instituted to preserve and enforce the rights of private parties to suits and to compel obedience to the orders, writs, mandates and decrees of the court; whereas criminal contempt proceedings are instituted to preserve the authority and vindicate the dignity of the court. *State v. Greenwood*, 63 N.M. 156, 315 P.2d 223 (1957); *State v.*

Magee Pub. Co. et al., 29 N.M. 455, 224 P. 1028 (1924). Direct contempts are contemptuous acts committed in the presence of the court, while indirect, or constructive contempts, are such acts committed outside the presence of the court. *Roybal v. Martinez*, 92 N.M. 630, 593 P.2d 71 (Ct.App.1979).

Generally, before criminal contempt may be imposed and enforced, the following requirements must be met: (1) Except in cases of flagrant contemptuous conduct, the trial judge should not exercise the power of summary contempt in the absence of a prior warning, *see Caldwell v. United States*, 28 F.2d 684 (9th Cir. 1928); *Sussman v. Com.*, —— Mass. ——, 374 N.E.2d 1195 (1978); *State v. Sanchez*, 89 N.M. 673, 556 P.2d 359 (Ct.App.1976); (2) an opportunity to explain, *Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974); and (3) a hearing on the matter, *Taylor v. Hayes, supra.*

In the instant case, the statements by the court were not clear enough to constitute a specific warning to appellant. Appellant requested that he be allowed to read Interrogatory No. 38. The court answered in part, "[i]f you are going to ask her a question, fine," and appellant interpreted this to permit the reading of the interrogatory. If the court meant to forbid any reading of the interrogatory, its prohibition was not made clear to appellant, and consequently, there was no willful disobedience of a court order. Even assuming that the court's warning was sufficiently specific, still the requirements of a warning and hearing were absent.

The necessity of allowing an explanation of allegedly contemptuous acts was recognized by the United States Supreme Court in *Taylor v. Hayes, supra.* Quoting in part from an earlier decision, the court stated:

> Even where summary punishment for contempt is imposed during trial, "the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution" (citation omitted).

418 U.S. 488, 498, 94 S.Ct. 2697, 2703, 41 L.Ed.2d 897.

And in *Sussman v. Com., supra*, the Massachusetts court stated:

> Especially in light of the potential for abuse of the contempt power, and adequate opportunity to defend or explain one's conduct is a minimum requirement before imposition of punishment.

374 N.E.2d 1195, 1200.

Appellant in this case was not afforded such an opportunity, as Judge Cole stated, "I don't want an explanation."

After appellant was cited for contempt and a mistrial was declared, the contempt order was filed under a miscellaneous cause number and assigned to District Judge Phillip Baiamonte. Judge Cole then had the case reassigned to himself. This Court has held, in *In the Matter of Avallone*, 91 N.M. 777, 581 P.2d 870 (1978), that the proper test for determining whether the impartiality of a judge has been affected by the acts of the contemnor is whether the act involves the personal feelings of the judge. The United States Supreme Court has also held that "contemptuous conduct, though short of personal attack, may still provoke a trial judge and so embroil him in controversy that he cannot 'hold the balance nice, clear, and true between the State and the accused . . . .'" *Taylor v. Hayes, supra*, at 501, 94 S.Ct. at 2704 quoting, *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1910). Judge Cole, in declaring a mistrial, stated that he had become so involved in the case that he felt he could not fairly try it. The matter of the contempt order should have been left to Judge Baiamonte. *Taylor v. Hayes, supra.*

Once the case was reassigned to Judge Cole, appellant's request for withdrawal of the contempt order and for a hearing were denied. In the case of criminal contempt committed in its presence, the court has the power to punish the contemnor *summarily. Cooke v. United States*, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767 (1925); *Ex Parte Terry*, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405 (1888). The rationale for such proceeding was explained in *Cooke v. United States*:

> To preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court, when occurring in open court.

267 U.S. 517, 534, 45 S.Ct. 390, 394, 69 L.Ed. 767.

> [Upon facts] . . . showing a clear case of contempt committed in the face of the Circuit Court, which tended to destroy its authority, and, by violent methods, to embarrass and obstruct its business, the petitioner was not entitled, of absolute right, either to a regular trial of the question of contempt, or to notice by rule of the court's intention to proceed against him, or the opportunity to make formal answer to the charges contained in the order of commitment.

128 U.S. 289, 306–307, 9 S.Ct. 77, 80, 32 L.Ed. 405.

Appellant's actions in this case did not constitute violent disruption of the proceedings of the court or blatant disrespect for the judge. *Compare State v. Driscoll,* 89 N.M. 541, 555 P.2d 136 (1976). As such, the imposition of summary contempt was not proper.

The result we reach should not be interpreted as condoning irresponsible or contemptuous behavior towards a court or disobedience by attorneys and others of a court's order; nor are we condoning conduct which causes undue disturbance in the court, physical obstruction of or disrespect of a judge. Order and decorum in the courts must be preserved. However, in all fairness to participants in litigation in this State, and except in cases of flagrant contemptuous conduct, before summary punishment for contempt may be imposed and enforced, the record should be clear that: (1) a specific warning was given by the judge; (2) an opportunity to explain was afforded, and (3) a hearing was held.

In this case, the behaviour on the part of Mr. Klecan during the course of the trial which may have constituted the alleged criminal contempt by the appellant towards the court may have been more obstructive, disrespectful and disobedient than what appears in the record. However, we are bound by the record on appeal and based on that record we conclude that the essentials and requirements for criminal contempt set forth above in this opinion were not met.

The contempt citation of appellant is set aside.

IT IS SO ORDERED.

FELTER, J., and HARL D. BYRD, District Judge, concur.

603 P.2d 1097

Robert BUDAGHER, Sheriff of Sandoval County, Trustee for and on behalf of H. E. Leonard, Winona Leonard, and Leonard Motor Company, beneficiaries, and H. E. Leonard, Winona Leonard and Leonard Motor Company, Individually, Plaintiffs-Appellees,

v.

SUNNYLAND ENTERPRISES, INC., John E. Kinscherff and County of Sandoval, Defendants-Appellants.

No. 12318.

Supreme Court of New Mexico.

Dec. 17, 1979.

Poole, Tinnin & Martin, Paull Mines, Douglas Seegmiller, Albuquerque, for defendants-appellants.

Gallagher & Walker, Peter E. Gallagher, Dale B. Walker, Jr., Albuquerque, for plaintiffs-appellees.

OPINION

FRANCHINI, District Judge.

This matter comes before this Court for a second time. The first decision in this case is reported in 90 N.M. 365, 563 P.2d 1158 (1977). In that decision this Court held that the trial court abused its discretion in refusing to consider evidence concerning reasonableness of attorney's fees in the sum of $45,399.23 awarded as a result of a foreclosure suit. That decision noted that a provision in a mortgage note for a 10% attorney's fee would entitle the mortgagor only to a reasonable fee with 10% as the upper allowable limit. The case was remanded to the trial court for a hearing on the reasonableness of the fee; a hearing was held and the sum of $45,399.23 was again set by the court below. This second appeal resulted.

A determination of the first issue presented on this appeal is dispositive of this case.

The issue is whether or not the trial court abused its discretion, after a hearing, in allowing attorney's fees in the amount of $45,399.23. We find no abuse of discretion.

The recent case of *Fryar v. Johnsen*, 93 N.M. 485, 601 P.2d 718 (1979) set out several factors to be considered in determining the reasonableness of a fee. These include:

> (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
>
> . . . . .
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> . . . . .
>
> (7) the experience, reputation and ability of the lawyer or lawyers performing the services;

Id. at 487, 601 P.2d at 720.

A reading of the record in this case convinces us that the trial court considered all of these factors.

Neither the record nor the briefs in this case show an abuse of discretion on the trial court's part. The award of attorney's fee in this case is not excessive considering the factors set out above.

We affirm.

IT IS SO ORDERED.

EASLEY and FEDERICI, JJ., concur.

603 P.2d 1098

Tony S. PARKER, Plaintiff-Appellant,

v.

BOARD OF COUNTY COMMISSIONERS OF DONA ANA COUNTY, Defendant-Appellee.

No. 12444.

Supreme Court of New Mexico.

Dec. 21, 1979.

Anthony F. Avallone, Las Cruces, for appellant.

Joseph M. Holmes, Asst. Dist. Atty., Las Cruces, for appellee.

OPINION

PAYNE, Justice.

Appellant filed an action for declaratory judgment in the district court challenging the constitutionality of portions of the Dona Ana County Subdivision Regulations. The trial court granted summary judgment. We affirm.

Appellant subdivided land into a Type 3 classification under Section 47–6–2(M), N.M.S.A.1978 (Cum.Supp.1979), and Section II–49 of the county subdivision regulations. To receive county approval and to meet with county road requirements, appellant filed a disclosure statement and agreed to surface subdivision roads with six inches of base course and two inches of asphalt within a year.

The county suspended plat approval in October 1977 because appellant failed to meet his deadline for surfacing all roads. Thereafter, the county accepted an $18,000 indemnification bond to extend for twelve months the time within which to install "two inches of hot mix asphalt." Appellant again failed to make the improvements. He now states he would suffer irreparable damage if the guarantee of performance were enforced.

The issue before us is whether the New Mexico Subdivision Act (the Act), Sections 47–5–9, 47–6–1 to 47–6–28, N.M.S.A.1978, authorized the county to enact Section XX of its regulations. That regulation provides:

> Upon approving a subdivision plat, *the Commission expressly reserves jurisdiction to subsequently determine whether plat approval should be suspended or revoked* because:
>
> 1. Any material misstatement or error of fact in the disclosure statement or any information upon which the Commission relied; or
>
> 2. A subsequent failure to comply with a material provision of the disclosure statement or a subsequent failure to comply with County Regulations. (Emphasis added.)

To resolve this issue we must address several points; namely, the purpose and requirements of the Act, and the requirements of due process.

With the enactment of the New Mexico Subdivision Act, the board of county commissioners was given "the power to adopt, promulgate and enforce subdivision regulations . . . ." *El Dorado at Santa Fe, Inc. v. Board of Cty. Com'rs*, 89 N.M. 313, 320, 551 P.2d 1360, 1367 (1976).

Section 47–6–9(A), N.M.S.A.1978, of the Act provides in part:

> A. The board of county commissioners of each county shall regulate subdivisions within the county's boundaries. In regulating subdivisions, the board of county commissioners of each county shall adopt regulations setting forth the county's requirements for:
>
> . . . . .
>
> (5) sufficient and adequate roads;
>
> . . . . .
>
> (10) any other matter relating to subdivisions which the board of county commissioners feels is necessary to ensure that development is well planned, giving consideration to population density in the area.

The concept of "well planned" development through subdivision regulations protects purchasers from unscrupulous or nonperforming developers. Even after the approval of a subdivision, Section 47–6–25 clearly allows a county to revoke or suspend that approval for failure of the developer to comply with a schedule of compliance:

> The board of county commissioners may suspend or revoke approval of a plat as to the unsold or unleased portions of a subdivider's plat if the subdivider does not meet the schedule of compliance approved by the board.

Sections 47–6–11 and 47–6–17 of the Act set forth specific methods for submission of information on Types 1, 2, and 4 subdivisions, requiring a disclosure statement for them. The Act does not specifically set forth a method for the smaller Type 3 subdivision, but Section 47–6–12(B) does provide the following:

> Any subdivider submitting a plat of a type-three or a type-four subdivision shall submit *sufficient information* to permit the board of county commissioners to determine whether or not the subdivision conforms to the New Mexico Subdivision Act and the county's subdivision regulations. (Emphasis added.)

Appellant asserts that the county may not impose requirements for approval of a Type 3 subdivision beyond those of the statute. We do not agree.

The Act delegates authority to counties to adopt regulations for Type 3 subdivisions. Standards need not be specific; broad general standards are permissible " 'so long as they are capable of a reasonable application and are sufficient to limit and define the Board's discretionary powers.' " *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 417, 389 P.2d 13, 18 (1964). *See also Ayres v. City Council of City of Los Angeles*, 34 Cal.2d 31, 207 P.2d 1 (1949); *Clark v. Town Council of Town of West Hartford*, 145 Conn. 476, 144 A.2d 327 (1958); *Vogel v. Board of County Com'rs of Gallatin Co.*, 157 Mont. 70, 483 P.2d 270 (1971); *Frank Ansuini, Inc. v. City of Cranston*, 107 R.I. 63, 264 A.2d 910 (1970). Because the Section 47–6–12(B) requirement of submission of "sufficient information" is general, the county is left to determine what quantum of information amounts to "sufficient information" and to specify the form for acquiring it.

The county regulations set forth requirements for developers who apply for approval of Types 3 and 5 subdivisions. One provision requires information on the surfacing of roads through the filing of a disclosure statement. Appellant complied with this requirement. The county could not consistently require a disclosure statement for approval and then not insure compliance therewith. Section XX is a reasonable exercise of the delegated power. It prevents subdividers, subsequent to plat approval, from circumventing the Act and the county regulations adopted to supplement the Act.

Appellant challenges Section XX of the county regulations as a violation of the due process clause of the Fourteenth

Amendment to the United States Constitution, because he was allegedly deprived of land without just compensation. He seeks support for his position from the case of *El Dorado at Santa Fe, Inc., supra*, wherein this Court held:

> Upon compliance with the statutory prerequisites to subdivision and sale by a subdivider, followed by a determination of the board of county commissioners that such compliance had in fact occurred, rights vest in the subdivider which cannot thereafter be withheld, extinguished or modified except upon due process of law.

89 N.M. at 319, 551 P.2d at 1366. The *El Dorado* holding is not applicable to the present case. We cannot equate the approved subdivision plat in this case with vested property rights, as the approval was conditioned upon performance by the subdivider. Suspension or revocation of plat approval remain realities for the developer until he complies with the reasonable conditions imposed by the county within its authority. The appellant failed to accomplish the conditions he agreed to accomplish and which were required by the county as a prerequisite to plat approval.

We affirm the trial court.

IT IS SO ORDERED.

SOSA, C. J., and FELTER, J., concur.

603 P.2d 1101

STATE of New Mexico, Plaintiff-Appellee,

v.

Vickie Gloria QUINTANA, Defendant-Appellant.

No. 4126.

Court of Appeals of New Mexico.

Sept. 25, 1979.

Roderick A. Dorr, Terrazas & Dorr, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Lawrence A. Barela, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

The appeal involves a double jeopardy claim based on the prosecutor's alleged bad faith conduct.

Defendant was being tried on a charge of forgery of a check. During his opening statement, the prosecutor stated that a detective would testify that he presented a photo array to the victim, that the array was of persons that "may or have been involved in previous crimes" and that the victim had selected defendant's picture from the array. The victim was the first witness. After an in-court identification of

defendant as the one who passed the check, the victim was asked to identify a set of pictures. The victim identified the pictures as the array which she had viewed, and testified that she had selected defendant's picture from the array. When the prosecutor moved the admission of defendant's picture (from the array), defendant objected and moved for a mistrial. The mistrial motion was granted; there is no issue as to the propriety of this ruling. *State v. Gutierrez*, 93 N.M. 232, 599 P.2d 385 (Ct.App. 1979).

Thereafter, defendant moved to dismiss the forgery charge. The motion asserted, and it is not disputed on appeal, that the photo of defendant was a "mug shot" which showed a police number and an arrest date unrelated to the forgery charge. The motion alleged that use of defendant's photo and the reference to the photo array in the opening statements "were either intentional attempts to abort this trial or grossly negligent actions amounting to prosecutorial misconduct and overreaching." On this basis defendant contended that to retry the defendant would violate double jeopardy. The trial court denied the motion; we granted an interlocutory appeal.

Defendant is the one who sought and obtained the mistrial. Ordinarily a mistrial granted on defendant's motion removes any double jeopardy barrier to reprosecution. This, however, is not the rule when the mistrial results from prosecutorial overreaching. *State v. Mazurek*, 88 N.M. 56, 537 P.2d 51 (Ct.App.1975). The "overreaching" which bars retrial requires bad faith conduct which threatens the defendant with successive prosecutions or which seeks for the prosecutor a more favorable opportunity to convict. *State v. Dunn*, 93 N.M. 239, 599 P.2d 392 (Ct.App.1979).

It cannot be seriously contended that the prosecutor's references to the photo array in his opening statement and his attempt to introduce defendant's mug shot into evidence were not efforts to afford the prosecutor a more favorable opportunity to convict the defendant. See *State v. Gutierrez*, supra. The question is whether the prosecutor's efforts can be characterized as having been undertaken in bad faith.

The arguments to the trial court while the mistrial motion was being considered show that counsel differed as to the holding in *State v. Gutierrez*, supra. The prosecutor's view was that *Gutierrez* did no more than prohibit references to "mug shots" and "mug books." Such a limited view of *Gutierrez* is amazing. The holding in *Gutierrez* reads:

> We will no longer tolerate prosecutorial references to "mugshots" or "mug books," or the introduction of "mug shots" in a criminal case under the circumstances brought to our attention here.

Although the prosecutor's selective view as to the holding in *Gutierrez* is dubious, the circumstances of *Gutierrez* and this case are sufficiently different; that even with the prosecutor's erroneous view of the *Gutierrez* decision, we cannot hold the prosecutor proceeded in bad faith.

Defendant's brief speculates as to the use the prosecutor would have made of defendant's picture if the trial had proceeded. Such speculative use does not show bad faith because it did not occur; a mistrial was declared.

At the time the trial court declared the mistrial, there had been no reference to "mug shot"; the prosecutor's references had been to a "photo array." Defendant's picture was never admitted into evidence; none of the pictures in the array had been shown to the jury. Testimony by the victim that she had selected the picture of the defendant from a photo array was relevant to corroborate her in-court identification. The trial stopped at that point. There had not been repeated testimony concerning, or repeated references to, defendant's picture; the only testimony concerning the picture had come from the victim, and the victim's testimony had not been repetitious. The limited use of the defendant's mug shot picture in this case was sufficiently different from the use in *State v. Gutierrez*, supra, that we cannot hold, as a matter of law, either that the prosecutor proceeded in bad faith or that the trial court's refusal to

dismiss, on a theory of prosecutor overreaching, was an abuse of discretion. Compare the facts in *State v. Callaway*, 92 N.M. 80, 582 P.2d 1293 (1978).

The order denying the motion to dismiss is affirmed.

IT IS SO ORDERED.

LOPEZ and WALTERS, JJ., concur.

603 P.2d 1103

Douglas ARAGON and Robert Aragon, Plaintiffs-Appellants,

v.

Ronald BROWN and Marion Brown, Defendants-Appellees.

No. 3965.

Court of Appeals of New Mexico.

Nov. 1, 1979.

Stephen A. Hubert, Martin, Martin, Lutz & Cresswell, P.A., Las Cruces, for plaintiffs-appellants.

Edward E. Triviz and John L. Campbell, Las Cruces, for defendants-appellees.

OPINION

WALTERS, Judge.

Douglas Aragon, age 17, was bitten by defendants' St. Bernard dog while visiting

at their home. The injury required 320–375 sutures to close the wound. Suit was brought to recover damages of $100,000 for personal injuries to Douglas and for $4000 in medical expenses incurred by his father. The jury returned a verdict for defendants. Plaintiffs appeal on grounds that the jury was improperly instructed; defendants cross-appeal contesting the trial court's denial of their motions for directed verdict, and the court's refusal of their tendered jury instruction regarding unlawful use of liquor by a minor.

The Aragons contend the district court erred by giving instructions on negligence, contributory negligence, and trespass. They argue that the only proper instruction was UJI No. 5.3, which states:

> UJI Civ. 5.3 Liability of owner or keeper of dog.
>
> In order for the owner of a dog to be liable to a person injured, the burden of proof is on the plaintiff to establish that the dog was vicious or had a natural inclination or tendency to be dangerous and that the owner had knowledge thereof.
>
> In determining the character of the dog, you may consider evidence of the general reputation of the dog, as well as evidence of any prior acts and conduct of the dog.
>
> In determining the knowledge of the owner, you may consider evidence of the manner in which the owner maintained the dog, his knowledge of prior acts and conduct of the dog, and any previous warnings issued to others by the owner.
>
> ("The owner of such a dog is not liable to the person injured if the injured person has knowledge of the character of the dog and wantonly excites it or voluntarily and unnecessarily puts himself in the way of the dog.")

[redacted] N.M.R.Civ.P. 51D, N.M.S.A. 1978 (Special Supp.1979), formerly N.M.R.Civ.P. 51(1)(c), N.M.S.A. 1978, makes use of UJI 5.3 mandatory. The instruction states the entire law of liability and relief from liability in connection with dog-bite injuries, instructing the jury that it must first find the dog to be dangerous and that the owner knew it. The instruction allows the jury to determine the nature of the dog, good or bad, from its general reputation and from evidence of other acts or conduct. Means of determining the knowledge of the owner are set out, and any defenses available to the owner are provided in the last paragraph. UJI 5.3 encompasses all the necessary elements of determining liability or non-liability in dog-bite cases. Thus, it was error for the district court to give jury instructions on the issues of negligence and contributory negligence. False issues were injected, and the erroneous instructions could only have confused the jury. *State ex rel. State Highway Comm'n v. Atchison, T. & S. F. Ry. Co.*, 76 N.M. 587, 417 P.2d 68 (1966).

[redacted] The court's instruction on the issue of trespass was also erroneous. There was insufficient evidence to establish a trespass situation. Douglas had been invited to the Brown premises, and his entry into the back yard from the Brown residence would not constitute a trespass in absence of any express limitation of his visit to a specific area of the Brown residence or grounds. This instruction raised an additional false issue. *Kight v. Butscher*, 90 N.M. 386, 564 P.2d 189 (Ct.App.1977).

[redacted] Appellee asked for an instruction on the unlawfulness of giving beer to a minor. There was no evidence that Douglas's possession or consumption of beer at the Brown residence, in violation of § 60–10–16, N.M.S.A. 1978, was in any way the proximate cause of his injuries. Moreover, an instruction on violation of the liquor statute could only have gone to the issue of contributory negligence and we have already ruled that no contributory negligence instructions shall supplement UJI 5.3 in dog-bite cases. Appellee's argument on the Court's refusal to so instruct the jury is without merit.

Because this case is reversed for a new trial, we address plaintiff's objection to the limitation on recoverable damages declared by the trial court.

The district court ruled that if plaintiff prevailed, defendants would be entitled to a credit of $1000 already paid by their insurance company under the medical payments provision of their policy, against any damages awarded. "Compensation received from a collateral source does not operate to reduce damages recoverable from a wrongdoer." *Trujillo v. Chavez*, 76 N.M. 703, 708, 417 P.2d 893, 897 (1966). This rule has been applied where an injured plaintiff received reimbursement from her own insurer for medical expenses, *Selgado v. Commercial Warehouse Company*, 86 N.M. 633, 526 P.2d 430 (Ct.App.1974); where a plaintiff received sick leave pay from her employer, *Trujillo, supra. Martinez v. Knowlton*, 88 N.M. 42, 536 P.2d 1098 (Ct.App.1975); where the injured party received public assistance, *Mobley v. Garcia*, 54 N.M. 175, 217 P.2d 256 (1950); and where an injured passenger received compensation under the medical payments provision of her driver's (co-plaintiff's) insurance policy, *Bailey v. Jeffries-Eaves, Inc.*, 76 N.M. 278, 414 P.2d 503 (1966). But whether the collateral source rule applies to payments made to a plaintiff under the medical payments provisions of defendant's insurance policy is a question of first impression in this jurisdiction.

It is the well-reasoned and majority rule that where the benefits derive from the defendant himself or a source identified with him, he is entitled to credit for it, since there is no collateral source but only funds provided by the defendant. *E. g., Overturff v. Hart*, 531 P.2d 1035 (Okl.1975); *Yarrington v. Thornburg*, 58 Del. 152, 205 A.2d 1 (1964); *Feeley v. United States*, 337 F.2d 924 (3d Cir. 1964); Restatement of Torts, 2d § 902(A); Dobbs, *Law of Remedies* (1973), 185, 583–584. The trial court was correct, and if plaintiffs recover when this case is retried, any damages awarded shall be reduced by insurance payments already received from defendant's insurer.

This case is reversed and remanded for a new trial consistent with this opinion.

IT IS SO ORDERED.

HENDLEY and ANDREWS, JJ., concur.

603 P.2d 1105

Paul A. PHILLIPS and Estelle S. Phillips, husband and wife, Plaintiffs-Appellants,

v.

ALLSTATE INSURANCE COMPANY, Defendant-Appellee.

No. 3735.

Court of Appeals of New Mexico.

Nov. 8, 1979.

Paul A. Phillips, pro se.

LeRoi Farlow, Gordon J. McCulloch, Farlow & Bradley, Albuquerque, for defendant-appellee.

OPINION

HERNANDEZ, Judge.

Plaintiffs appeal from the granting of summary judgment in favor of defendant.

We reverse and remand for further proceedings.

Plaintiffs had been insured by defendant for automobile liability and collision from 1957 on. Defendant had renewed plaintiffs' coverage on a yearly basis since that time. On July 29, 1976 defendant mailed a letter to plaintiffs, the pertinent part of which reads as follows:

> *Your auto insurance has been continued* and we appreciate the opportunity to serve you. *The protection you have for the coming year and the cost is shown on the enclosed premium statement.*
>
> . . . . .
>
> If you wish to use a payment plan, your payment notice shows the amount of your first payment and when it is due. Or, you can pay the total amount. Either way, please be sure to send your payment on time. Then you won't risk being without insurance. [Emphasis added.]

Attached to this letter were two documents. One was the payment statement, which reads in part:

USE THE PAY PLAN YOU PREFER

3–PAY PLAN (SEE BACK)	40 PERCENT DUE	$217.25*
MULTI–PAYMENT PLAN	AMOUNT DUE	54.85*
PAY–IN–FULL	AMOUNT DUE	536.00

* A PARTIAL PAYMENT FEE OF $12.50 IS INCLUDED.

The other document recites in part as follows:

DECLARATIONS
ALLSTATE INSURANCE COMPANY
ISSUED JUL 29, 1976

SUPPLEMENT PAGE 1
Policy Period
BEGINS ON AUG 31, 1976
WITH NO FIXED DATE OF EXP.
12:01 A.M. Standard Time
(See reverse side for additional Policy Provisions.)

1. Policy number 0 20 856215 08/31
2. Name of Insured PAUL A & E PHILLIPS
3. Address 9800 CHAPALA N E ALBUQUERQUE NM 87111
4. The insurance afforded, including that with respect to each described vehicle, is only for each such coverage, including the limit(s) applicable thereto, as is set forth below, subject, however, to all the applicable provisions of the policy. (if the word "amended", followed by a date, appears above, the insurance applies only prospectively from such date.) [Emphasis added.]

On August 2, 1976 defendant mailed another letter which reads in pertinent part as follows:

> In reply please refer to
> August 2, 1976
> Policy Number: 20 856 215
> Type of Policy: Auto
> Expiration Date: Aug. 31, 1976
> Refund: If any, will follow
> Paul A. & E. Phillips
> 9800 Chapala NE
> Albuquerque, NM 87111
> Dear Mr. & Mrs. Phillips:
> We're sorry we are unable to renew your insurance protection under the policy listed above. Your insurance will expire at

12:01 A.M. (at your address) on the expiration date shown above. Of course, your protection will continue until then. [Emphasis added.]

Plaintiffs in their first cause of action alleged that:

3. On or about July 29, 1976, the Defendant agreed to and contracted to renew Plaintiffs' auto insurance coverage from August 31, 1976 to August 31, 1977. This was done by letter and enclosure copies of which are annexed hereto as Exhibit A. The premium for the renewal of such insurance was approximately $536.00. Thereafter, on or about August 2, 1976, Defendant ALLSTATE, in a letter to the Plaintiffs, copy of which is annexed hereto as Exhibit B, purported to refuse to renew Plaintiffs' automobile insurance coverage.

4. Defendant's purporting to refuse to renew Plaintiffs' insurance constituted a breach of the contract created by its letter of July 29, 1976, and its actions over a period of nineteen years of insurance coverage.

Plaintiffs in their second cause of action alleged that:

6. By reason of the Defendant's arbitrary and capricious and unreasonable refusal to perform its contract and to continue its course of dealing with the Plaintiffs, Plaintiffs' reputation as an insurance risk was severely damaged and in the course of years to come will constantly be required to pay higher premiums than if the Defendant had performed its contract.

Defendant denied all of these allegations.

An examination of the plaintiffs' complaint and the exhibits and the denials in defendant's answer immediately raises several very material issues of fact.

Plaintiff alleged in his complaint that his prior course of dealings with defendant spanned a period of eighteen years. The facts surrounding prior renewals present material questions concerning the nature of those dealings, and plaintiff should have had the opportunity to present evidence on that matter unless we can say that, as a matter of law, they would have no bearing on the question of renewal. In view of defendant's unambiguous and declaratory statements in the documents mailed July 29th, we are of the opinion that, depending upon what the evidence of prior conduct shows, defendant may well have extended an irrevocable offer to plaintiff (*See* Corbin on Contracts, §§ 43–44), or plaintiff may have accepted the offer by his silence (ibid., § 75), or this letter may have constituted an automatic renewal or continuation of the existing contract of insurance between the parties. In this regard, we note that the policies referred to in the letter of July 29th and the letter of August 2nd are the same—policy number 20 856 215. *See, also, Small Agency, Inc. v. Dugay*, 4 Conn.Cir. 710, 239 A.2d 553 (1967).

Martin v. Argonaut Insurance Company, 91 Idaho 885, 434 P.2d 103 (1967) states:

[A] course of conduct by the insurer which automatically renews policies over a period of years may require an actual notice to the insured of intent not to renew.

17 Couch on Insurance 2d at § 61:11 states:

The refusal to renew a policy can of course have no effect upon rights which have already vested.

Furthermore, a claim of defamation, like other tort claims, raises questions of fact which generally preclude summary judgment adjudication. This case is no exception. *See Salazar v. Bjork*, 85 N.M. 94, 509 P.2d 569 (Ct.App.1973), *cert. denied*, 85 N.M. 86, 509 P.2d 561 (1973); *Tagawa v. Maui Publishing Company*, 49 Haw. 675, 427 P.2d 79 (1967); *Barlow v. International Harvester Company*, 95 Idaho 881, 522 P.2d 1102 (1974); *Cahill v. Hawaiian Paradise Park Corporation*, 56 Haw. 522, 543 P.2d 1356 (1975); *Schulze v. Coykendall*, 218 Kan. 653, 545 P.2d 392 (1976).

It is firmly established in this jurisdiction that summary judgment is properly granted *only when there is no genuine issue as to any material fact* and the moving party is entitled to judgment as a

matter of law. [Emphasis added.] *Archie v. Smith*, 78 N.M. 548, 434 P.2d 73 (Ct.App.1967), *cert. denied*, 78 N.M. 627, 435 P.2d 1009 (1967).

The defendant did not submit any affidavits or other documents in support of its motion for summary judgment. Defendant's counsel filed a memorandum brief. The arguments of counsel, no matter how erudite, are not evidence.

[T]he 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. *Fidelity Nat. Bank v. Tommy L. Goff*, 92 N.M. 106, 583 P.2d 470 (1978).

It is our opinion that the defendant failed to carry this burden.

IT IS SO ORDERED.

HENDLEY and WALTERS, JJ., concur.

603 P.2d 1108

U. V. INDUSTRIES, INC., Appellant,

v.

The PROPERTY TAX DIVISION OF the TAXATION AND REVENUE DEPARTMENT of the State of New Mexico, Appellee.

No. 3906.

Court of Appeals of New Mexico.

Nov. 13, 1979.

Rehearing Denied Nov. 21, 1979.

Oliver W. Gushee, Jr., Thomas A. Nelson, Salt Lake City, Utah, Fred C. Hannahs, Montgomery, Andrews & Hannahs, Santa Fe, for appellant.

Jeff Bingaman, Atty. Gen., Sarah Bennett, John C. Cook, Sp. Asst. Attys. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

The appeal concerns the valuation, for property tax purposes, of class one productive mineral property, see § 7–36–22(A), N.M.S.A. 1978, and property used in connection with that property. The taxpayer, U.V. Industries, Inc., claims the negative value of class one productive mineral property, for tax year 1978, should be applied against the positive value of other property used in connection therewith to reduce the total taxable value. PTD (Property Tax Division of the Taxation and Revenue Department) rejected this contention in its special order denying the taxpayer's protest. The taxpayer's claim, on appeal, that the order denying the protest was a de facto regulation adopted contrary to statutory procedures, is frivolous. The special order does no more than decide the taxpayer's protest. We discuss: (1) negative valuation; (2) use of a negative valuation; and (3) unequal protection.

Negative Valuation

Section 7–36–23, N.M.S.A. 1978 states a special method for valuation of the property involved in this case. The value of class one productive mineral property "is an amount equal to three hundred percent of the annual net production value . . . ." Section 7–36–23(C), supra. Two methods are provided for arriving at annual net production value; by an averaging method and by using the net production value of the year immediately preceding the tax year involved. The statute authorizes deductions under both methods. Section 7–36–23(F), supra. *Santa Fe Pacific R. Co. v. Property Tax Dept.,* 89 N.M. 446, 553 P.2d 726 (Ct.App.1976) held that because of the authorized deductions the valuation could be a minus figure when the averaging method is used. Because of the authorized deductions, the valuation could also be a minus figure when valuation is under § 7–36–23(F)(2), supra. PTD does not seriously contend to the contrary.

Use of a Negative Valuation

The taxpayer valued its class one productive mineral property under § 7–36–23(F)(2), supra. The valuation was a negative figure. This negative was multiplied by 300 percent. The result was reported as the value of "mineral property production." Other property valued included personal property, mining machinery and equipment, milling machinery and equipment, land improvements and buildings and warehouse. These items were "property used in connection with mineral property . . . ." Section 7–36–23(A), supra. Taxpayer sought to apply the reported negative value of its mineral property production against the reported positive value of property used in connection with mineral property and, thus, reduce its total taxable value by the amount of the negative.

Taxpayer contends its use of the negative is authorized by § 7–36–23, supra; that this statute "is the outline of a procedure for determining how *the whole* of a taxpayer's mineral property and property used in connection with mineral property must be valued for property taxation purposes." This claim is too broad, it disregards the contents of § 7–36–23, supra.

Section 7–36–23(A), supra, states that the "provisions of this section apply to the valuation of all mineral property and property used in connection with mineral property . . . ." The provisions of § 7–36–23(C) and (F) were used to arrive at the negative valuation of class one productive mineral property. Section 7–36–23, supra, does not state what use may be made of this negative valuation, nor do we. The issue is whether the negative of production value may be offset against the positive value of property used in connection with mineral property. Other statutory provisions do not permit the offset.

Section 7–36–23(B) states:

> B. The following kinds of property held or used in connection with mineral property shall be valued under the methods of valuation required by the Property Tax Code [Articles 35 to 38 of Chapter 7 NMSA 1978]:

(1) improvements, equipment, materials, supplies and other personal property held or used in connection with all classes of mineral property; "improvements" as used in this section includes surface and subsurface structures, but does not include pits, shafts, drifts and other similar artificial changes in the physical condition of the surface or subsurface of the earth produced solely by the removal or rearrangement of earth or minerals for the purpose of exposing or removing ore from a mine . . . .

Property coming within the above-quoted provision is to be valued "under the methods of valuation required by the Property Tax Code . . . ." There is no claim that taxpayer's property used in connection with mineral property does not come within the above-quoted provision.

Section 7–36–33, N.M.S.A. 1978 is the applicable valuation method for property used in connection with mineral property. Section 7–36–33(A) states:

A. The following kinds of property shall be valued for property taxation purposes in accordance with the provisions of this section:

(1) all property used in connection with mineral property and defined in Paragraph (1) of Subsection B of Section 7–36–23 NMSA 1978 and Paragraph (1) of Subsection B of Section 7–36–25 NMSA 1978[.]

Section 7–36–33(G), supra, provides:

Each item of property . . . *valued under this section* shall have *its net taxable value* allocated to the government unit in which the property is located. (Our emphasis.)

Each item of the property used in connection with mineral property was valued under § 7–36–33, supra; § 7–36–33(G), supra, requires the net taxable value of each item be allocated to the governmental unit involved. The requirement of allocating the net taxable value of *each item* prevents use of the negative value for mineral property production to reduce the valuation of property valued under § 7–36–33, supra. PTD did not err in rejecting use of the negative figure for mineral property production to reduce the positive value of property used in connection with mineral property.

Equal Protection

The equal protection contention is limited. It does not involve use of a negative value for mineral property production (regardless of the method of determining annual net production value) to reduce the valuation of property used in connection with mineral property. It does not involve comparing the valuation of class one productive mineral property with the valuation of other classes of mineral property. The contention goes only to the alternative methods for valuing class one productive mineral property, and involves utilization of a negative value.

The equal protection argument involves the different results which may result under the alternatives for arriving at annual net production value for class one productive mineral property. The taxpayer contends that if the averaging method of § 7–36–23(F)(1), supra, is used and some of the years averaged are a negative, the taxpayer obtains the benefit of the negative; however, if valuation is under § 7–36–23(F)(2), supra, and the preceding year's net production value is a negative, the taxpayer obtains no benefit from the negative.

The benefit to a taxpayer who uses the averaging method is in utilizing a negative figure to reduce the positive valuation of class one productive mineral property. One who does not average, such as the taxpayer in this case, does not receive that benefit. This difference is asserted to be a denial of equal protection. We disagree.

The taxpayer's brief presents a hypothetical situation to illustrate the differences in valuation figures, and thus in financial benefits, between the alternative statutory valuation methods. This hypothetical does not establish a denial of equal protection. "Constitutional issues affecting taxation do not turn on even approximate mathematical determinations." *Mullaney*

v. Anderson, 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952). The dispositive question is whether the statute provides unequal treatment to taxpayers of the same class. See *Gruschus v. Bureau of Revenue*, 74 N.M. 775, 399 P.2d 105 (1965); compare *First Nat. Bank v. State Tax Commission*, 43 N.M. 307, 92 P.2d 987 (1939), appeal dismissed, 308 U.S. 515, 60 S.Ct. 173, 84 L.Ed. 439 (1939). The statutory provisions for determining annual net production value, § 7–36–23(F)(1) and (2), supra, do not provide for unequal treatment because § 7–36–23(G) gives the taxpayer the choice of valuation methods. Compare *United States v. Behle*, 316 F.2d 134 (10th Cir. 1963). Inasmuch as the taxpayer has a choice of valuation methods, the statute does not deprive the taxpayer of equal protection.

PTD's special order is affirmed.

IT IS SO ORDERED.

SUTIN and WALTERS, JJ., concur.

604 P.2d 121

STATE of New Mexico ex rel. John L. HUNING, Edeal Dairy, Inc., Van Tol Farms, Huning Land Trust, Nicholas Duran de Chavez Company and Johanna C. Othart, Plaintiffs-Appellees,

v.

LOS CHAVEZ ZONING COMMISSION, composed of: J. Phillip Castillo, Jose I. Garcia, Wilma Berlier, Mitzi Smith and Calvin Botiver, and each of them, Defendants-Appellants.

No. 12408.

Supreme Court of New Mexico.

Nov. 15, 1979.

Rehearing Denied Dec. 26, 1979.

Thomas C. Esquibel, Dist. Atty., Los Lunas, for appellants.

Keleher & McLeod, John B. Tittmann, Albuquerque, for appellees.

OPINION

FEDERICI, Justice.

Plaintiffs brought this action in quo warranto under § 44–3–1, et seq., N.M.S.A.1978, in the District Court of Valencia County, challenging the validity of the Los Chavez Zoning District, pursuant to the Special Zoning District Act, § 3–21–15, et seq., N.M.S.A.1978.

Plaintiffs contend that the formation of the Los Chavez Zoning District which occurred approximately two years prior to the filing of the action, was defective in that the number of signatures on the petition for the creation of the district was insufficient to meet the requirements of § 3–21–18, N.M.S.A.1978 (current version at § 3–21–18, N.M.S.A.1978 (Cum.Supp.1979)). This section requires the signatures of fifty-one percent of the registered electors residing within the boundaries of the proposed district.

After a trial on the merits, the district court entered judgment for the plaintiffs, decreeing that the Los Chavez Zoning District never existed as a legal entity, and ordering that the defendant Los Chavez Zoning District Commissioners cease and desist from acting in such capacity. Defendants appeal.

On appeal defendants rely on several points: (1) the plaintiffs, as private rela-

tors, were without standing to bring this action under quo warranto absent a showing, as required by statute, that the attorney general refused to bring the action, or that the office usurped pertained to a county, incorporated village, town or city, or school district; thus leaving the district court without jurisdiction; (2) the district court was without jurisdiction to hear this action because the County of Valencia, the County Clerk and the County Commission, each a necessary and indispensible party to the action, were not joined as party defendants; (3) the district court was without jurisdiction to entertain plaintiff's complaint as it was untimely filed and barred by the doctrine of laches; (4) there is not substantial evidence to support the findings and judgment of the trial court; and (5) the district court committed error in interpreting the meaning of the phrase "registered electors residing in the area" as used in § 3–21–18(B).

In reversing the trial court we need only reach the first two of defendants' points of appeal.

Under the Special Zoning District Act, the Legislature has provided a method for creating special zoning districts in areas outside the boundary limits of incorporated municipalities. The Act provides for a zoning commission to be elected by the registered electors residing in the district.

Section 3–21–20 provides:

Election of members to the commission.

Within sixty days after the creation of a district, the *county commissioners* of the county in which the district is situate *shall hold an election for members to the commission.* When the district is situate in more than one county, the county commissioners of the counties shall cooperate in conducting an election for members to the commission. *The election shall be conducted in the same manner as elections for municipal school board members. The cost of conducting elections for members to the commission shall be borne by the county* or counties in which the district is situate. Each county shall pay its prorata share, which is determined by the number of registered electors of the district residing within the county. (Emphasis added.)

Considering the language used in the Special Zoning District Act, we are of the opinion that the Office of Commissioner of the Los Chavez Zoning District Commission is a "public office" for which an action lies in quo warranto under § 44–3–4.

In *State v. Rodriguez*, 65 N.M. 80, 332 P.2d 1005 (1958), this Court considered the issue of whether a contest for municipal school board was proper under the quo warranto statute. The Court held that it was proper and stated:

> We conclude that quo warranto was a proper action to bring in this case since there is no provision in the Election Code or other related statutes providing for contests for municipal school board elections.

65 N.M. at 83, 332 P.2d at 1006.

No special statutory method has been called to our attention, nor have we found any, which provides a method for attacking the validity of the office of a zoning district commissioner or the creation of a special zoning district. Further, it should be noted that under § 3–21–20 of the Special Zoning District Act, the Legislature provided that the election of members to the Commission shall be conducted in the same manner as "elections for municipal school board members."

In view of this language, the reasoning of the Court in *State v. Rodriguez* is applicable here.

Since quo warranto is appropriate, the following excerpt from § 44–3–4, N.M. S.A.1978 is dispositive as to who is a proper party plaintiff and when such party may institute an action in quo warranto, as a private relator.

Section 44–3–4 provides:

[Who may bring action; private relators; when action lies.]

An action may be brought by the attorney general or district attorney in the name of the state, upon his information

or upon the complaint of any private person, against the parties offending in the following cases:

A. when any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office or offices in a corporation created by authority of this state; or,

* * * * * *

The district attorneys in their respective judicial districts shall exercise the same power and right given by this section to the attorney general in cases which may be limited in their operation to the said district.

When the attorney general or district attorney refuses to act, or when the office usurped pertains to a county, incorporated village, town or city, or school district, such action may be brought in the name of the state by a private person on his own complaint. (Emphasis added.)

Notwithstanding the result we reach that quo warranto is an appropriate remedy, the case is remanded to the district court for the reason that plaintiffs have failed to show that an attorney general or district attorney has refused to act on their behalf. We can understand that the district attorney may be considered to refuse to act since he must represent the Special Zoning District Commission. However, there has been no showing that the attorney general of the State of New Mexico has refused to act on behalf of the private litigant plaintiffs. Since the statutory requirement for quo warranto has not been met in this respect, there is no authority in the plaintiffs to file this application in quo warranto. *State ex rel. Hannett v. District Court*, 30 N.M. 300, 233 P. 1002 (1925). *See State ex rel. White v. Clevenger*, 69 N.M. 64, 364 P.2d 128 (1961); *State ex rel. Besse v. District Court*, 31 N.M. 82, 239 P. 452 (1925).

In addition, in view of the provisions contained in the Special Zoning District Act which require the Board of County Commissioners to call an election for membership on the Commission, and to conduct the election in a manner provided for election for municipal school board members and to pay the cost of such elections, we are of the opinion that the Board of County Commissioners is an indispensible party. Since the County Commissioners were an indispensible party and were not joined, the trial court lacked jurisdiction to adjudicate the merits of plaintiffs' quo warranto action. *Perez v. Gallegos*, 87 N.M. 161, 530 P.2d 1155 (1974); *State Game Commission v. Tackett*, 71 N.M. 400, 379 P.2d 54 (1962). *See State ex rel. Anaya v. McBride*, 88 N.M. 244, 539 P.2d 1006 (1975).

For the reasons stated, the cause is remanded to the district court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

SOSA, C. J., and FELTER, J., concurring in result.

604 P.2d 123

Kalvin Zeno KIEHNE, Plaintiff-Appellee,

v.

Robert A. ATWOOD, Defendant-Appellant.

No. 12478.

Supreme Court of New Mexico.

Dec. 5, 1979.

David L. Norvell, Albuquerque, for defendant-appellant.

Martin, Martin & Lutz, William L. Lutz, Las Cruces, for plaintiff-appellee.

OPINION

EASLEY, Justice.

Kalvin Zeno Kiehne, plaintiff-appellee, sued Robert A. Atwood, defendant-appellant, to invalidate the latter's election as Catron County Clerk. The trial court held Atwood's election invalid and declared Kiehne the winner. Atwood appeals. We affirm in part and reverse in part.

Since Atwood's winning margin was two votes, we could dispose of this cause by affirming the invalidation of any three of the votes. Normally this Court exercises judicial restraint by addressing only those issues the answers to which will conclude the dispute between the parties. However, numerous important questions of broad public interest involving election procedures are raised in this case. We decide each of these in order to more firmly establish the procedures for future elections. The issues are:

1. whether, at an election contest trial, a voter who has cast an illegal vote has a privilege to refuse to reveal for whom he voted;

2. whether there is substantial evidence to sustain the finding of the trial court that six of the voters were not residents of Catron County, thus voiding their ballots;

3. whether an absentee ballot is void when a voter claims in his application that he would be absent from the county because of his "duties, occupation, business or vacation," but had no intent or reason at the time of application to be gone from the county;

4. whether, if the voter finds himself in the county on election day after having cast an absentee ballot on the basis that he would be absent, his vote is to be considered as illegal;

5. whether absentee votes may be cast at the County Clerk's office at times other than regular office hours;

6. whether it is mandatory that the voter swear to and sign the affidavits on the application and the absentee ballot in the actual presence of the County Clerk before the Clerk can notarize the documents;

7. whether it is illegal for any person, other than the voter or the mailman, to deliver the completed ballot to the Clerk's office; and

8. whether, in the absence of any statutory provision regarding assistance to an absentee voter in marking his ballot, it voids the vote if the County Clerk, whose husband's name is on the ballot as a candidate for office, assists the voter.

In the November 7, 1978 general election, Atwood, the Democrat, received 684 votes, two more than Kiehne, the Republican, who received 682. Kiehne contested the election in the district court claiming that numerous illegal votes had been cast for Atwood. The matter was tried to the judge, who agreed with Kiehne and ruled that he has the legal right to the office. The specific findings and conclusions as to each point will be discussed in conjunction with that point in the order set forth above.

1. *Ballot Secrecy.*

At trial Atwood objected to voters stating for whom they voted in the Clerk's race on the grounds that it violated the principle of secrecy of the ballot. He asserted that only in a case of fraud could a voter be forced to disclose this fact. Thirty-seven voters testified, some of whom objected to identifying the person for whom they voted while others made no objection. The trial court ordered the objectors to disclose the information.

Kiehne claims that a person who votes illegally cannot invoke a privilege against revealing for whom he voted and contends that such privilege, in any event, would belong to the voter and subject only to his assertion, rather than being available to Atwood.

Article VII, Section 1, of the Constitution of New Mexico calls for enactment of laws to secure the secrecy and purity of elections. A multitude of statutes in the election code reinforce this significant mandate.

■ The sanctity of a New Mexican's ballot is undoubtedly one of his most cherished and jealously-guarded rights. It is

one of the fundamental civil liberties that form the bulwark against the erosion of a democratic government. Compromising the secrecy of the ballot is not to be tolerated except in cases of paramount public importance. In election contests two major public interests are often balanced against each other: the secrecy of the ballot versus the purity of elections. The choice between the two is not to be lightly made. The purity of elections is the public interest which sometimes outweighs the individual's right to have his ballot kept secret.

In *Carabajal v. Lucero*, 22 N.M. 30, 158 P. 1088 (1916), this Court considered whether voters may be compelled to testify about choices between candidates in an election and stated:

> [t]o permit the returns of an election, honestly and fairly conducted, to be overturned by the testimony of the voters is to destroy the safeguards thrown around the secrecy of the ballot, designed to procure an honest and free expression of the voter's choice without intimidation or coercion by any one.

Id. at 42, 158 P. at 1092–1093. Public policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it. *Hyde v. Bryan*, 24 N.M. 457, 462, 174 P. 419, 421 (1918).

However, this Court has faced this precise question and unequivocally decided that an illegal voter has no privilege against testifying as to the persons for whom he voted. *Montoya v. Ortiz*, 24 N.M. 616, 175 P. 335 (1918). As in the present case, the election contest there was over the choice of a county clerk. Ortiz, the Democratic candidate, was first thought to be the winner over Montoya, the Republican candidate. Montoya claimed that several persons had voted illegally. He called them to the stand and asked for whom they voted. The trial court did not consider this testimony, theorizing that it was not competent for an illegal voter to reveal these facts in court.

This Court, on appeal, ruled that the trial court had been led astray by *Carabajal, supra*, and that the case was not controlling for the reason that no question was raised in *Carabajal* regarding *illegal* votes. The same reliance on *Carabajal* by Atwood is misplaced. This Court in *Montoya* stated:

> [b]ut in the case of illegal voters *it is universally recognized* that the right to examine the voters in such a case is in affirmance and vindication of the essential principle of the elective system, that the will of the majority of the qualified voters shall determine the right to an elective office, and that the testimony of the voter, after it has been shown that he voted illegally, is competent, and should be received by the court or jury for what it is worth. (Citation omitted.) The law protecting the secrecy of the ballot is intended to apply only to lawful voters, and does not ordinarily apply to or protect illegal voters, who can be required to testify as to how they voted at an election. * * * Were the courts to close their doors to the reception of evidence as to how an illegal voter has voted, it would tend to promote fraud and encourage corruption. (Citation omitted.) * * It is held that neither the contestant nor the contestee is called upon to contend for the rights of a witness who does not demand protection, and, if the witness is compelled to testify, it does not follow that his testimony, which is competent without objection on his part, should not go to the court or jury for what it may be worth. (Citation omitted, emphasis added.)

Id. at 622–623, 175 P. at 337–338.

This principle is also enunciated in Rule 507, N.M.R. Evid. 507, N.M.S.A.1978, which states:

> [e]very person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot *unless the vote was cast illegally.* (Emphasis added.)

The case law of other states is overwhelming in holding that, although legal voters may not be compelled to disclose how they voted, illegal voters do not enjoy this same privilege. *Singletary v. Kelley*, 242 Cal.App.2d 611, 51 Cal.Rptr. 682 (1966);

Sims v. Atwell, 556 S.W.2d 929 (Ky.App. 1977); *McRobbie v. Registrars of Voters of Ipswich*, 322 Mass. 530, 78 N.E.2d 498 (1948); *Belcher v. Mayor of City of Ann Arbor*, 79 Mich.App. 387, 261 N.W.2d 56 (Ct.App.1977); *Wehrung v. Ideal School District No. 10*, 78 N.W.2d 68 (N.D.1956); *Oliphint v. Christy*, 157 Tex. 1, 299 S.W.2d 933 (1957); Annot., 90 A.L.R. 1362 (1934). Atwood has failed to produce any persuasive authority to the contrary.

In *Oliphint, supra*, the court reasoned that fraud could not be detected in an election conducted by voting machines if the illegal voter had the right to refuse to testify, and that the person voting could not be considered a "voter" since his illegal vote is a nullity. *Wehrung, supra*, holds that the privilege of secrecy is entirely a personal one, and the voter himself may waive this privilege. *Kaufmann v. La Crosse City Board of Canvassers*, 8 Wis.2d 182, 98 N.W.2d 422 (1959). We agree with these decisions.

However, there are peripheral legal principles that place some constraints on the procedures for purging illegal votes. *Montoya, supra*, recognized that the authorities maintain that an illegal voter cannot be required to testify if he claims his constitutional privilege against self-incrimination. *Sims, supra*. This is obviously good law, since voting when not qualified subjects the voter to criminal sanctions. § 1–20–22, N.M.S.A.1978. Of course, the burden is upon the party attacking a person's vote to prove that it is illegal. The presumption that a vote is legal must be overcome. *Berry v. Hull*, 6 N.M. 643, 30 P. 936 (1892).

Inherent in Atwood's arguments on appeal is the assumption that *he* had the right to invoke the secrecy privilege on behalf of the voters. This is patently erroneous. Maintaining the secrecy of one's ballot is a privilege personal to the voter. *Wehrung, supra*; *Boardman v. Esteva*, 323 So.2d 259 (Fla.1975). The record shows that there are enough votes to change the results of the election that were cast by voters whose testimony convicts them of illegal voting and who did not claim their right against self-incrimination.

We hold that one who votes illegally forfeits the right of secrecy. The purity of the election demands that the illegal votes be purged. This prevents a manifest injustice. We cannot permit illegal voters to elect to office a person whom the *qualified* voters would not have elected. We affirm the decision of the district court on this issue.

2. *Residency for Voting Purposes.*

Six absentee ballots were invalidated by the court below for the reason that the voters were found to be non-residents of Catron County. Atwood challenges these findings of the trial court, claiming there was insufficient evidence to support them.

Under the terms of Article VII, Section 1 of the Constitution of New Mexico, a citizen must reside in the precinct, and the county, in which he offers to vote.

The New Mexico statutes are clear that the residence of a person is the place in which his habitation is fixed, and to which, whenever he is absent, he has the intention to return. § 1–1–7, N.M.S.A.1978. The statute establishes a two-prong test to determine residency: a change of residence is accomplished only by the act of moving to another place coupled with the intent to remain in the other place. A person does not lose his residence if he goes to another place for temporary purposes only and with the intention of returning.

The cases generally hold that the return must be anticipated at some reasonably definite or determinable time in the future. It does not mean an undefined or undefinable purpose to return to one's former residence. *Moore v. Tiller*, 409 S.W.2d 813 (Ky.1966).

With this unambiguous definition of "residence" before us, the task is to assess the trial testimony to determine if there is substantial evidence to show the non-residence of the voters in question.

It is undisputed that the six people whose votes were invalidated had removed them-

selves from the county; they all testified and were cross-examined. However, these voters were caught on the second prong of the residency test. At no place in the record is there a statement by any one of the six persons that they had any intention of returning to Catron County. All of them had permanent jobs in other counties of the state. Insofar as the record reflects, they all either intended to stay permanently in their new locations or, if they decided to move, intended to go to some place other than Catron County.

There is absolutely no doubt that these six people voted illegally in the election. The trial court was correct in deciding to purge their votes from the totals.

3. *Validity of Reasons For Voting Absentee.*

4. *Presence In the County on Election Day.*

The trial court found and concluded that twenty-one voters of absentee ballots "knew" at the time of making their application that they "would be present in Catron County on the day of the election, and were in fact present in Catron County" on that date.

This finding and conclusion has two pertinent parts: (1) the trial court implicitly found that none of these persons intended to be or thought they would be out of Catron County on election day on business or on vacation; and (2) significance was given to the fact that they were actually in the county when the election was held.

Section 1–6–3 of the New Mexico Absent Voter Act, §§ 1–6–1 *et seq.*, N.M.S.A.1978, provides that any qualified elector who "cannot be present" at his precinct poll on election day, "because of illness, injury or disability, or who will be absent from his county of residence because his duties, occupation, business or vacation requires him to be elsewhere, * * *" may vote by absentee ballot.

Myriad reasons, which drastically differ from those stated in their applications, were given at trial by the voters for voting absentee. Two voters testified that they knew they would be present in Catron County on election day and obtained absentee ballots for the reason that they did not like voting on the voting machines. Six testified that they were working in the mountains on election day and that they knew, when applying for the absentee ballots, that they would be present in Catron County on election day. One voter voted absentee because she did not know if her husband would take her to the polls and she did not want to go alone. Two voters testified that they planned to be present in Catron County on election day, but deliberately stated in their applications for absentee ballots that they would be away from the county on that day. As to nine other votes that were voided by the trial court, the evidence is plain that the persons making their applications for absentee ballots did not have the intention to be absent from the county on election day.

However, five of the voters whose votes were invalidated by the trial court testified, without contradiction, that they had thought they would probably be either out of state or out of the county on election day. One of these voters testified that his business often demanded that he be in Arizona. He stated that he could not predict or control when he would have to go to Arizona on business and therefore applied for an absentee ballot. Two of these voters testified that they applied to vote absentee because they had medical problems and could not predict whether they could make it to the polls. One of them stated that she had a doctor's appointment in Albuquerque scheduled for the day of the election when she applied to vote absentee, although it so happened that she did not keep her appointment.

The first question is whether a person who has no reason to think or believe that he or she will be out of the county for business or vacation on election day is qualified to vote absentee for either of those reasons. The answer is quite obvious from the statute. It permits absentee voting when a person "cannot" make it to the polls for those specific reasons. This clearly con-

templates that the person must have *some statutory reason.* If he has none, he is not a qualified absentee voter. The votes of those who testified that they had no known statutory reason for applying for or voting by an absentee ballot are void.

Under Section 1–6–4, the Secretary of State prescribes the form for the application for an absent voter ballot. The form used here has a box to be checked to indicate the reason a person is applying for an absentee ballot. The printed reasons from which a person chooses are identical with the statutory provisions. All voters involved here made check marks to indicate their reasons. There are elaborate procedures in the same section for insuring that the voter does not vote at the polls after having cast an absentee ballot.

Section 1–6–6 requires the Clerk to keep an "absentee ballot register" and deliver to each precinct board a list of all absentee ballot applicants or deliver a signature roster containing the same information to those precincts using voting machines.

Section 1–6–8, among other things, provides that the outer envelope of the absentee ballot shall contain a form to be executed under oath by the absentee voter which specifies that he will not vote "in this election other than by the enclosed ballot."

The finding that the voters knew that they would be present, and actually were present in the county on election day raises two issues: (1) whether it is necessary that an applicant actually *know* that he or she will be out of the county on election day before being eligible to vote by absentee ballot (the answer is obvious: there is no way that future absence from the county can be positively *known* in advance); and (2) whether the absentee vote is void if the voter is actually in the county on election day after having voted by absentee ballot.

There is little uniformity in the case law on these issues. Many of the differences are due both to the varied expressions in the statutes regarding absentee voter qualifications and to the degree of strictness with which the courts have construed the statutory language.

There are few general rules of statutory construction in this area. One of these is that absentee voting is considered a privilege granted the electors and is not an absolute right. *Sommerfeld v. Board of Canvassers,* 269 Wis. 299, 69 N.W.2d 235 (1955); Annot., 97 A.L.R.2d 257 (1964). Another question of importance is whether to apply a strict or liberal construction to our laws. On this issue there is a split of authority, with a preponderance of the cases taking a liberal approach in favor of the voter. 97 A.L.R.2d at 266, *supra.*

This Court in *Bryan v. Barnett,* 35 N.M. 207, 292 P. 611 (1930) placed New Mexico on the liberal side by deciding that absentee voters, although required by the statute then in effect to sign their applications for ballots, did not lose their votes, in the absence of fraud, because the applications were signed by a person other than the voter. This Court reasoned that the law favors the right to vote and seeks to give effect to the express will of the electorate. This Court there quoted *State ex rel. Read v. Crist,* 25 N.M. 1975, 179 P. 629 (1919), to the effect that only when the Legislature *expressly provides* that deviation from the prescribed procedure prevents the counting of the vote will the ballot be declared void. This Court held that the Legislature must make the procedures mandatory and stated:

> [t]hus it seems that this court has made it extremely plain that such regulations of electors and of voting are directory unless expressly made mandatory.

Bryan at 212, 292 P. at 613.

There is no provision in the present law which expressly voids an absentee ballot if the voter, after casting his absentee ballot, finds himself in the county on election day.

In *Bryan,* this Court equated absentee voting with regular attendance at the polls. It stated that the principle of absentee voting was adopted by our Legislature as our public policy and thus "the right became as sacred, as much to be protected and favored by the courts, as the right of voting by personal presence." *Id.* at 212, 292 P. at 613.

It is settled law in New Mexico that statutes should be construed to carry out the legislative intent. *Burroughs v. Board of Cty. Com'rs, Cty. of Bernalillo*, 88 N.M. 303, 540 P.2d 233 (1975).

The obvious intent of the absentee voting statutes, considering them in their entirety in conjunction with applicable related statutes in the election code, is to enlarge the right of franchise to people who fall into the categories specifically set forth in the law, provided they have good reason to believe that they cannot be available at the polls on election day. A person who expects to be gone from the county on business or vacation can never know with certainty that he will follow his plans, however well settled they may be. To hold that the application must be made with *certain* knowledge that the voter *cannot* be present would place unreasonable constraints upon the right to vote. This would be in contravention of the Legislature's manifest intent to enlarge the voter franchise.

We first take note that neither the statutes nor the application for an absentee ballot requires the voter to state details about his belief that he cannot get to the polls on election day. The application form only calls for a checking of a box indicating the appropriate statutory reason.

We determine the intent of the Legislature to be that a qualified absentee voter must in good faith have a reasonable belief that he may be unable to vote in person on election day for one or more of the specific statutory reasons and must sign the proper affidavits under oath to prove his status. After he has done this, it is the burden of the one challenging his right to vote to come forward and prove that the ballot is illegal, either when the votes are counted or by election contest.

Thus, the persons here who alleged statutory reasons for applying and voting, such as health and business, and whose testimony showed reasonable grounds to sustain their good faith in applying for and voting by absentee ballot, should have their votes counted. The trial court erred in voiding these votes.

The cases are in conflict on the other question that is raised as to whether an absentee ballot is void if the voter is not actually absent from the county on election day. Our statutes do not specifically void such a ballot. Furthermore, such a construction contradicts the Absent Voter Act as a whole. *Wood v. State*, 133 Tex. 110, 126 S.W.2d 4 (1939); *Longoria v. Lozano*, 485 S.W.2d 308 (Tex.Ct.App.1972).

At one time, the Texas law permitted absentee balloting in cases where the voter "expects to be absent." This law was amended to read: "who through the nature of his business *is absent*." (Emphasis added.) In *Wood v. State, supra*, the lower court ruled that under the later statute the absentee ballot would be illegal if the voter was not actually absent on election day. The Texas Supreme Court overruled that decision and held that it was a construction that contradicted the entire absentee voter law. This decision called attention to all of the various duties imposed upon the voter, the County Clerk and the election officials, by the Texas law. These duties began with the application and continued through the counting of the votes. The Texas Court stated that nowhere in the law was it ever hinted that actual presence in the county on election day would justify a refusal to count the vote. That Court found that election officers had an affirmative duty to count the ballot if it appeared from the papers before them that the voter had complied with the absentee voting statute. Our statutes should be construed in the same manner.

If his vote by absentee is void because of his inadvertent presence in the county on election day, how is the person going to exercise his right to vote? He could not vote in person at the polls. His precinct records would reflect that he had already voted. §§ 1–6–5 and 1–6–6. Furthermore, under the construction adopted by the trial court, he would be in the ludicrous position of having to needlessly absent himself from the county during the election to validate his absentee vote and to avoid the possibili-

ty of criminal prosecution for voting illegally. Unquestionably, the Legislature had no intentions of creating such an impasse. We hold that presence in the county on election day by an otherwise qualified absentee voter does not invalidate his vote.

5. *Weekend Voting.*

Three votes were invalidated by the trial court because the voters cast their absentee ballots in person at the County Clerk's office during the weekend when the office was normally closed.

The lower court found that Section 1–6–5(E), which states that "[a]bsentee ballots *may* be cast in person during the regular hours and days of business at the county clerk's office from 8:00 a. m. on the fortieth day preceding the election up until 5:00 p. m. on the Thursday immediately prior to the date of the election" is a mandatory provision (emphasis added). We disagree.

We have previously distinguished between mandatory and directory election provisions. *Telles v. Carter*, 57 N.M. 704, 262 P.2d 985 (1953); *Valdez v. Herrera*, 48 N.M. 45, 145 P.2d 864 (1944).

In *Valdez*, the votes from four precincts were ruled by the trial court to be void because the poll books were not delivered within twenty-four hours of the closing of the polls as required by the statute. This Court stated there that "the voter shall not be deprived of his rights as an elector either by fraud or the mistake of the election officers if it is possible to prevent it." *Id.* at 55, 145 P.2d at 870. Earlier in *Wright v. Closson, Mayor, et. al.*, 29 N.M. 546, 553, 224 P. 483, 485 (1924), this Court held that "the election will not be disturbed by reason of technical irregularities in the manner of conducting it or of making the returns thereof, especially in the absence of pleading and proof that the result was thereby changed or at least made uncertain." *See also Gallegos v. Miera*, 28 N.M. 565, 215 P. 968 (1923).

This Court has held that "[m]ere irregularities in the conduct of an election will not render an election void in the absence of a statute so providing, * * *" *Orchard v. Board of Com'rs of Sierra County*, 42 N.M. 172, 187, 76 P.2d 41, 51 (1938); *see Gallegos v. Miera, supra.* This Court in *Orchard* applied the principle to irregularities in canvassing the election returns. Other cases have found statutory provisions to be directory and not sufficient to cancel a voter's ballot. *Valdez, supra* (the ballots were not delivered to the County Clerk within the statutory period); *Bryan, supra* (the applications were not personally signed by the voter but by some other person); *Wright, supra* (an erroneous election proclamation); *Gallegos, supra* (a violation of the statutory provisions for wrapping and tying ballots, placing them in the box and sealing the box); and *State ex rel. Walker v. Bridges*, 27 N.M. 169, 199 P. 370 (1921) (procedures for the registration of voters).

No statutory provision specifies that an absentee ballot is void if it is voted by the voter in the County Clerk's office on a weekend rather than during regular office hours. No fraud was alleged or proved. We therefore hold that the taking of these ballots on the weekend by the County Clerk was a technical irregularity which did not threaten the purity of the electoral process. We hold that the trial court erred in invalidating these votes.

6. *Notarization of Absentee Ballots and Applications Outside of Voter's Presence.*

The County Clerk notarized either the application for an absentee ballot or the absentee ballot itself for seven voters who were not in her presence when they signed the documents. All of these voters testified that they had wanted the County Clerk, Atwood, to notarize their signatures although some had not expressed this wish to her. The trial court found that there was no fraud on the part of the County Clerk.

The statutes specifically require that the voter "shall" subscribe and swear to the affidavits on both the absentee ballot application and the ballot itself before a person authorized to administer oaths. §§ 1–6–4(D) and 1–6–9(A).

An "affidavit" has been defined as being a written statement, under oath, sworn to or affirmed by the person making it before some person who has authority to administer an oath or affirmation. *State v. Knight*, 219 Kan. 863, 549 P.2d 1397 (1976). It is distinctly different from an acknowledgement which is a method of authenticating an instrument by showing that the authenticating act was the act of the person executing it. *H.A.M.S. Co. v. Elec. Contractors of Alaska*, 563 P.2d 258 (Alaska 1977).

The execution of an affidavit necessarily demands the taking of an oath. The statutory language is in mandatory form. Although there is no specification in our statutes that a ballot not meeting the affidavit requirement will be considered void, a sworn affirmation of the truth of the statements in the two affidavits definitely enhances the integrity of the ballot. The affidavit on the application for a ballot requires the applicant to swear that he is a registered voter, that he will not be able to be present at his designated polling place, that he is qualified because of statutory grounds, that he is not a prisoner and that he has not been convicted of a felony. The affidavit attached to the ballot after it has been marked requires that the voter swear that he is a registered voter, that he will not vote in the election other than by the enclosed ballot, that he will not receive or offer compensation or reward for giving or withholding any vote, and that his address, precinct and party affiliation are correct.

This strikes close to the heart of the absentee voting process. The oath and the affidavit serve a salutary purpose by helping to insure that answers bearing on the qualifications of the voter are truthful; thus the oath and affidavit protect the integrity of the election.

In *Fugate v. Mayor and City Council of Town of Buffalo*, 348 P.2d 76 (Wyo.1959), the Wyoming Supreme Court, under similar circumstances, ruled that the absentee voter had no right to vote until he took an oath and signed the affidavit and that the voter had a duty to see that the affidavit was duly attested. This case involved affidavits on absentee ballots that were signed by the electors offering to vote but were not attested. On election day, a precinct official attested to twelve of the affidavits, but not in the presence of the affiants; seven of the affidavits were not attested to by anyone. The Wyoming Court held all of these votes illegal.

The Supreme Judicial Court of Massachusetts was faced with very similar facts to ours in *Desjourdy v. Board of Registrars of Voters*, 358 Mass. 664, 266 N.E.2d 672 (1971). The Massachusetts Court said that notarization outside the presence of the voter "results in more than simply a technical irregularity" since the statute "sets up significant safeguards to insure that the ballot represents the will of the voter." *Id.* at 671, 266 N.E.2d at 677. *Accord: Miller v. Hutchinson*, 150 Me. 279, 110 A.2d 577 (1954); *In re Application of Gould*, 81 N.J. Super. 579, 196 A.2d 278 (1963); *Owens v. Chaplin*, 228 N.C. 705, 47 S.E.2d 12 (1948); *Schmidt v. City of West Bend Board of Canvassers*, 18 Wis.2d 316, 118 N.W.2d 154 (1962).

We hold that, as to the affidavits in question, swearing to and subscribing by the voter and attesting to by a notary or other official are not mere technicalities. The statutes prescribing these duties are not simply directory. The acts called for are significant safeguards against fraud and mistake, are necessary to preserve the purity of our elections, and are mandatory duties. We affirm the decision of the district court in which seven ballots were voided for failure to abide by the oath and affidavit requirements.

7. *Delivery of Absentee Ballots by Third Person.*

The trial court voided the ballots of Mr. and Mrs. Natividad Sanchez because their ballots were not delivered personally to the County Clerk by the voters or by mail. They were taken to the Clerk's office by Clory Aragon who was advised by the County Clerk to mail the ballots, which he did. The trial court found that the possession of the ballots by Aragon invalidated

the Sanchez' votes. Although the trial court found that his possession was not intended to be for the purpose of influencing their votes, but rather was for the Sanchez' convenience, and that he had no knowledge of the alleged illegality of the act, the votes were still void.

Section 1–6–5 details the manner in which applications are to be processed, ballots are to be issued and voters are to cast their ballots in person in the Clerk's office. Subsection (F) states the manner in which the absentee ballots are to be mailed to people outside of the continental limits of the United States. Subsection (G) spells out the requirements for applicants domiciled inside the continental limits of the country. Subsection (H) provides as follows:

> [n]o absentee ballot shall be delivered or mailed to any person other than the applicant for such a ballot.

It seems clear that within the context of this whole section subsection (H) is applicable to the delivery or mailing of ballots to potential voters *by the County Clerk.* Construing this subsection, as Atwood attempts to do, to cover delivery of the completed ballots *back to the Clerk* is not reasonable. This view is reinforced by the logical arrangement of the provisions of the statutes, thus:

Section 1–6–6: Absentee ballot register;
Section 1–6–7: Form of absentee ballot;
Section 1–6–8: Absentee ballot envelopes;
Section 1–6–9: Manner of voting;
Section 1–6–10: Receipt of absentee ballots by clerk.

Regarding the return of completed ballots by absentee voters, Section 1–6–9 states that "[v]oters shall either deliver or mail the official outer envelope to the county clerk of their county of residence." This section also covers overseas citizen voters and others voting from outside the state, and provides that they may deliver the ballots or mail them. No mandatory requirement of *personal* delivery of the completed ballots, as opposed to having a third party perform the task, can be read into this statute.

To require that only United States mailhandlers and the County Clerk can touch the completed ballot after it leaves the hands of the voter would be tantamount to disenfranchising all overseas voters since there would be persons other than the United States mailmen or County Clerk who would handle the documents. It is not a sensible proposition to hold that a legal voter who has properly completed his ballot and sealed it cannot have it delivered by his agent to the County Clerk's office.

In *Lanser v. Koconis,* 62 Wis.2d 86, 214 N.W.2d 425 (1974), an election was challenged because the City Clerk did not mail the absentee ballots to the electors or deliver them personally as provided by the statute. That Court held that the record did not indicate the slightest evidence of fraud, connivance or attempted undue influence and refused to invalidate the votes. That opinion quoted generously from *Sommerfeld v. Board of Canvassers, supra,* which dealt with the mailing of *completed ballots* by absentee voters, as here. The statute in *Sommerfeld* provided that the ballot be mailed "or if more convenient it may be delivered in person." The *Sommerfeld* Court held that the complaint as to the delivery of the ballots by an agent was purely technical, that delivery by the agent was substantial compliance with the spirit of the election laws, and that the statute was directory only.

We hold that delivery of the completed ballots by an agent of the voters to the County Clerk's office, standing alone, is not a sufficient deviation from the provisions of the absentee voter laws to void the votes in question. We reverse the trial court on this issue.

8. *Assistance of Absentee Voter.*

Although there are elaborate provisions for giving assistance to a disabled voter who requests it at the polls on election day, § 1–12–15, N.M.S.A.1978, there was no hint in the law at the time of this election as to the proper way to assist a disabled absentee voter who was voting in

the County Clerk's office. The Legislature has since enacted a law to close this gap. § 1–6–5(E), N.M.S.A.1978 (Cum.Supp.1979).

In this case, Mrs. Atwood, the wife of the Democratic candidate, assisted a voter in casting her ballot. There is no claim or proof of any undue influence or other wrongdoing on the part of Mrs. Atwood, except that she simply helped the voter in casting her ballot. There was no violation of a statute. There is no other evidence of acts that were inimical to the purity of the election. We hold that the voiding of this ballot by the trial court was in error.

Having affirmed the district court on the invalidation of sufficient votes to change the election results, we remand the case to that court for the entry of a judgment confirming the election of Kiehne as Catron County Clerk.

IT IS SO ORDERED.

FEDERICI, J., and JOE H. GALVAN, District Judge, concur.

604 P.2d 363

Richard MALDONADO, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 12542.

Supreme Court of New Mexico.

Dec. 21, 1979.

John Bigelow, Chief Public Defender, Martha A. Daly, App. Defender, Michael Dickman, Asst. App. Defender, Santa Fe, for petitioner.

Jeff Bingaman, Atty. Gen., Santa Fe, for respondent.

OPINION

EASLEY, Justice.

Maldonado appeals his conviction of criminal trespass. The Court of Appeals summarily affirmed. We affirm.

At issue is whether any court can review the admissibility of evidence presented to a grand jury, although not later used in the trial, and whether Maldonado was denied his right to due process when inadmissible evidence was presented to the grand jury returning his indictment.

The grand jury indicted Maldonado for aggravated burglary and aggravated assault. He was acquitted of these two felonies. However, he was convicted of the included petty misdemeanor of criminal trespass.

The alleged inadmissible evidence presented to the grand jury included: (1) a knife supposedly seized from Maldonado's brother's house which was given to the grand jurors for their inspection but which the State's witness could not identify; (2) a police officer's testimony in response to questions asked by the State concerning Maldonado's refusal to speak after being advised of his *Miranda* rights; and (3) a statement, introduced as an admission of Maldonado's, made by Maldonado's attorney to a police officer.

We accept these facts. The Court of Appeals did not permit a transcript of the grand jury proceeding to be submitted with Maldonado's appeal, so we cannot verify the accuracy of these allegations. And the Court of Appeals has held that the facts recited in a docketing statement, which go unchallenged, are accepted as the facts in the case. *State v. Calanche*, 91 N.M. 390, 574 P.2d 1018 (Ct.App.1978).

In his appeal, Maldonado challenged his indictment on two grounds. First, he claimed that the evidence in question was not legally admissible at trial and thus its introduction violated Section 31–6–11(A), N.M.S.A.1978 (current version at Cum. Supp.1979). The Court of Appeals rejected

this challenge on the basis of the well-established rule that the New Mexico courts have no authority to review the sufficiency, legality, or competency of evidence upon which an indictment has been returned. *State v. Ergenbright*, 84 N.M. 662, 506 P.2d 1209 (1973); *State v. Chance*, 29 N.M. 34, 221 P. 183 (1923); *State v. Stevens*, 93 N.M. 434, 601 P.2d 67 (Ct.App.1979); *State v. Paul*, 82 N.M. 619, 485 P.2d 374 (Ct.App. 1971). Apparently, the Court of Appeals agreed with the statement made by this Court in *State v. Chance* that statutes, such as 31–6–11(A), "governing the kind, character, and degree of evidence which should be produced before a grand jury in order to warrant the returning of an indictment, are *directory* and for the *guidance* of the grand jury. *Id.* 29 N.M. at 39, 211 P. at 185 (emphasis added)." *See also State v. McGill*, 89 N.M. 631, 556 P.2d 39 (Ct.App. 1976).

In 1971, the Court of Appeals stated in *State v. Paul*, 82 N.M. at 622, 485 P.2d at 378:

> [s]ince the legislature in amending the laws pertaining to grand juries in 1969 still did not see fit to give the courts authority to review the sufficiency of evidence to support grand jury indictments, and since it is deemed to have had *State v. Chance*, supra, [sic] in mind when it enacted the new statutes, we see no reason to overrule or distinguish *Chance*.

We reiterate this reasoning here. Less than a year ago the Legislature had the opportunity to, and in fact did, amend the laws pertaining to grand juries. §§ 31–6–2 to 31–6–14, N.M.S.A.1978 (Cum.Supp.1979). The Legislature chose not to give the New Mexico courts the authority to review evidence supporting a grand jury indictment.

However, by the above holding we do not give to the State unbridled discretion to employ inadmissible evidence to obtain indictments. We merely recognize, as do the majority of jurisdictions, that there are compelling reasons for the courts not to go behind an indictment to inquire into the evidence considered by a grand jury. These reasons include the need for both judicial economy and secrecy of grand jury proceedings.

As we stated in 1977:

> [t]he grand jury has evolved to where it now functions as a guardian of the citizens' right to be free from government harassment unless good cause is shown for attempting a prosecution. The grand jury is not, and should not be, the tool of the prosecuting authority to manipulate at will. Our statutes specify certain procedures . . . to aid the grand jury's investigation of criminal activity. We will not permit anyone to circumvent the letter or the spirit of those laws.

Davis v. Traub, 90 N.M. 498, 500, 565 P.2d 1015, 1017 (1977). Although in *Davis* we were examining the validity of an indictment tainted by the presence of unauthorized persons in the grand jury room, we think the policy stated there is applicable to the instant case. Section 31–6–11(A) provides that all evidence presented to a grand jury must be such as would be "legally admissible" upon trial. Prosecuting attorneys *must* abide by the letter and spirit of our laws, and this precludes their use of inadmissible evidence when obtaining indictments.

Maldonado also claimed prosecutorial misconduct based on the admission of the questioned evidence, and urged that his right to due process of law was thereby violated. He relies on two cases in which the Court of Appeals held that the asserted violations of due process vis-a-vis the grand jury are reviewable. *State v. Reese*, 91 N.M. 76, 570 P.2d 614 (Ct.App.1977); *State v. McGill, supra.*

In *State v. Reese*, the indictment was based on false evidence. The Court of Appeals stated that since an accused has no right concerning a grand jury except that it be conducted according to law, the accused's right in this respect should be rigorously protected. And since an indictment based on false evidence is not an indictment of a grand jury conducted according to law, the accused's right to due process had been violated. In *State v. McGill*, the Court of Appeals recognized that an accused could be

denied due process by a prosecutor's withholding of exculpatory evidence from the grand jury. In the recent case of *State v. Herrera*, 93 N.M. 442, 601 P.2d 75 (Ct.App. 1979), the Court of Appeals reaffirmed that due process requires the presentation of evidence to the grand jury which tends to negate guilt. Further, the newly-enacted grand jury reforms specifically require that the prosecutor present exculpatory evidence to the grand jury. § 31–6–11(B).

Maldonado argues that the facts in his case present a comparable due process violation. He would have us extend the holdings in *State v. Reese* and *State v. Herrera* and rule for the first time that the receipt of inadmissible evidence by a grand jury is grounds for invalidating an indictment. We decline to do so.

"Due process" is an elusive concept. In the context of a defendant's challenge to an indictment on due process grounds, it is even more difficult of definition. None of the three New Mexico cases dealing with the concept of due process in this context adequately defines it. In its summary affirmance of this case, the Court of Appeals only stated that the facts here "simply do not give rise to a due process claim."

In looking to other jurisdictions, both for an adequate definition of due process in this context and to determine what facts give rise to such claims, we find neither the federal nor the state courts had developed consistent standards. Some courts have not gone as far as the New Mexico courts in holding that the presentation of false or perjured evidence to or the withholding of exculpatory evidence from a grand jury is a sufficient due process violation requiring quashing of the indictment. *United States v. Kennedy*, 564 F.2d 1329 (9th Cir. 1977); *United States v. Ruyle*, 524 F.2d 1133 (6th Cir. 1975). Other courts have taken the same position we do on this issue. *United States v. Phillips Petroleum Co.*, 435 F.Supp. 610 (N.D.Okl.1977); *Gieffels v. State*, 590 P.2d 55 (Alaska 1979) (*Gieffels* III); *Johnson v. Superior Court of San Joaquin Cty.*, 15 Cal.3d 248, 124 Cal.Rptr. 32, 539 P.2d 792 (1975); *State v. Bell*, Haw., 589 P.2d 517 (1978).

Some courts have gone further than we are willing to go by holding that indictments based, in whole or in part, on hearsay or on the testimony of an incompetent witness are invalid. *United States v. Estepa*, 471 F.2d 1132 (2nd Cir. 1972); *State v. Gieffels*, 554 P.2d 460 (Alaska 1976) (*Gieffels* I); *People v. Bartlett*, 199 Cal.App.2d 173, 18 Cal.Rptr. 480 (1962); *see People v. Bishop*, 64 Misc.2d 147, 314 N.Y.S.2d 419 (1975). These courts did not, however, hold the indictments invalid on due process grounds. They merely subscribe to the minority position which opposes the general rule that courts will generally not review the legality, competency, or sufficiency of evidence upon which an indictment is based.

It appears that those cases which do speak in terms of "due process" have one thing in common: some type of prosecutorial misconduct that results or may result in the denial of a fair trial to the defendant. *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974); *United States v. Phillips Petroleum Co., supra; Johnson v. Superior Court of San Joaquin Cty., supra.* In other words, the false or perjured evidence before a grand jury and the withholding of exculpatory evidence, *if used or withheld by the prosecutor at trial*, may result in the denial of a fair trial to the defendant.

But inadmissible evidence which has been presented to the grand jury will presumably not be admitted at trial by the trial judge. In this instance, the defendant still receives a fair trial. The present case only involves inadmissible evidence. In his petition for a writ of certiorari, Maldonado concedes that this evidence was not admitted at trial. In sum, Maldonado was not denied a fair trial.

We hold that the indictment in this case is not void because of the introduction of inadmissible evidence and that Maldonado was afforded due process. We affirm the conviction.

IT IS SO ORDERED.

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

604 P.2d 366

Juan F. MARTINEZ, Plaintiff-Appellant,

v.

Gilbert MARTINEZ and Priscilla Martinez, his wife, Defendants-Appellees.

No. 12256.

Supreme Court of New Mexico.

Dec. 31, 1979.

Anthony Lopez, Taos, for plaintiff-appellant.

Eliu E. Romero, Taos, for defendants-appellees.

OPINION

EASLEY, Justice.

Appellant brought suit for declaratory relief and for damages involving a claimed easement for ingress and egress over appellee's land. At the close of appellant's case, the claim was dismissed by the trial court. We reverse and remand.

The question is whether appellant has an easement under the circumstances. He bases his claim on any of three alternative theories: by express grant, by implication, or by necessity.

Abutting tracts of land are owned by the parties to the suit. Both parties gained title to the southern portions of their tracts from their father some years ago. All of the property in question was originally owned by their father, who devised his estate to his twelve sons and daughters as tenants in common. The heirs exchanged warranty deeds in 1973 severing the tenancy in common and creating individual ownership in twelve tracts. Appellant and appellee acquired the northern portions of their abutting tracts in this exchange.

Appellant's combined tract, consisting of the tract he first owned and the tract to the north obtained by the division of inherited land, is bounded on the north and west by property owned by non-parties to this action, on the south by a public road, and by appellee's tract on the east. Appellee's combined tract has a public road on the south and another road called the "middle road" along its eastern edge. The middle road was provided by the heirs' father in his will for their common use. The appellant seeks an easement across the northern portion of appellee's inherited tract to use for ingress and egress to and from the middle road. By expending some money and using some of his previously acquired property, appellant could construct a road with access to the public road to the south.

The 1973 warranty deed by which appellant received title to his tract was signed by appellee and provided for "rights of ingress and egress". In fact, all of the twelve deeds exchanged by the heirs contain a similar clause. There is no mention in the deed of a particular road or way. However, the record shows that the parties' father, who owned both tracts until his death in 1973, and then the appellant used a dirt road for thirty years to cross what is now appellee's land to get from the middle road to what is now appellant's land. Appellant argues that the "right of ingress and egress" in his deed refers to this dirt road.

The trial court held that appellant did not have an easement across appellee's land because appellant's use was permissive. The sole basis for this finding was hearsay testimony by appellant's son that his father told him that the parties had a verbal agreement concerning use of the existing road. Appellee urges that a permissive use can never give rise to an easement by prescription. We agree. *Maestas v. Maestas*, 50 N.M. 276, 175 P.2d 1003 (1946); *Hester v. Sawyers*, 41 N.M. 497, 71 P.2d 646 (1937). However, appellant did not claim an easement by prescription in his complaint.

A preliminary consideration is the proper construction of "rights of ingress and egress". This phrase has frequently been used interchangeably with the word "access" to express the right of a person to enter, go upon, and return from the lands in question. *See Hacker Company v. Joliet*, 196 Ill.App. 416 (1915); *Commonwealth v. Shapiro*, 41 Pa.Super. 96 (1909). Access is "loosely defined as the right of ingress to and egress from the property via the abutting street or highway." *State v. Danfelser*, 72 N.M. 361, 365, 384 P.2d 241, 244 (1963).

But another, more expanded, meaning of "ingress and egress" is evident in the case law: access to the land in question plus the *crossing* of another's land in order to obtain this access. This Court has used "ingress and egress" in this sense. *Kenne-*

dy v. Bond, 80 N.M. 734, 460 P.2d 809 (1969); *Castillo v. Tabet Lumber Company*, 75 N.M. 492, 406 P.2d 361 (1965); *Hughes v. Lippincott*, 56 N.M. 473, 245 P.2d 390 (1952); *Michelet v. Cole*, 20 N.M. 357, 149 P. 310 (1915). A Texas court has specifically stated that "a right of ingress and egress is a right to go upon and across the land of another." *Parker v. Bains*, 194 S.W.2d 569 (Tex.Civ.App.1946).

The deed in question provides for a "right of ingress and egress." Following the above authorities, we hold that this provision gives the appellant the right to cross appellee's land in order to obtain access to his own land. Appellee was the only one of the twelve heirs who exchanged deeds that owned or received land abutting appellant's land. The exchanged deeds could only refer to the heirs' property being divided, not to any third party's land abutting the devised land. Thus, appellant's "right of ingress and egress" can only refer to his right to cross appellee's land to obtain access to his own land.

No particular words of grant are necessary to create an easement. Any words which clearly show intention to grant an easement are sufficient, provided the language is certain and definite in its term. *Kennedy v. Bond, supra; State ex rel. State Highway Commission v. Dannevik*, 79 N.M. 630, 447 P.2d 510 (1968); *Dyer v. Compere*, 41 N.M. 716, 73 P.2d 1356 (1937).

We hold that the language in this deed is certain and definite. An easement is the generic term for a "liberty, privilege, right or advantage which one has in the land of another. (citation omitted.)" *State v. Begay*, 63 N.M. 409, 412, 320 P.2d 1017, 1019 (1958). A right of ingress and egress is descriptive of the easement right. Thus, this Court stated that "[t]he term 'right-of-way' is merely descriptive of the easement rights. (citation omitted.)" *State ex rel. State Highway Commission v. Dannevik, supra* at 632, 447 P.2d at 512. We hold that appellant has an express easement to cross appellee's land in order to obtain access to his land.

In addition, it is the duty of this Court to ascertain and give effect to the intention of the parties. The intention of the parties as gleaned from all the evidence reinforces our holding that appellant has an express easement.

When their father devised his land to his twelve children, he provided in his will that the middle road was "for the common use of all the heirs." This middle road is the one bordering appellee's land from which appellant claims he has access to his northern tract of land. Although appellant's other previously acquired property is bordered on the south by a public road, in order to reach the northern portion of his land appellant would have to build a road through his land and across an irrigation ditch. The southern portion of appellant's land was owned well before the exchange of deeds gave him his northern tract.

At trial, there was testimony to the effect that appellant is not the only heir who received land which could not be reached by the middle road without crossing another of the heir's land. It is clear that the litigants' father did not intend that any of his heirs be landlocked. Their father knew the situation when he executed the will: that, regarding the land being devised, what is now appellant's northern tract could only be reached by crossing what is now appellee's land. The litigants' father stated in his will that the middle road was for the use of all of his heirs. And this intent was reiterated by his twelve children when they included in all of their deeds "rights of ingress and egress." Further, when a common ancestor simultaneously conveys, or when there is partition of a tenancy in common, the implication of an easement is stronger. *See* Rest.Property, § 476(f) (1944); 2 Thompson, *Real Property*, § 356 (1961 Repl.).

The second issue raised by this appeal is the location of appellant's easement. The record shows that the dirt road claimed by appellant as his easement crosses through the middle of appellee's land. The record also states that there was some discussion

between the parties, if not actual use, of a dirt road bordering appellee's land to the north.

The trial court held that appellant has no easement because of his permissive use of appellee's land. The parties' agreement went to the location of the easement, not its existence. The parties' behavior can furnish the scope or location of the missing details; it does not permit a disregard of the language in the conveyance. *See* 3 Powell, The Law of *Real Property* § 415, 34, 188, 191 (1979). We therefore remand to the district court for a determination of the location of appellant's easement.

Concluding as we do that there is an express easement in the deed, it becomes unnecessary to decide the questions of easement by implication or necessity.

Although findings of fact and conclusions of law were not requested by appellant and not entered in detail by the trial court, we find that the ultimate and controlling facts are not substantially in dispute. We are not, therefore, bound by the trial court's conclusions of law. *State ex rel. Apodaca v. New Mexico State Bd. of Ed.*, 82 N.M. 558, 484 P.2d 1268 (1971). We address the legal issues because the trial judge applied incorrect principles of law in arriving at his decision.

We reverse and remand.

IT IS SO ORDERED.

SOSA, C. J., and FELTER, J., concur.

PAYNE and FEDERICI, JJ., respectfully dissenting.

PAYNE, Justice, dissenting.

I respectfully dissent. I feel the majority has read more into the deed than the law allows.

The 1973 warranty deed by which appellant received title to his tract was signed by appellees and provides for "rights of ingress and egress." There is no mention in the deed of a particular road or way, nor is there mention of a servient estate supporting the easement. Appellees' warranty deed is similarly worded. There is no easement reserved for appellant in appellees' deed. Appellant argues and the majority agrees that the words "rights of ingress and egress" are certain and definite and that they refer to a specific dirt road across appellees' tract to the middle road.

I agree that no particular words of grant are necessary to create an easement. The words used, however, must clearly show the intention to grant an easement. To be sufficient *the language must be certain and definite in its terms. See Kennedy v. Bond*, 80 N.M. 734, 460 P.2d 809 (1969); *State ex rel. State Highway Commission v. Dannevik*, 79 N.M. 630, 447 P.2d 510 (1968); *Dyer v. Compere*, 41 N.M. 716, 73 P.2d 1356 (1937).

It is unclear if the warranty deed grants appellant the right to enter and return from his own land or appellees' land, or even some third party's land; the warranty deed is not specific or definite on its face. It does not mention any particular road but is only a general statement used in the deeds of all the heirs whether or not they were located next to a public road or other right-of-way.

"The general rule is, . . . that no right in a way, which has been used during the unity of possession, will pass upon the severance of the tenements, unless proper terms are employed in the conveyance to show an intention to create the right de novo." *Michelet v. Cole*, 20 N.M. 357, 362, 149 P. 310, 311 (1915). In the case of *Hughes v. Lippincott*, 56 N.M. 473, 245 P.2d 390 (1952), the Court held that where the description of the property conveyed designates a road or way as a boundary, and the fee to the way is in the grantor, then an easement passes to the grantee.

The law is jealous of easement claims, and the burden is on the party asserting such a claim to prove it clearly. This he must do by showing a grant conferring an easement in express terms, or by necessary implication. *Davis v. Gowen*, 83 Idaho 204, 360 P.2d 403 (1961); *Zentner v. Fiorentino*, 52 A.D.2d 1036, 384 N.Y.S.2d 297 (1976).

The warranty deed does not by its recitation of right of ingress and egress create an easement. The deed does not show the intent to create an easement on appellees' land. The deficiencies of the deed defeat the claim of an easement by an express grant.

Appellant's second claim is that an easement by implication was created. Although the majority does not discuss this theory, it too would be insufficient to support appellant's claim. The requirements for creating an easement by implication are (1) that a separation of the title occur; (2) that the history of the claimed easement has run for a period sufficient to demonstrate its permanency; and (3) that the use of the easement be reasonably necessary for the full enjoyment of the grant. *Venegas v. Luby*, 49 N.M. 381, 164 P.2d 584 (1945). I feel appellant failed to carry the burden of showing reasonable necessity.

Originally, the test was one of absolute or strict necessity. *Douglass v. Lehman*, 62 App.D.C. 264, 66 F.2d 790 (D.C.Cir.1933). If any alternative was available to an easement claimant, no easement would be found. This requirement of absolute necessity has been moderated in most jurisdictions to that of reasonable necessity. The test of necessity in New Mexico is whether the party claiming the easement could, through the reasonable expenditure of labor or money, create an alternative avenue for ingress and egress on his own estate. In the *Venegas* case, we discussed reasonable necessity and stated: "The basis for an easement by implication must be reasonable necessity, as distinguished from mere convenience . . . ." 49 N.M. at 386–87, 164 P.2d at 587.

The record shows that appellant's land is bounded on the south by a public road. Appellant claims that creating access through his own land would be too expensive, in terms of land use and monetary expenditure. Appellant is not entitled to the easiest or most convenient route if he has an alternative. Appellant presented his evidence to the court and failed to prove his claim of an easement by implication. On the basis of the record presented here, I can find no error.

Appellant's third theory was that of easement by necessity which would also fall by the analysis above.

For the reasons set forth, I must respectfully dissent.

FEDERICI, J., concurs.

604 P.2d 370

Thomas F. YOUNG, Connie Young, Edwin B. Duncan, Camille T. Duncan, William K. Jones, Margaret A. Jones, and 1601 St. Michael's Drive Corporation, Plaintiffs-Appellees,

v.

Bess G. THOMAS, Individually and as Executrix of the Estate of Bradley M. Thomas, Sr., Deceased, Bradley Morris Thomas, Jr. and Virginia Thomas Nydes, Defendants-Appellants.

No. 12275.

Supreme Court of New Mexico.

Dec. 31, 1979.

[redacted]

[redacted]

Johnson & Lanphere, Floyd Wilson, Albuquerque, for defendants-appellants.

Arthur H. Coleman, Albuquerque, for plaintiffs-appellees.

OPINION

EASLEY, Justice.

Young and others (Young) filed a declaratory judgment action against Thomas and others (Thomas) for a declaratory judgment on a real estate lease. Thomas counterclaimed for reformation of the lease because of mutual mistake. The trial court granted summary judgment in favor of Young. We reverse.

We inquire whether the lease is ambiguous so as to permit testimony regarding the intent of the parties, and thereby creating a question of material fact precluding summary judgment.

Thomas, the owner of the land, had a long-term ground lease with the Duncans and the Jones (Duncan/Jones) which contained an agreement that the lease could not be assigned without Thomas' consent and that the rent would be increased upon assignment. Duncan/Jones organized the 1601 St. Michael's Drive Corporation in which they owned all the stock. Thomas agreed to an assignment of the lease from Duncan/Jones to the corporation. A new lease was signed containing the same restriction on assignment and providing for increased rent upon any assignment.

The corporation now proposes to sell all its stock to Young. This suit was brought to determine whether the lease provisions requiring approval by Thomas of the assignment and the increase in rent are applicable.

In relevant part the lease reads:

> *CORPORATION* and *DUNCAN/JONES* agree that *they* shall not, henceforth, be permitted to *assign*, sell or convey *all or any part of their interest* in and under the aforesaid Ground Lease, without the prior written approval of THOMAS, and it is understood that rentals for the premises the subject of said Ground Lease shall be reset upon the effective date of any such assignment, sale or conveyance . . . (Emphasis added.)

Young claims this restriction does not apply to the sale of stock in the corporation, only to the conveyance of an interest in the lease. Duncan/Jones had assigned all of their interest in the lease to the corporation, under another provision in the agreement, and claim that they do not need to obtain Thomas' approval to sell their stock.

Thomas asserts that this restriction prohibits both the corporation and Duncan/Jones from selling or conveying any part of their interest in the lease without his permission. In addition, Thomas claims

that if they sell or convey their interest he has the right to increase the rent. The inclusion of "Duncan/Jones" in the restriction is not mere surplusage, Thomas claims. Since the only interest Duncan/Jones has in the lease is their ownership of the stock of the corporation, their sale of the stock must be a sale of their interest in the lease requiring prior written approval of Thomas.

It is not clear from the agreement why "Duncan/Jones" was included in the restriction. If the restriction was not also concerned with the sale of their stock, why were they named? There is no other plausible reason for having included them in the phraseology of the provision. The mere fact that we have to speculate demonstrates the ambiguity of the agreement. Whether an ambiguity exists in an agreement is a matter of law. *McDonald v. Journey*, 81 N.M. 141, 464 P.2d 560 (Ct.App.1970). But once this determination has been made, the construction of the agreement depends on extrinsic facts and circumstances, and then the terms of the agreement become questions of fact. *Jaeco Pump Co. v. Inject-O-Meter Manufacturing Co.*, 467 F.2d 317 (10th Cir. 1972); *see Marchant v. McDonald*, 37 N.M. 171, 20 P.2d 276 (1933). When a genuine issue of material fact exists, summary judgment is improper. N.M.R.Civ.P. 56, N.M.S.A.1978.

The meaning of an agreement is to be determined with reference to the intention of the parties at the time the agreement was made. *Keeth Gas Co., Inc. v. Jackson Creek Cattle Co.*, 91 N.M. 87, 570 P.2d 918 (1977). And the intent of the parties may be ascertained by parol evidence of the language and conduct of the parties, the objects sought to be accomplished by the agreement and the surrounding circumstances at the time of the execution of the agreement. *Leonard v. Barnes*, 75 N.M. 331, 404 P.2d 292 (1965); *Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.*, 84 N.M. 524, 505 P.2d 867 (Ct.App. 1972). We remand to the trial court for presentation of such evidence to determine the intent of the parties, and thereby the meaning of the restriction.

The summary judgment awarded Young as to Thomas' counterclaim, seeking reformation of the agreement because of mutual mistake, is also reversed and remanded. Since Thomas claims that there was a mutual mistake concerning the same restriction discussed above, the presentation of evidence concerning the ambiguity will also shed light on whether the ambiguity was the result of mutual mistake.

IT IS SO ORDERED.

FEDERICI, J., and JOE H. GALVAN, District Judge, concur.

604 P.2d 818

Harry W. HEATH and Fern Heath, his wife, John M. Wood and Catherine Wood, his wife, Harry A. Alexander and Ruth Alexander, his wife, Forrest Brown and Marcia Brown, his wife, John B. Klein and Helen Klein, his wife, William K. Church and Hazel Church, his wife, and Edythe M. Polster, a single woman, Plaintiffs-Appellees,

v.

Ross E. PARKER and Anne Parker, his wife, Defendants-Appellants.

No. 12331.

Supreme Court of New Mexico.

Jan. 3, 1980.

Standley & Suzenski, Robert Suzenski, Santa Fe, Bert E. Newland, Deming, for defendants-appellants.

John F. Schaber, Deming, for plaintiffs-appellees.

OPINION

EASLEY, Justice.

Harry and Fern Heath and eleven other subdivision lot owners (Heath) sued Ross and Anne Parker (Parker) to enforce a restrictive covenant against placing a "trailer" in the subdivision, claiming that Parker's double-wide mobile home fits that definition. The trial judge found for Heath. We reverse.

The sole issue is whether Parker's mobile home is a trailer under the circumstances here. The material facts are not in dispute. Parker purchased two lots in the Deming Ranchettes subdivision in 1975 and 1977. He bought a double-wide mobile home and moved it on the lots. The wheels, axles, and running gear were removed and sold, and the home was placed on a concrete and slump stone foundation. The mobile home has three bedrooms, two full baths and contains 1,440 square feet of floor space. A patio, a 200 square foot porch, sidewalks, and a 672 square foot two-car garage were constructed. A water well was drilled and a septic tank was installed. Both were connected to the mobile home. A conventional style asbestos shingle roof and alumi-

num siding were added to the home. A garden was planted and 210 trees were obtained to be planted.

Parker testified that he and his wife intended to reside in the home permanently. Photographs admitted into evidence showed that their home had the appearance of a conventional single-family dwelling. It compares favorably with other homes in the subdivision.

Restrictive covenants should be construed in favor of the free use of property. *Montoya v. Barreras*, 81 N.M. 749, 473 P.2d 363 (1970); *Hoover v. Waggoman*, 52 N.M. 371, 199 P.2d 991 (1948). We examine the particular facts of each case to arrive at a logical, reasonable, and fair interpretation. *H. J. Griffith Realty Co. v. Hobbs Houses, Inc.*, 68 N.M. 25, 357 P.2d 677 (1960).

In *Montoya*, we stated that "[r]estrictive covenants must be considered reasonably, though strictly, and an illogical, unnatural or strained construction must be avoided." (Citation omitted.) *Id.* at 750, 473 P.2d at 364. Any ambiguities in a restrictive covenant should be resolved in favor of the free enjoyment of the property and against restrictions. *Grossman v. Hatley*, 21 Ariz.App. 581, 522 P.2d 46 (1974). Restrictions on land use will not be read into covenants by implication. *Hannula v. Hacienda Homes*, 34 Cal.2d 442, 211 P.2d 302 (1949). When the covenant is uncertain in its application to the particular facts the intention of the parties to the covenants is controlling. *Becker v. Arnfeld*, 171 Colo. 256, 466 P.2d 479 (1970).

This is a case of first impression in New Mexico. We find *Hussey v. Ray*, 462 S.W.2d 45 (Ct.App.Tex.1970) and *Manley v. Draper*, 44 Misc.2d 613, 254 N.Y.S.2d 739 (1963) persuasive. Under similar facts, the Texas Court of Civil Appeals in *Hussey* held that the mobile home did not violate the restrictive covenant because it had been "built for human habitation, has all the attributes of a permanent type dwelling, was used as such and was fixed to the realty by various connections." 462 S.W.2d at 48. The *Hussey* Court stated:

> There is nothing in the instrument restricting the size, shape or composition of the residential building, nor is there anything therein as to the minimum cost of construction. The dedicating instrument made no attempt to define "trailer." Under such circumstances the commonly accepted meaning will be applied. [Citation omitted.]
>
> Webster's New International Unabridged Dictionary (3rd Edition), defines "trailer" as "4c: a nonautomotive highway * * * vehicle designed to be hauled (as by tractor, motor truck or passenger automobile)."
>
> It defines "vehicle" as "a means of conveyance."

462 S.W.2d at 46.

The *Hussey* Court held that the purpose of the restrictive covenant was "to prevent the property owner from using any temporary structure for a residence." *Id.* at 47. It concluded that the mere fact that the home was moved upon the lot was not necessarily a controlling factor. It found that any wooden frame house could be moved from its location, as mobile homes can be moved.

Manley, supra is in accord with *Hussey*. The *Manley* Court stated that the defendant had fully converted his mobile home "into a permanent residence, with all the conveniences and attributes of the most modern dwelling . . . ." *Id.* 44 Misc.2d at 616, 254 N.Y.S.2d at 742.

The court in *Yeager v. Cassidy*, 20 Ohio Misc. 251, 253 N.E.2d 320 (1969) raised an important public policy issue as follows:

> The court is of the opinion that the issue evoked by these proceedings is of broad import and will probably become critical as the use of pre-fabricated and pre-built structures becomes more prevalent.
>
> . . . . .
>
> The courts must acknowledge that prebuilt homes, mobile or otherwise, which in

> a given case may be more attractive in appearance and design than many conventional homes built completely on the site, are a part of our changing society, and give recognition to the fact that the law must be responsive to the best interests of those whom it is designed to serve. Unless such dwellings are expressly and explicitly excluded by the terms of a protective covenant, their use should not be enjoined, provided that in each case, the dwelling otherwise conforms to the spirit of the restriction.

Id. at 255–6, 253 N.E.2d at 323–4.

The covenants here were obviously designed to preserve the residential character of the neighborhood by preventing temporary structures from being used as homes. They do not specifically prohibit the construction of the type of home that Parker placed on his lots. It strains one's credulity to state that Parker's home is a temporary structure, or a "trailer". The fact that it was initially designed to be transported to its site by attached wheels and that it could be subsequently moved is not controlling. With modern equipment and ingenuity even brick buildings are movable.

These decisions should rest on the facts and circumstances of each case. Based solely on the evidence here, we hold that the Parker home is substantially the same as a conventional one-family dwelling and that the placing of the Parker home on his lots does not violate the letter or the spirit of the restrictive covenants.

The decision of the district court is reversed and the case is remanded with directions to set aside the judgment and enter judgment for Parker.

IT IS SO ORDERED.

SOSA, C. J., and FELTER, J., concur.

604 P.2d 822

Eddie RAEL, Plaintiff-Appellee,

v.

Emilio CADENA and Manuel Cadena, Defendants-Appellants.

No. 3921.

Court of Appeals of New Mexico.

Oct. 23, 1979.

John A. Budagher, Albuquerque, for defendants-appellants.

Leof T. Strand, Albuquerque, for plaintiff-appellee.

OPINION

LOPEZ, Judge.

Defendant Emilio Cadena, a non-active participant in the battery of plaintiff Eddie Rael, appeals the judgment of the trial court finding him, along with the active participant, jointly and severally liable for the battery. We affirm.

The issue on appeal is whether a person present at a battery who verbally encourages the assailant, but does not physically assist him, is civilly liable for the battery.

On a visit in Emilio Cadena's home, Eddie Rael was severely beaten on the head and torso by Emilio's nephew, Manuel Cadena. As a result of the beating, he suffered a fractured rib and was hospitalized. Eddie Rael testified that once the attack had started, Emilio yelled to Manuel in Spanish, "Kill him!" and "Hit him more!" The trial court sitting without a jury found that Emilio encouraged Manuel while Manuel was beating Eddie. Based on this finding, the court held the Cadenas jointly and severally liable for the battery.

Emilio urges that in order for the trial court to have held him jointly liable for the battery, it had to find either that he and Manuel acted in concert, or that Manuel beat and injured Eddie as a result of Emilio's encouragement. This is a misstatement of the law.

This is an issue of first impression in New Mexico. It is clear, however, that in the United States, civil liability for assault and battery is not limited to the direct perpetrator, but extends to any person who by any means aids or encourages the act. *Hargis v. Horrine*, 230 Ark. 502, 323 S.W.2d 917 (1959); *Ayer v. Robinson*, 163 Cal. App.2d 424, 329 P.2d 546 (1958); *Guilbeau v. Guilbeau*, 326 So.2d 654 (La.App.1976); *Duke v. Feldman*, 245 Md. 454, 226 A.2d 345 (1967); *Brink v. Purnell*, 162 Mich. 147, 127 N.W. 322 (1910); 6 Am.Jur.2d *Assault and Battery* § 128 (1963); 6A C.J.S. *Assault and Battery* § 11 (1975); Annot., 72 A.L.R.2d 1229 (1960). According to the Restatement:

> [f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> * * * * * *
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself. * * *

Restatement (Second) of Torts § 876 (1979).

Although liability cannot be predicated upon mere presence at a battery, *Duke, supra*; 6 Am.Jur., *supra*, verbal encouragement at the scene gives rise to liability. *Hargis, supra; Ayer, supra; Brink, supra.*

> [A] person may be held liable for the tort of assault and battery if he *encouraged* or incited *by words* the act of the direct perpetrator. * * * (Emphasis added.)

6 Am.Jur., *supra* at 108. Because he yelled encouragement to his nephew while the latter was beating Eddie Rael, Emilio Cadena is jointly liable with his nephew for the battery.

Contradictory evidence was offered as to whether Emilio Cadena did yell anything during the beating. Eddie Rael claimed that Emilio urged Manuel to beat him; Emilio denied that he said anything; and Manuel testified that he never heard Emilio. However, the trial court found that Emilio did verbally encourage Manuel to beat Eddie. Although the evidence was in conflict, the court could conclude from the testimony of Eddie Rael that Emilio Cadena verbally encouraged his nephew to attack. This testimony, if believed, is substantial evidence to support the trial court's finding. It is not the function of the appellate court to weigh the evidence or its credibility, or to substitute its judgment for that of the trial court. So long as the findings are supported by substantial evidence, they will stand. *Getz v. Equitable Life Assur. Soc. of U. S.*, 90 N.M. 195, 561 P.2d 468, *cert. denied*, 434 U.S. 834, 98 S.Ct. 121, 54 L.Ed.2d 95 (1977).

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

SUTIN and ANDREWS, JJ., concur.

604 P.2d 823

Marcus L. GRAMMER, Plaintiff-Appellee,

v.

KOHLHAAS TANK AND EQUIPMENT COMPANY, a corporation, Defendant-Appellant.

No. 3652.

Court of Appeals of New Mexico.

Nov. 27, 1979.

Rehearing Denied Dec. 7, 1979.

Janet T. Santillanes, Eugene Klecan, Klecan & Roach, Albuquerque, for defendant-appellant.

O. R. Adams, Jr., David A. Grammer, Jr., Albuquerque, for plaintiff-appellee.

OPINION

SUTIN, Judge.

This is a strict products liability case in which a compressor tank manufactured by defendant exploded below the automotive shop of Montgomery Wards and seriously injured plaintiff employed there as a mechanic. The jury returned a verdict for plaintiff and defendant appeals from the judgment rendered. We affirm.

A. *Facts most favorable to plaintiff.*

Plaintiff was a mechanic who worked in the automotive shop of Montgomery Wards. On August 10, 1973, while at work, one of the three compressor tanks manufactured by defendant, while operating under pressure, exploded causing plaintiff serious injuries. The tank that exploded was delivered to Montgomery Wards in good condition in February, 1973 and was in operation about six months prior to the explosion. The normal life of the tank would approximate five years, although a replacement tank and others had been in operation 12 years.

The evidence is undisputed that the tank ruptured at a welded seam. The tank had a longitudinal seam and top seam, designated as a circumferential seam. The initial failure in the tank occurred on the longitudinal seam in the vicinity of 6 to 10 inches below the top weld. The explosion did not occur at the point of maximum stress. Metal, particularly steel, has a property called fatigue in which steel will carry a given stress for many applications until this fatigue process occurs to a sufficient degree that it will no longer carry that particular load even though the load or stress has never increased above a particular value.

Expert testimony established that, over the several months the tank was in use, the failure occurred as a result of fatigue, due to the fatigue of the weld during normal operating stress in the tank; that if the weld had been done properly, it would have been as strong as the parent metal. It would have carried a considerable overload. The fact that all of the failure occurred in the seam indicated that it was the weakness of the seam that caused the failure. The experts opinionated that the tank failed under normal working or operating conditions as the result of a faulty weld based on the fact that the weld seam simply came apart.

B. *Defendant was not entitled to a directed verdict or judgment N.O.V.*

Defendant claims the trial court erred in denying its motion for a directed verdict and judgment N.O.V. "because the plaintiff did not prove that a defect existed; nor did plaintiff prove that any defect caused the accident."

It does not require citation of authority to support plaintiff's position that under the doctrine of strict products liability, defendant, the manufacturer of the tank that exploded, which tank was in defective condition, unreasonably dangerous to plaintiff, and without any change in the condition in which it was sold to Montgomery Wards, is liable for damages to plaintiff even though defendant exercised all possible care in the manufacture and sale of the tank.

We have carefully read 25 pages of defendant's argument on this subject matter. Nothing was found which shows insufficient evidence to submit to the jury the factual questions of the presence of a defect and its proximate cause of the accident. Expert testimony was strong and effective to establish these facts. Apart from expert

testimony, defendant, by cross-examination of plaintiff, learned in mechanics and welding, established that the weld was defective from the top of the seam all the way down.

To establish an insufficiency in the evidence, defendant must set forth all testimony, facts and evidence, together with all reasonable inferences to be drawn therefrom, most favorable to plaintiff and disregard all conflicting evidence. This, defendant did not do. It has often been stated that motions based upon an insufficiency of the evidence lack favor on appeal unless defendant hews the mark to show a complete absence of evidence to sustain an issue of fact. This must be done before defendant can argue vociferously, as defendant did, that plaintiff cannot rely on res ipsa loquitur when this doctrine was absent from the case; that the primary method of proof by plaintiff was to show that no misuse occurred; that the mere happening of an accident is not proof of products liability, or that plaintiff is attempting to stretch the doctrine of strict liability far beyond its intended scope. Argument of this nature is valueless.

Defendant failed to destroy expert testimony wherein opinions focused on fatigue as the defect in the weld. The arguments made by way of logic, that the experts did not compute or analyze the strength of a weld of ⅓ penetration, ¼ penetration, or any variation from 100% penetration, together with other similar detailed technical disputations, might affect the weight of the expert's testimony. To answer each of the technical contentions made, would require this Court to sit in conference with physicists to seek a solution. We are not physiochemical physicists who can apply defendant's logic to the expert's opinion to decide whether the opinion was without foundation. Defendant's disputations are matters of argument to the jury, not to this Court. It is common knowledge that this Court will not weigh evidence. We determine whether plaintiff made a prima facie case. We hold that plaintiff did.

We say without hesitation that the experts' opinions, as well as that of plaintiff, created issues of fact for the jury on whether plaintiff proved the existence of a defect in the weld.

Defendant raised two additional sub-points: (1) the requisite proof of defect existing at the time the tank left the defendant manufacturer is missing and (2) it was error to allow the expert witness to judge the credibility of other witnesses. These sub-points do not deserve discussion.

C. *The court did not err in allowing testimony regarding A.S.M.E. Standards.*

One of plaintiff's experts was allowed to testify briefly as to requirements in the manufacture of the tank under the Standards of the American Society of Mechanical Engineers. This testimony, defendant argues, was extremely prejudicial. We disagree.

Defendant overlooked the prior testimony of Max A. Smith, vice-president and engineer of defendant. His deposition was read into evidence. The following questions and answers were read without objection:

Q. On these specifications that you just read, Mr. Smith, where did you get that information?

A. It is design criteria taken from A.S.M.E. code textbook for design of pressure vessels.

* * * * * *

Q. Data, documents and information relating to manufacture and specifications.

A. Yes. * * * This is a design data based upon A.S.M.E. code which would include, among other things, the design criteria *for this particular tank.* That's the heads *for the tank.* The elliptical heads, that's this one, and similar design criteria for the shell thickness *of the tank in question.*

* * * * * *

Q. * * * This book is entitled "Fogle's Number One Tank and Pressure Vessel Handbook for the New 1952 A.S.M.E. Code."

A. Yes, sir.

Q. And on the inside it's marked "1952 Edition."

A. Um-hum.

Q. *And is this still the book that you use in the manufacture?*

A. Yes.

Q. *It's still valid for the things it has in it?*

A. Yes. [Emphasis added.]

Defendant's objections to the expert's testimony on A.S.M.E. Standards comes too late. Defendant relies on *Jasper v. Skyhook Corporation*, 89 N.M. 98, 547 P.2d 1140 (Ct.App.1976), reversed on other grounds, 90 N.M. 143, 560 P.2d 934 (1977). In *Jasper I*, this Court held that federal Occupational Safety and Health Act (O.S.H.A.) Regulations were not relevant and were inadmissible in evidence. Not so in the instant case where A.S.M.E. Standards were used in the manufacture of the tank in question.

The trial court did not err in allowing testimony regarding A.S.M.E. Standards.

D. *No error occurred in disclosure of defendant's insurance.*

During the course of the trial, the following questions were asked by plaintiff and answered by Vincent DiSylvester, a witness.

Q. By whom are you employed, Mr. DiSylvester?

A. Presently Denny's Restaurant in Las Cruces, New Mexico.

Q. And by whom were you employed in August of 1973?

* * * * * *

A. Hartford Insurance Group.

Q. And what was your job, Mr. DiSylvester?

A. Senior claims representative.

Q. And, Mr. DiSylvester, shortly after August 10th, 1973, did you have occasion to go examine a pressure tank that exploded under a hoist out at Montgomery Ward and Company?

A. Yes, I did.

* * * * * *

Q. Now, Kohlhaas Tank Company, and not Montgomery Ward was your insured, right?

A. Yes.

* * * * * *

Q. Who was your insured? In other words—

A. It was Kohlhaas Tank and Equipment.

Defendant objected to the admission of this testimony.

In chambers, before voir dire of the jury, the matter of plaintiff identifying DiSylvester as an employee of Hartford Insurance Group was a verbal war. The purpose of the identification was to show that Max Smith, vice-president and engineer of defendant, together with DiSylvester, examined the tank; that Smith told DiSylvester that he, Smith, thought the tank had ruptured because of a defective welding at the seam and that the testimony of DiSylvester would prove an admission by Smith and impeachment of his testimony.

In defendant's answers to interrogatories and Max Smith's deposition, both read to the jury, defendant and Smith stated that the cause of the rupture along the longitudinal seam was *misuse* and not defective welding at the seam. Smith and DiSylvester did meet at Montgomery Wards after the explosion. Smith did not recall any conversation relating to the cause of the accident. DiSylvester's testimony followed:

Q. Subsequent to the examination made by yourself and by Mr. Smith, did you have a discussion with Mr. Smith about the cause of the tank rupturing?

* * * * * *

A. * * * [A]s we were leaving, Mr. Smith and I were discussing what might have been the cause, and we discussed either a weak seam or an improper seam.

* * * * * *

Q. What did Mr. Smith tell you that he thought about the cause of the rupture?

* * * * * *

A. Well, he had indicated that possibly it might have been a bad seam.

Q. Did he give you any reasons as to why he would like to get the tank to run tests on?

* * * * * *

A. Well, he said he had not seen anything like it, and would want to try to run some tests to see what caused it, so possibly it wouldn't happen again.

In cross-examination, when inquiry was made of DiSylvester, he answered:

A. Well, Mr. Smith, who was with me, made the statement, or said something like "It's obvious that it's the seam. It's obvious it broke at the seam."

* * * * * *

Q. But what caused the break at the seam couldn't be told as you were looking over this tank?

A. It would—we just knew it was an explosion of some sort.

* * * * * *

Q. * * * [A]s I understand it, you prefaced it as far as Mr. Smith's language, he said that possibly it might have been a bad seam.

A. Well, he said possibly it might have been a bad weld, bad seam, could have been.

The tank explosion occurred on August 10, 1973. New Mexico Rules of Evidence became effective July 1, 1973. Rule 411 reads:

> 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. [Emphasis added.]

Rule 403 reads:

> 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 stands for the proposition that the existence of a liability insurance policy is not admissible to show one's negligence or other wrongful conduct. But evidence of the existence of insurance may be shown for other purposes, *Charter v. Chleborad*, 551 F.2d 246 (8th Cir. 1977), and the exclusion of insurance coverage where relevant is reversible error. *Posttape Associates v. Eastman Kodak Co.*, 537 F.2d 751 (3rd Cir. 1976).

In fact, it has been held that references to insurance coverage made in the course of *identifying a statement* for purposes of impeachment did not violate Rule 411's prohibition against admitting evidence of insurance coverage in order to show wrongdoing. *Varlack v. SWC Caribbean, Inc.*, 550 F.2d 171 (3rd Cir. 1977). On the issue of whether insurance coverage is admissible to establish an agency relationship, see *Hunziker v. Scheidemantle*, 543 F.2d 489, 495, Note 10 (3rd Cir. 1976), and as bearing upon the credibility of a witness and the weight to be given to his testimony, see, *Theurer v. Holland Furnace Co.*, 124 F.2d 494 (10th Cir. 1941).

A review of the law on the admission in evidence of insurance coverage began over a third of a century ago with discussion of questions directed to jurors on voir dire examination in regard to their interest in insurance companies. *Olguin v. Thygesen*, 47 N.M. 377, 143 P.2d 585 (1943). *Olguin* points out that to suggest that jurors are without knowledge as to insurance coverage for those likely to be subjected to action for negligent conduct is fictitious. The Court said:

> It must now be rather generally recognized that in suits of this character at least the large employer of labor usually carries liability insurance, *and that the insurance carrier in such cases is in fact*, if not strictly as a matter of law, *the real party in interest since it must pay any judgment recovered*. . . . [Emphasis added.] [Id. p. 384, 143 P.2d p. 589.]

This concept was carried forward in *Hale v. Furr's Incorporated*, 85 N.M. 246, 511

P.2d 572 (Ct.App.1973), Sutin J., Specially Concurring. Hartford Insurance Group was not only the real party in interest in fact, but it also assumed a fiduciary relationship with defendant. *Chavez v. Chenoweth*, 89 N.M. 423, 553 P.2d 703 (Ct.App. 1976). We have not, to date, reversed any case by reason of the admission in evidence of insurance coverage. But on two occasions, reversible error resulted where exclusion of insurance coverage occurred. *Selgado v. Commercial Warehouse Company*, 86 N.M. 633, 526 P.2d 430 (Ct.App.1974); *Mac Tyres, Inc. v. Vigil*, 92 N.M. 446, 589 P.2d 1037 (1979). See *Anderson v. Welsh*, 86 N.M. 767, 527 P.2d 1079 (Ct.App.1974).

Mac Tyres, Inc., involved a plaintiff who lied to a representative of his employer's workmen's compensation carrier. The trial court disallowed testimony that the person to whom the lie was told was a representative of the insurance company. In reversing this case, authorities omitted, Justice McManus said:

> The trial court has a great deal of discretion in applying Rules 403 and 411. * * *
>
> * * * * * *
>
> * * * The trial court's ruling can only be held to be reversible error in the event of an abuse of that discretion.
>
> * * * In our opinion, the trial court abused its discretion by limiting Mac Tyers' presentation of impeachment evidence.
>
> The right to impeach a witness is basic to a fair trial. * * * [Id. 589 P.2d 1039.]

The rule in New Mexico on disclosure of insurance coverage may be stated as follows:

1. Evidence that a person was or was not insured against liability is *not* admissible upon the issue whether he acted negligently or otherwise wrongfully.

2. Evidence that a person was or was not insured against liability *is* admissible when offered for any other purpose which is relevant and basic to a fair trial.

3. The trial court may, in its discretion, admit evidence of insurance coverage if it believes that its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Contrariwise, in its discretion, the trial court may exclude evidence of insurance coverage.

4. The trial court's ruling can only be held to be reversible error in the event of an abuse of that discretion.

The fiction of which Judge Carmody spoke in *Olguin* in 1943 has not been discarded. It has been pierced. Yesterday, it was proper on cross-examination to ask a claims investigator if he were working for an insurance company—*Hale v. Furr's Incorporated*, 85 N.M. 246, 511 P.2d 572 (Ct. App.1973), Sutin, J., Specially Concurring. Today it is proper on direct examination or redirect examination. *Wood v. Dwyer*, 85 N.M. 687, 515 P.2d 1291 (Ct.App.1973).

The trial court did not abuse its discretion in allowing disclosure of the fact that defendant was insured.

E. *Remarks by plaintiff's lawyer did not deny defendant its right to a fair trial.*

Defendant argues that "Throughout the course of the trial, plaintiff's attorney deliberately made improper remarks about defendant and about defendant's attorney in the presence of the jury." An example given occurred during plaintiff's final oral argument. The remaining seven examples occurred during the course of the trial. We have examined them all and find that during 8 days of the proceedings, defendant had a fair trial based upon the following established rules.

(1) *Oral argument was proper.*

At the end of his final closing argument, plaintiff's attorney said:

> And I say to you, ladies and gentlemen, it would indeed be a travesty of justice if the defendant in a case like this could get ahold of the evidence and destroy it, when it wasn't even his, and then elimi-

nate the case. That wouldn't be right, and that isn't the law, and that isn't the way this should go.

Defendant claims that the purpose of these remarks was to prejudice the jury against the defendant by accusing defendant of intentionally destroying evidence which plaintiff needed. Even if we assumed that the remarks were improper, which we do not, defendant's claim of prejudicial error disappears under all of the various rules following which were adopted by the Supreme Court.

(a) *Alleged error was not preserved for review.*

Defendant did not object to the above portion of oral argument nor was the judge requested to caution the jury. Defendant's lawyers, long experienced in trial of civil cases, experienced this problem in *Hunter v. Kenney*, 77 N.M. 336, 422 P.2d 623 (1967). As plaintiff's attorney in *Hunter*, he objected to defendant's oral argument because it was really improper. The objection was overruled. The Supreme Court held that plaintiff did not properly preserve this point for review. The objection to alleged improper argument must be specified and made known to the court so that the court may intelligently rule thereon. When that is not done, the proposition is not properly reviewable on appeal. In any event, the trial court has wide discretion in controlling argument of lawyers in addressing the jury and absent a clear abuse of discretion, it is not for us to interfere.

A party cannot complain on appeal that oral argument was prejudicial if no objections were made at the trial. Objections should be made in time for the trial court to rule on them and to correct them, where it is possible to correct them by a cautionary instruction before the jury retires. *McCauley v. Ray*, 80 N.M. 171, 453 P.2d 192 (1968); *Jackson v. Southwestern Public Service Company*, 66 N.M. 458, 349 P.2d 1029 (1960).

(b) *The alleged error was not outside the record.*

Griego v. Conwell, 54 N.M. 287, 222 P.2d 606 (1950) sounded the warning that absent objections, a judgment will be reversed and a new trial ordered where lawyers go outside the record when they address the jury or attempt to influence the minds of the jury against opposing litigants. Such a case was *Chavez v. Valdez*, 64 N.M. 143, 325 P.2d 919 (1958). But the matter complained of must attain a degree of seriousness. *Bailey v. Jeffries-Eaves, Inc.*, 76 N.M. 278, 414 P.2d 503 (1966); *Baros v. Kazmierczwk*, 68 N.M. 421, 362 P.2d 798 (1961). We do note that in *Chavez* and *Baros* motions were made for a mistrial.

"It is not every inaccuracy or flight of oratory that will constitute error." *Jackson, supra* [66 N.M. at 474, 349 P.2d at 1039].

The *Griego* rule is a rule of last resort. It applies in the absence of objections made and in the absence of any discretion exercised on the part of the trial court. We should not apply the rule unless we are satisfied that the argument presented to the jury was so flagrant and glaring in fault and wrongdoing as to leave the bounds of ethical conduct. Plaintiff's lawyer's argument did not go outside the record.

We hold that the *Griego* rule was not applicable here.

(c) *The discretion of the trial court is the test.*

Beal v. Southern Union Gas Co., 66 N.M. 424, 349 P.2d 337 (1960) holds that it is for the trial judge, within his sound discretion, to determine if lawyers have transgressed the grounds of professional duty or whether there has been prejudicial misconduct in argument presented to the jury. Arguments are under the supervisory control of the trial court which has wide discretion in this regard. We must assume that the only part to be played by an appellate court under the *Beal* rule is to determine whether the trial court abused its discretion.

The trial court can best judge the effect of oral argument upon the minds of the jury, especially in long and tedious trials.

Defendant sought a new trial. One of the reasons stated was improper oral argument stated above. In a hearing on the motion, defendant argued strongly that the closing argument of plaintiff's attorney was prejudicial error. The motion was denied. We agree with the trial court's ruling.

(2) *Alleged error of remarks during course of trial was not prejudicial.*

Defendant points to seven examples of improper remarks made by plaintiff's attorney during the course of the entire trial. In *Higgins v. Hermes*, 89 N.M. 379, 552 P.2d 1227 (Ct.App.1976), this Court adopted the rule that to constitute prejudicial error based upon improper remarks during the entire trial, the result must be characterized as a "miscarriage of justice." We hold that the result was fair.

The conduct of lawyers during trial should be characterized by candor and fairness. It is not candid or fair for lawyers to engage in a shouting match in open court and such conduct and language have no place in a court of law. This Court does not condone such conduct and language. *Apodaca v. United States Fidelity and Guaranty Co.*, 78 N.M. 501, 433 P.2d 86 (1967). In *Apodaca*, plaintiff's lawyer in the instant case charged defendant's lawyer with every type of misconduct before the jury but to no avail.

Opposing lawyers in the instant case appear to be emotional and sensitive during the struggle to win a lawsuit before a jury. The trial court sought to see that the lawyers conducted themselves properly and with respect according to the canons of ethics of our profession and the oath which all attorneys have taken. *Apodaca, supra.* When lawyers continue to carry on a shouting match, neither can claim prejudicial error. Nevertheless, a review of the record discloses that in most part, the remarks of plaintiff's lawyer were provoked by defendant's lawyer.

No basis can be found upon which to hold that the alleged claims of prejudicial error with reverence to plaintiff's lawyer's oral argument nor remarks during trial.

F. *The award of $335,000.00 to plaintiff was not excessive as a matter of law.*

The jury awarded plaintiff the sum of $335,000.00 for injuries suffered when the tank exploded in 1973. Trial was held five years later.

At the time of the explosion on August 10, 1973, plaintiff was 55 years of age with a life expectancy of 21 years. He was rendered unconscious by reason of a skull fracture. Being a very sick man, he was taken to a hospital for treatment and observation. His head injury was sutured. Although the symptoms have left, plaintiff may not have recovered from his head injury.

Blood from his head injury caused his neck to become stiff and painful. He wore a collar brace. Doctors gave up trying to cure the neck problem with conservative means, and two years later, plaintiff underwent a neck fusion. Surgery was a matter of mediocre success. Thereafter, plaintiff continued to suffer persistent pain in the shoulder and restrictions in the mobility of his neck.

Plaintiff also suffered a low back sprain, underwent traction treatments, medication and injections without relief. Significantly worse changes took place since the time of the explosion. As a result, it is highly probable that plaintiff will need surgery in the low back area.

Plaintiff also suffered a moderately severe neurosensory type hearing loss in both ears as a result of damages to the inner organ of the ears, a nerve mechanism. This hearing loss was binaural to the extent of 58.3%. He wears a hearing aid, a microphone with a loud speaker. It does not cure the hearing problem. It has created difficulty in conversation.

Generally, plaintiff suffered nerve root injuries that extended from the shoulder down through the arm, hip and legs. Heat

therapy for the hip felt and looked like a piece of roast beef at the end of each treatment. Plaintiff was unable to lift things that weighed 20 to 30 pounds. His hands gave way. Limitations of leg movement resulted in inability to walk more than a block. Loss of leg control occurred. Walking on steps "tore his back up." He suffered cramps in his leg.

To all of the foregoing, add severe headaches, constant pain, vomiting and impairment of speech. Every four or five days when pain got so severe that he could not take it, plaintiff went to a chiropractor for adjustments. Often he must return several times until his muscles relax enough to overcome pain with use of a vibrator.

A host of doctors and chiropractors have not solved plaintiff's medical problems with treatment. In fact, plaintiff was declared to be totally and permanently disabled five years after the explosion. He has not been able to work since his neck operation in July, 1975 and shall not be able to work the remainder of his life. All of his former recreational, family and social joys have been removed during his lifetime. Plaintiff now is a "complainer."

It is not the duty of an appellate court to evaluate the mental and physical suffering that comes from severe and constant headaches and pain reasonably certain to be experienced for a period of 21 years more or less. This evaluation is for the jury to determine and for the trial court to approve or disapprove. When the jury makes a determination and the trial court approves, the amount awarded in dollars stands in the strongest position known in the law. The trial court sees the various witnesses, observes their demeanor during direct and cross-examination, as well as the attitude of the jurors during the progress of the trial, and the conduct of lawyers. We read the cold record. An appellate court will not disturb the award unless it factually appears that the jury was influenced by partiality, prejudice, corruption, a mistaken view of the evidence, or that the amount awarded is shocking to the mind of a reasonable person.

While most courts, like our own, recognize that pain and suffering constitute legitimate elements of damages in tort claims, one will search in vain for any extensive judicial analysis of its essential components. The meaning of pain and suffering, and the rules of law applicable thereto are matters of first impression. For an explanation thereof, see, *Rael v. F & S Company, Inc.*, No. 3486, filed October 11, 1979, Sutin, J., dissenting.

By U.J.I. No. 14.5, we have set the guidelines.

* * * * * *

> The guide for you to follow in determining compensation for pain and suffering, if any, is the enlightened conscience of impartial jurors acting under the sanctity of your oath to compensate the plaintiffs with fairness to all parties to this action.

No one can measure another's pain and suffering; only the person suffering knows how much he or she is suffering, and even this person cannot accurately say what would be reasonable compensation for it. The only standards or guide for a juror to use is his or her common sense.

Almost a quarter century ago, Justice Lujan established the common sense rule to be applied by an appellate court. In *Mathis v. Atchison, Topeka and Santa Fe Railway Co.*, 61 N.M. 330, 337, 300 P.2d 482, 487 (1956), he wrote:

> * * * There is no standard fixed by law for measuring the value of human pain and suffering. In every case of personal injury a wide latitude is allowed for the exercise of the judgment of the jury, and unless it appears that the amount awarded is so grossly out of proportion to the injury received as to shock the conscience, this court cannot substitute its judgment for that of the jury . . . .

The damages awarded were not excessive as a matter of law.

Defendant raised six additional points in this appeal. We do not find them suffi-

ciently meritorious to warrant any discussion.

Affirmed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

WOOD, C. J., specially concurs.

WOOD, Chief Judge (specially concurring).

I concur in the result reached by Judge Sutin. My reasons follow.

1. In arguing the sufficiency of the evidence, defendant failed to comply with Rule of Civ.App.Proc. 9(d) in that defendant did not state the substance of all evidence bearing on this issue. Instead, defendant argues insufficiency by taking testimony out of context and, in effect, asks this Court to weigh the evidence. Contrary to defendant's contention, there is evidence that the weld which failed was defective. The defect was either metal fatigue, the absence of an inside weld, or insufficient penetration of the weld. Defendant contends there was no evidence that a defect existed when it left the manufacturer. The evidence of no changes in the tank subsequent to manufacture and the evidence that the tank was properly used, permits the inference that the defect existed while the tank was with the manufacturer. Contrary to defendant's contention, the testimony supporting the verdict is not based on speculation and conjecture.

Defendant attempts to obfuscate the evidence issue by asserting that plaintiff could not rely on res ipsa loquitur; plaintiff did not rely on res ipsa loquitur. Another attempt at obfuscation is the claim that expert witnesses judged the credibility of other witnesses. This claim simply disregards the testimony of the experts, and is not supported by the record. Related to these obfuscations are additional claims, not discussed by Judge Sutin. One claim is that the witness Johns was not qualified to express an opinion as to the cause of the explosion. Another claim is that the plaintiff was not qualified to testify concerning penetration of the weld that failed. The record in this case shows that the testimony of Johns and plaintiff was admissible under Evidence Rule 701. *Jesko v. Stauffer Chemical Company*, 89 N.M. 786, 558 P.2d 55 (Ct.App.1976).

2. Defendant's argument concerning the A.S.M.E. Standards is that, at the time of the explosion, the Standards had not been adopted in New Mexico. Whether or not adopted in New Mexico, relevancy of the Standards was established by testimony that the Standards were used by defendant in manufacturing the tank in question.

3. I agree with defendant that the method of interjecting insurance into this case goes beyond the facts of prior New Mexico cases; I have found no New Mexico case where plaintiff interjected insurance by questioning his own witness on direct examination. As I read Evidence Rule 411, the admissibility of testimony which informs the jury of insurance coverage depends on relevancy, and not on whether the testimony is elicited on direct, cross or rebuttal.

I disagree with Judge Sutin's comment that Hartford Insurance Group was the real party in interest. There are simply too many variables in the relationship between insurer and insured to make such a statement. Testimony identifying a party's insurer does not permit an inference that the insurance covered the event in question, or that the insurer would pay all or part of a judgment entered against the insured party. Whether one is a real party in interest depends on the facts, and a reference to an insurance company, without more, is insufficient to establish the facts.

In permitting the identification of Hartford Insurance Group as an insurer of defendant, the trial court did not abuse its discretion. *MacTyres, Inc. v. Vigil*, 92 N.M. 446, 589 P.2d 1037 (1979). The interest of DiSylvester, the person who heard Smith's "bad seam" remark, was relevant in determining whether Smith made the remark and in determining the credibility of DiSylvester, the person who testified the remark was made. It is unnecessary to decide

whether this interest, standing alone, was sufficient because there was more. In cross-examining the personnel manager of plaintiff's employer, defendant justified questions concerning workmen's compensation "in that Montgomery Ward is the subrogated insurance carrier . . . ." In successfully objecting to portions of Smith's deposition, which plaintiff sought to introduce, defendant was able to leave the inference with the jury that DiSylvester was "a man from Montgomery Ward." The trial court could properly allow plaintiff to correct the false impression that defendant had placed before the jury. See *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct.App. 1977). There was no abuse of discretion in permitting the identification of the insurer because of the combination of DiSylvester's interest and the false impression left with the jury as to DiSylvester's position in the case.

4. Judge Sutin discusses defendant's contention that plaintiff's attorney denied defendant a fair trial by deliberate and prejudicial remarks. A related contention of defendant, not discussed by Judge Sutin, is that the conduct of the trial judge deprived defendant of a fair trial. Defendant did not object to some of the items on which he relies. Defendant takes some of the items out of context. A review of the record shows an obstreperous attorney for defendant who provoked plaintiff's attorney into giving as well as he got. There were times when the attorneys were so occupied with arguing with one another that they were slow to heed the trial court's admonition to desist. The details of the various arguments between counsel, the interruptions of counsel, and the objections made to the trial court need not be reviewed. The record shows that more of the offending was by defendant's counsel than by plaintiff's counsel. The record shows the trial court never abdicated its function to keep counsel in line; rather, the record shows the trial court was alert to the problems caused by counsel and worked at the job of keeping control of the trial. Defendant's claims of being denied a fair trial are meritless.

5. There is evidence of special damages consisting of past and future medical expense and lost earning capacity figured on a 10.9-year work-life expectancy. The special damages totaled $115,709. At the time of the accident, plaintiff had a life expectancy of 21.8 years. At the time of trial he was totally incapacitated from work; he has a severe limitation on his ability to walk, a 58 percent hearing loss, impairment of speech, severe headaches and almost constant pain. These residuals came about after injuries to the skull, neck and low back. The evidence does not permit this Court to hold the damages were excessive as a matter of law. *Gonzales v. General Motors Corporation*, 89 N.M. 474, 553 P.2d 1281 (Ct.App.1976).

6. Defendant contends that two instructions were erroneous, that certain exhibits were improperly admitted, and that there was cumulative error. I agree with Judge Sutin that these contentions are not sufficiently meritorious to require discussion.

604 P.2d 835

C & D TRAILER SALES, Appellant,

v.

TAXATION AND REVENUE DEPARTMENT, Appellee.

No. 3778.

Court of Appeals of New Mexico.

Nov. 29, 1979.

John F. Quinn, Santa Fe, for appellant.

Jeff Bingaman, Atty. Gen., Gerald B. Richardson, Sp. Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

HENDLEY, Judge.

Taxpayer appeals an order and decision of the Department which denied a protest of assessed gross receipts tax, interest and penalty on its sales of mobile homes. We affirm.

Taxpayer raises three issues on appeal: (1) the constitutionality of New Mexico's taxing scheme vis-a-vis mobile homes; (2) assuming the taxing scheme to be constitutional, whether it was proper to impose a penalty on Taxpayer for failure to timely pay said taxes; and (3) whether the procedures given Taxpayer by the Department were constitutionally adequate.

The Department made the following findings of fact:

* * * * * *

2. The taxpayer did not report to the Bureau its receipts from its New Mexico

sales of mobile homes nor did it pay gross receipts tax on such sales.

* * * * * *

8. The Penalty. The owner of C & D Trailer Sales testified he did not want to pay this tax because it is unfair and, if necessary, he deliberately determined to test the validity of the tax, but he did not intend to avoid paying taxes if taxes are determined to be due. He testified that he conveyed these thoughts to his attorney and his accountant and it appears his attorney and accountant simply agreed there were too many taxes on mobile homes. There is no evidence that the taxpayer's failure to report receipts and pay taxes for 12 months was based on advice of counsel or his accountant.

Constitutionality of New Mexico's Gross Receipts Tax as Applied to the Sale of Mobile Homes

The applicable constitutional provisions are U.S.Const., Amendment XIV, and N.M.Const., Art. II, § 18, prohibiting the State from denying due process and equal protection laws, and N.M.Const., Art. VIII, § 1, providing that taxes shall be equal and uniform upon subjects of the same class. The appropriate standard in determining the constitutionality of legislative classifications made in the exercise of the State's taxing power is that employed under equal protection analysis. *Rust Tractor Co. v. Bureau of Revenue,* 82 N.M. 82, 475 P.2d 779 (Ct.App.1970). That standard is the relatively lax rational basis test. In *Michael J. Maloof & Co. v. Bureau of Revenue,* 80 N.M. 485, 458 P.2d 89 (1969), the New Mexico Supreme Court adopted the United States Supreme Court's highly deferential test announced in *Madden v. Kentucky,* 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940):

> In the field of taxation, more than in other fields, the legislature possesses the greatest freedom in classification, and to attack such as a violation of the Fourteenth Amendment places the burden on the one attacking to negative every conceivable basis which might support the classification.

Taxpayer must show that the taxing statute is patently arbitrary and capricious or void for uncertainty in order to defeat the statute on constitutional grounds. *Maloof, supra.* Where the State seeks to raise revenue through its exercise of the taxing power, reviewing courts have no right to determine the propriety or wisdom of the classifications drawn, but only if any rational basis can be found to support it. *Amarillo-Pecos Valley Truck Lines v. Gallegos,* 44 N.M. 120, 99 P.2d 447 (1940).

Taxpayer contends that the classification is arbitrary, that there exists no real difference between the groups so distinguished and that there is double taxation. This is erroneous. Mobile homes are in the nature of both personal and real property. See James H. Carter, "Problems in the Regulation and Taxation of Mobile Homes," 48 Iowa L.Rev. 16, and cases cited therein. They are only personalty in the hands of the dealer. There is no double taxation nor is the classification arbitrary. The legislature may tax them accordingly. Taxpayer's constitutional challenge is without merit.

The Penalty

Section 7–1–69 A, N.M.S.A.1978, provides:

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

A taxpayer's mere belief that he is not liable to pay taxes is tantamount to negligence within the meaning of the statute and invocation of the penalty is appropriate. *Tiffany Const. Co., Inc. v. Bureau of Revenue,* 90 N.M. 16, 558 P.2d 1155 (Ct. App.1976), *cert. denied* 90 N.M. 254 (1977). However, where taxpayer's failure to pay taxes is the result of a "diligent protest,"

and his decision to challenge the tax is based on informed consultation and advice (i. e. from his attorney or accountant), the taxpayer negates any inference of negligence and the application of the above-cited penalty provision is inappropriate. *Stohr v. New Mexico Bureau of Revenue,* 90 N.M. 43, 559 P.2d 420 (Ct.App.1976), *cert. denied,* 90 N.M. 254 (1977).

Under § 7–1–25 D, N.M.S.A.1978, the reviewing court must determine whether the findings of the Department were supported by substantial evidence. To determine whether there is substantial evidence in the record "* * * the court considers only favorable evidence and views that evidence in a light most favorable to the Commissioner's decision." *Westland Corporation v. Commissioner of Revenue,* 84 N.M. 327, 503 P.2d 151 (Ct.App.1972). There is no evidence in the record that Taxpayer relied on any informed consultation in deciding not to pay its taxes. Taxpayer's own testimony supports the hearing officer's finding of no such informed consultation and, as such, the imposition of the penalty was proper.

Adequacy of Procedures Followed in Hearing Process Under Due Process Analysis

Taxpayer's due process challenge is that the administrative hearing below was not before a neutral hearing officer, i. e. someone unconnected with the Taxation and Revenue Department. A related issue confronted the New Mexico Supreme Court in *Seidenberg v. New Mexico Board of Medical Exam.,* 80 N.M. 135, 452 P.2d 469 (1969), where they upheld the administrative revocation of medical licenses by the same board that brought the charges.

The precise issue raised herein was addressed by the Oregon Court of Appeals in *Matthew v. Juras,* 16 Or.App. 524, 519 P.2d 402 (1974). There, as here, appellant relied on *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), where the United States Supreme Court held that one of the components of a fair administrative hearing is an impartial decision maker. The Oregon court, relying on *Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), held that the mere fact that the hearing officer was an employee of the agency does not violate the due process standards of *Goldberg, supra,* and *Morrissey, supra.*

The *Morrissey* court explained *Goldberg's* impartial trier of facts requirement as follows:

> In *Goldberg,* the Court pointedly *did not require* that the hearing on termination of benefits be conducted by a judicial officer or even before the *traditional "neutral and detached"* officer; it required only that the hearing be conducted by some person *other* than one initially dealing with the case. (Some emphasis added.)

We find the procedures and holdings of the Department to be proper and, therefore, we affirm.

IT IS SO ORDERED.

HERNANDEZ and WALTERS, JJ., concur.

604 P.2d 838

STATE of New Mexico, Plaintiff-Appellant,

v.

Sammy M. BARELA, Defendant-Appellee.

No. 4169.

Court of Appeals of New Mexico.

Dec. 6, 1979.

Daniel A. Bryant, Asst. Dist. Atty., Alamogordo, for plaintiff-appellant.

Thomas A. Sandenaw, Jr., Alamogordo, for defendant-appellee.

OPINION

WOOD, Chief Judge.

The State sought the forfeiture of a pickup truck under § 30–31–34, N.M.S.A. 1978. Although quasi-criminal, and gauged by standards applicable to a criminal proceeding, this was a civil proceeding. *State v. Ozarek,* 91 N.M. 275, 573 P.2d 209 (1978); *In re One 1967 Peterbilt Tractor, Etc.,* 84 N.M. 652, 506 P.2d 1199 (1973). On the basis of the affidavit submitted by the State in support of the petition for forfeiture, the trial court granted summary judgment in favor of Barela, the person to whom the pickup was registered. The State appeals. The issue is the meaning of the statutory forfeiture provision; specifically, whether it applies to the facts in this case.

The facts in the affidavit, undisputed, are:

1. On November 2, 1978, Barela told Gunter, an undercover police officer, that Barela had 17 pounds of marijuana for sale at $85 per pound. Gunter told Barela he wanted to purchase a pound the following day.

2. On November 3, 1978, Gunter told Barela that Gunter was ready to make the purchase. Barela asked Gunter to accompany him to Barela's home to pick up the marijuana.

3. Barela and Gunter drove to Barela's home in the pickup sought to be forfeited.

4. The marijuana was in the kitchen of Barela's home; Barela sold Gunter a pound of marijuana in the kitchen.

5. Barela and Gunter left Barela's home in the pickup and returned to the location where the two had met. On this return trip, the marijuana was in Gunter's possession.

Section 30–31–34(A), supra, provides for the forfeiture of controlled substances manufactured, distributed, dispensed or acquired in violation of the Controlled Substances Act. No claim is made that the marijuana did not come within this provision.

Also subject to forfeiture, under § 30–31–34(D), supra, are

> all conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation for the purpose of sale of property described in Subsections A or B . . . .

Neither § 30–31–34(B), supra, involving raw materials, products and equipment, nor § 30–31–34(G), supra, involving exclusions from forfeiture, are involved in this case.

Section 30–31–34(D), supra, pertains to:

(1) Conveyances used to transport for the purpose of sale, property described in Subsections A and B.

(2) Conveyances intended to be used to transport for the purpose of sale, property described in Subsections A and B.

(3) Conveyances used to facilitate the transportation for the purpose of sale, property described in Subsections A and B.

(4) Conveyances intended to be used to facilitate the transportation for the purpose of sale, property described in Subsections A and B.

Each of these four items involves transportation. Transportation for what purpose? "For the purpose of sale." The sale of what? "Property described in Subsections A and B."

Section 30–31–34(D), supra, required that the transportation aspect of the statute must be transportation of the marijuana for the purpose of sale. The briefs discuss "facilitation" of transportation. We are not concerned with facilitation because the transportation aspect of the statute relates to the transportation of the "property" (the marijuana) for the purpose of sale. There are no facts indicating the pickup was in any way involved in any transporting of the marijuana for the purpose of sale.

The State contends this view of the statute is too restrictive, that § 30–31–34(D), supra, is sufficiently similar to federal statutes that interpretations of federal statutes should apply to the New Mexico statute. A federal statute pertaining to forfeiture of carriers transporting contraband articles, 49 F.C.A. § 781(a) (1954) makes it unlawful "to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article." A federal statute pertaining to forfeiture in connection with controlled substances, 21 U.S.C.S. § 881(a)(4) (1972), subjects to forfeiture "[a]ll conveyances . . . which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) . . . ."

Both federal statutes are much broader than the New Mexico statute. For example, compare the language in 21 U.S.C.S. § 881(a)(4)—"to facilitate the transportation, sale, receipt, possession, or concealment of property described"—with the language in § 30–31–34(D), supra—"to facilitate the transportation for the purpose of sale of property described . . . ." Because the federal statutes are not similar to the New Mexico statute, federal decisions interpreting the federal statutes are not helpful in determining the applicability of the New Mexico statute to the facts in this case.

The opinion in *United States v. One 1974 Cadillac Eldorado Sedan, Etc.*, 548 F.2d 421 (2d Cir. 1977) states that the broad language of 21 U.S.C.S. § 881(a)(4) "patently indicates the congressional intent to broaden the applicability of the forfeiture remedy it provided." The history of the New Mexico statute shows a legislative intent to restrict the applicability of the forfeiture provision. As originally enacted by Laws 1972, ch. 84, § 33, the statute read: "[T]o facilitate the transportation for the purpose of sale *or receipt* of property described . . . ." (Our emphasis.) The emphasized language "or receipt" was removed from § 30–31–34(D) by Laws 1975, ch. 231, § 1.

The deletion of "or receipt" from the statute supports our view that the transportation aspect of § 30–31–34(D), supra, pertains to the transportation of the controlled substance for purpose of sale. This view is consistent with the statement in *State v. Ozarek*, supra: "Forfeitures are not favored at law and statutes are to be construed strictly against forfeiture." Such a strict approach to the meaning of § 30–31–34(D),

supra, is appropriate because forfeiture is quasi-criminal in character with the object of penalizing for the commission of an offense against the law. *State v. Ozarek,* supra.

The summary judgment is affirmed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

SUTIN, J., dissenting.

SUTIN, Judge (dissenting).

I dissent.

Summary judgment was granted defendant. In construing the language of § 30–31–34(D), N.M.S.A.1978, the trial court found that the defendant's pick-up truck was not used to transport, or in any manner to facilitate the transportation for the purpose of sale of marijuana.

Section 30–31–34(D) subjects to forfeiture:

> [A]ll . . . vehicles . . . which are used, or intended for use, to transport, or in any manner to facilitate the transportation for the purpose of sale of property [which includes marijuana] . . . .

To arrive at a conclusion in this case, we must first explain the meaning of the words and phrases in the statute.

(a) The word "for" means "with a view to; in order to effect." *Ramsay Signs, Inc. v. Dyck,* 215 Or. 653, 337 P.2d 309 (1959).

(b) All vehicles "intended for use," means vehicles "with a view to being used," or "in order to effect the use" such as "looking forward to be used," "expected to be used," or "proposed to be used."

(c) "To facilitate the transportation," means "to make [transportation] easy or less difficult . . . as to facilitate the execution of a task." *Mosley v. State ex rel. Broward Cty.,* 363 So.2d 172 (Fla.App. 1978); *United States v. One 1950 Buick Sedan,* 231 F.2d 219 (3d Cir. 1956); *Platt v. United States,* 163 F.2d 165 (10th Cir. 1947).

(d) "For the purpose of sale of property" means "with a view to making a sale of property" or "in order to effect a sale of property."

(e) "Transport" means to carry or convey from one place to another. *State v. One 1970 2-Door Sedan Rambler,* 191 Neb. 462, 215 N.W.2d 849 (1974). The statute does not say "transport property for sale." "Transportation" as used does not say "transportation of property for sale." "Transportation for the purpose of sale of property" means "a vehicle used by a person to effect a sale of property."

Section 30–31–34(D) is not limited to "vehicles actually used by persons as transportation to effect a sale." It also includes "vehicles which a person looks forward to using as transportation to effect a sale." Forfeiture is not limited to actual transportation by a person. In other words, the legislature intended that forfeiture of vehicles may be undertaken when the facts show that a person actually used the vehicle as a means of transportation to effect a sale, or when a person owns a vehicle which he looks forward to using whenever he wants to effect a sale. The thrust of the statute is to deprive the drug trafficker of needed mobility.

Of course, an automobile is subject to forfeiture when it is used to transport a drug to a parking lot where defendant met an unknown undercover agent to whom the sale was made. *State v. Datsun,* 139 N.J. Super. 186, 353 A.2d 129 (1976). In the instant case, defendant drove an undercover agent from a meeting place to defendant's home, made the sale, and then drove the agent back to the point of the meeting place. The vehicle was used "to facilitate the transportation for the purpose of making a sale of property." *Mosely, supra; One 1950 Buick Sedan, supra; Platt, supra.*

A question of fact exists whether defendant's vehicle is subject to forfeiture on two grounds: (1) whether the vehicle was used to facilitate a narcotics transaction and (2) whether the vehicle was intended for use for this purpose.

This conclusion results from the fact that the prime target of vehicle forfeitures is the "narcotic peddler" and "drug traffick-

er." The purpose of forfeiture is to deny these people mobility and to financially weaken the narcotics enterprise. *State v. One 1972 Pontiac Grand Prix, Etc.,* 242 N.W.2d 660 (S.D.1976).

Section 505(a)(4) of the 1979 Uniform Controlled Substances Act subjects to forfeiture:

> all . . . vehicles . . . which are used, or intended for use, to transport, or in any manner to facilitate the transportation for the purpose of sale *or receipt* of property [which includes controlled substances] . . . . [Emphasis added.]

"Or receipt" was deleted from the above New Mexico statute. The Commissioners' note says:

> . . . Effective law enforcement demands that there be a means of confiscating the vehicles and instrumentalities used by drug traffickers in committing violations under this Act. The reasoning is to prevent their use in the commission of subsequent offenses involving transportation or concealment of controlled substances *and to deprive the drug trafficker of needed mobility.* [Emphasis added.]

Forfeiture statutes are intended to apply to those individuals who are significantly involved in a criminal enterprise. *In re 1972 Porsche 2 Dr., Etc.,* 307 So.2d 451 (Fla.App.1975); *Griffis v. State,* 356 So.2d 297 (Fla.1978). This proceeding is now controlled by the New Mexico Rules of Civil Procedure inasmuch as summary judgment was entered. *Reeder v. State,* 294 Ala. 260, 314 So.2d 853 (1975). A preponderance of the evidence is required to establish the right of forfeiture. *State v. One Certain Conveyance, Etc.,* 211 N.W.2d 297 (Iowa 1973).

This appeal should be reversed.

604 P.2d 842

CITY OF ALBUQUERQUE,
Plaintiff-Appellee,

v.

Andrew R. MARTINEZ,
Defendant-Appellant.

No. 4077.

Court of Appeals of New Mexico.

Dec. 18, 1979.

James K. Gilman, Gilman & Maguire, Albuquerque, for defendant-appellant.

Albert N. Thiel, Jr., Asst. City Atty., Albuquerque, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

The defendant was convicted of shoplifting, a petty misdemeanor, in the municipal court and was sentenced to thirty days. He

appealed to the district court and after a de novo hearing his conviction was affirmed and he was sentenced to thirty days. He appeals contending that there was a failure of proof of value. We disagree and affirm.

Albuquerque Ordinance 3–2(B)(1) reads in part:

> Shoplifting consists of any one or combination of the following acts:
>
> 1. Willfully taking possession of any merchandise with the intent of converting it without paying for it.

Subsection (C)(2) reads:

> "Merchandise" means chattels of any type or description of the value of $100 or less offered for sale in or about a store.

In the district court Mr. Henry Lopez, security manager for K-Mart, testified that he observed the defendant in the store. The defendant put on a man's coat and left the store without paying for it. Mr. Lopez, in addition, testified, "This coat was valued at $47.97." He further described the coat, "It was a man's ski jacket, kind of heavy, filled with something like polyester." Additionally, he testified that he did speak to the defendant, "When I stopped him outside, he said that he was going to ask his wife for some money to pay for it." During cross-examination the following exchange took place:

> Q. And what is your basis for saying the coat was worth a certain amount of money?
>
> A. Mr. Martinez—when I observed him, he removed the coat, removed the tag, and I picked it up where he dropped it.

The above testimony is sufficient circumstantial proof that the coat had some market value at the time of conversion by the defendant. Additionally, the trier of fact could properly infer that the price tag was the source from which the security manager concluded the precise value of $47.97. We adopt the holding in *Norris v. State,* 475 S.W.2d 553 (Tenn.App.1971):

> We hold that in a shoplifting case evidence that merchandise was displayed for regular sale at a marked price representing its retail price is sufficient circumstantial evidence of value, where totally uncontradicted, to support a conviction grounded upon the marked price as its value.

Affirmed.

IT IS SO ORDERED.

LOPEZ and ANDREWS, JJ., concur.

604 P.2d 1240

Grace M. JONES, Plaintiff-Appellant,

v.

UNITED MINERALS CORPORATION, a New Mexico Corporation, formerly Dotson Minerals Corporation (NSL), a New Mexico Corporation, Defendant-Appellee.

No. 12445.

Supreme Court of New Mexico.

Dec. 26, 1979.

Thomas F. McKenna, Albuquerque, for plaintiff-appellant.

Modrall, Sperling, Roehl, Harris & Sisk, Leland S. Sedberry, Jr., Mark B. Thompson, III, Albuquerque, for defendant-appellee.

OPINION

FEDERICI, Justice.

The questions for determination in this case are whether or not there is substantial evidence to support the judgment of the district court that: (1) a binding settlement agreement amending the mining lease of October 9, 1968 was entered into by the parties; (2) the settlement agreement was invalid by reason of fraud or mistake; and (3) the lease of October 9, 1968 did not expire by its terms, but rather was continued pursuant to the settlement agreement.

Appellant Jones entered into a ten year mining lease with appellee United Minerals

on October 9, 1968. In 1978, Jones filed a complaint to quiet her title for the purpose of cancelling the lease. While the action was pending the parties entered into settlement negotiations. A series of four letters was exchanged, consisting of: (1) an offer of settlement by appellee on October 20, 1978; (2) an acceptance of that offer by appellant on October 24, 1978, subject to the approval of the attorney in fact for appellant; (3) notice to appellee on October 30, 1978 that the attorney in fact for appellant had agreed to settlement; and (4) notice to counsel for appellee on November 20, 1978, that appellant would not go forward with the settlement due to the alleged discovery of gold-bearing minerals in a area near, but not on, the subject property.

Pursuant to the foregoing correspondence, appellee filed a motion to confirm the settlement agreement. After a hearing the trial court confirmed the agreement and held that it was binding upon the parties and enforceable. This appeal followed. We affirm.

Appellant urges that no firm enforceable settlement agreement was reached because the settlement negotiations called for a novation and a rental payment, neither of which condition was met.

Appellant next urges that, assuming an enforceable agreement was reached, sufficient cause was shown to set it aside, based upon fraud or mistake. In support of this, appellant urges that absent a showing of prejudice or detriment to appellee, the settlement may be set aside.

Appellant also contends that the order entered by the trial court amounted to entry of summary judgment against her and that such action was not appropriate since there is a dispute as to the facts. Appellant lastly urges that despite the settlement negotiations, the mining lease had expired by its own terms.

Appellee contends that there was substantial evidence to support the trial court's determination that a binding settlement agreement had been entered into by the parties; that there was substantial evidence to support the district court's refusal to set aside the agreement on the grounds of fraud or mistake; and that a full hearing was had on appellant's motion and that judgment was properly entered after that hearing. Appellee also maintains that if appellant was going to take the position that the lease had terminated, then she had an obligation to advise appellee that the offer could not be accepted and file a motion to dismiss pursuant to N.M.R.Civ.P. 41, N.M.S.A.1978.

The district court's determination that the parties had entered into a binding compromise and settlement is contained in its Findings of Fact Nos. 3, 4, 5, and 9. These facts established that the parties had confirmed the settlement reached by their attorneys; that appellee would continue on the property after the termination date of October 9, 1978, but only if appellee paid a rental substantially in excess of the amount called for in the lease; and, that appellee would have an option to purchase the property.

■ The offer of compromise and its acceptance through letters by counsel for the respective parties constituted a contract of settlement which is enforceable through judicial proceedings, and the repudiation by appellant does not release her from its enforcement under the facts in this case. *Marrujo v. Chavez*, 77 N.M. 595, 426 P.2d 199 (1967); *Bogle v. Potter*, 72 N.M. 99, 380 P.2d 839 (1963); *Bogle v. Potter*, 68 N.M. 239, 360 P.2d 650 (1961); *Esquibel v. Brown Construction Company, Inc.*, 85 N.M. 487, 513 P.2d 1269 (Ct.App.1973). *See also Augustus v. John Williams & Assoc., Inc.*, 92 N.M. 437, 589 P.2d 1028 (1979).

■ On the issue of fraud the trial court found that there was no fraud or misrepresentation. The testimony of appellee's witnesses was that they had no knowledge concerning any valuable discovery of minerals in the area of the property leased from appellant. One of appellee's witnesses acknowledged that there had been rumors of discovery and even some newspaper accounts to that effect, and that mining crews had been seen going to and from the

mine on adjacent property. Appellant introduced no evidence concerning knowledge in the appellee of any valuable discovery of minerals on the property which was the subject of the lease and of the compromise settlement. Nor did appellant show any relationship between any alleged discovery on adjoining property and the property in question. Further, appellant did not show that if a discovery had in fact been made on adjoining property, that it would affect the geological knowledge held by appellee and constitute the withholding of pertinent information from appellant. Also, the record does not disclose sufficient facts to show that appellant could have been unilaterally mistaken concerning the proposed settlement agreement at the time it was entered into. There is substantial evidence in the record to support the trial court's finding that there was no fraud, misrepresentation or mistake.

In regard to the issue of whether the lease expired by its own terms or was continued pursuant to the settlement agreement, the record is clear that the parties understood the effect of the October 9, 1968 lease as it stood. It is also apparent that the parties were aware of the effect the settlement negotiations were to have on that lease. The proposed settlement was not couched in terms of the expiration of the October 9, 1968 lease by its own terms, but rather, in the nature of a continuation of such leasehold agreement. Appellant's contention that appellee's failure to tender a rental payment on or before October 9, 1978 caused a lapse of the rental agreement dated October 9, 1968, and is inconsistent with and contrary to his October 24, 1978 acceptance of a settlement agreement offer from appellee.

Appellant seeks to avoid her acceptance of the settlement agreement based upon a fact which she knew to exist at the time of her acceptance. Such a position cannot properly be maintained. *Marrujo, supra.*

This Court has ruled in the past that a party can be considered bound by a settlement even if certain details are not worked out, if such details are not essential to the proposal or cause a change in the terms or purpose to be accomplished by the settlement. *Bogle v. Potter*, 72 N.M. 99, 380 P.2d 839 (1963). We hold that under the facts of this case, the failure of appellee to tender a $20.00 rental payment on or before October 9, 1978, and the absence of a novation, did not change the terms or purpose to be accomplished by the settlement offer.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

EASLEY and FELTER, JJ., concur.

604 P.2d 1242

STATE of New Mexico, Plaintiff-Appellee,

v.

Clifford Leo McCARTER, Defendant-Appellant.

No. 12341.

Supreme Court of New Mexico.

Jan. 9, 1980.

[redacted]

[redacted]

[redacted]

Sarah M. Singleton, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Walter G. Lombardi, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

FEDERICI, Justice.

Appellant was convicted of first degree murder and appeals. Appellant has presented five issues for our determination:

POINT I: Did the trial court err in refusing to grant a mistrial because the judge communicated with the jury in open court, but in the absence of the defendant, concerning the numerical division of the jury?

POINT II: Did the trial court err in excluding evidence of a plea of guilty of aggravated battery by the victim?

POINT III: Did the trial court err in refusing to give defendant's requested instruction on diminished responsibility?

POINT IV: Did the trial court err in refusing to instruct the jury on the voluntariness of defendant's statements?

POINT V: Did the trial court err in limiting the evidence which could be presented at trial and by making certain remarks concerning defense counsel?

We hold that the trial court erred with respect to Point I and we remand for a new trial.

POINT I

Following the reading of the instructions and the arguments of counsel, the court addressed the jury, informing them, among other things, that when they had reached a unanimous verdict, the foreman would sign and return the appropriate verdict. This happened around noon. At a quarter to five in the evening, the jury foreman sent the court a message which read: "Sir: We are at a decision of eleven to one for murder in the first degree. What next?" At this time the defense counsel, but not the defendant, were present. Defense counsel moved for a mistrial.

The trial court sent the following note to the jury: "You must consider further deliberations." The defense also objected to this procedure.

At ten minutes after five the jury returned to open court with a verdict of guilty of first degree murder. The judge polled the jury, asking, "[i]s this your verdict?" to each juror. One juror responded: "Reluctantly." The court said: "But it is your verdict?" The juror answered: "Yes."

The record discloses that the trial court was aware of the prohibition against shotgun instructions and was attempting to avoid error. However, the note sent by the court to the jury was, under the specific circumstances present in this case, tantamount to a simplified shotgun instruction. We realize that when a statement is submitted to the court by the jury during deliberations concerning the inability of the jury to arrive at a verdict, together with a disclosure of the numerical division, the judge must communicate with that jury in some fashion. The judge not only can, but should, communicate with the jury and can do so if the communication leaves with the jury the discretion whether or not it should deliberate further. The court can inform the jury that it *may* consider further deliberations, but not that it *must* consider further deliberations. This would be proper under *State v. Aragon,* 89 N.M. 91, 547 P.2d 574 (Ct.App.1976), *cert. denied,* 89 N.M. 206, 549 P.2d 284 (1976).

The coercive nature of the procedure used in this case was condemned in *Aragon.* In that case, the court stated that an additional instruction, after revelation of the numerical division, becomes a lecture to the lone juror who does not favor conviction. Such conduct violates due process because it impinges on the right to a fair and impartial trial.

This Court has specifically prohibited the use of such instructions, recognizing that they have been held to be coercive. N.M.U.J.I.Crim. 50.30, Use Note & Comm. Comments, N.M.S.A.1978. The instructions which accompany N.M.U.J.I.Crim. 50.07, N.M.S.A.1978, given prior to retiring, informs the jury of their duty to deliberate and to reach a unanimous verdict, are quite clear. "After the jury has retired for deliberation neither this instruction nor any 'shotgun' instruction shall be given." N.M.U.J.I.Crim. 50.07, Use Note. *See also* N.M.R.Crim.P. 43, N.M.S.A.1978. The trial court's note to the jury violated this specific mandate.

This Court has long recognized that any communication by a trial court with the jury must be in open court in the presence of the accused and his counsel. *State v. Orona,* 92 N.M. 450, 589 P.2d 1041 (1979); *State v. Beal,* 48 N.M. 84, 146 P.2d 175 (1944); *State v. Hunt,* 26 N.M. 160, 189 P. 1111 (1920); *State v. Brugger,* 84 N.M. 135, 500 P.2d 420 (Ct.App.1972). When communications occur in the absence of the accused, a presumption of prejudice arises, and the State must demonstrate that the communication did not affect the verdict. *Orona, supra; Brugger, supra.* These principles were reaffirmed recently in *State v. Stephens,* 93 N.M. 458, 601 P.2d 428 (1979).

> In New Mexico the law on this point is well settled. It is highly improper for the trial court to have any communication with the jury except in open court and in the presence of the accused and his counsel. *State v. Orona,* 92 N.M. 450, 589 P.2d 1041 (1979); *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. *State v. Brugger, supra.* Such a presumption of prejudice must have been intended to be guardian to the rights of confrontation and cross-examination, and therefore strong and compelling. The State has the burden of affirmatively showing that the defendant was not prejudiced by the communication between the court and the jury. *State v. Orona, supra, State v. Beal, supra.*

The Court concluded:

> Further, the record fails to show substantial evidence to the effect that the communication did not affect the verdict. The burden of establishing this fact resting with the State, and the State failing to meet this burden, the presumption of prejudicial error must prevail.

93 N.M. at 461, 601 P.2d at 431.

It is our opinion that the trial court erred in failing to grant a new trial, because of the communication by the jury to the court of its numerical standing on conviction and the written statement sent to the jury by the court, and the absence of the accused in open court during those proceedings, and because there is a lack of substantial evidence in the record to overcome the presumption of prejudice that the verdict was affected.

Appellant presents the following four additional points on appeal. We hold that these additional points are without merit.

POINT II

Evidence of a pertinent trait of character of the victim of a crime is admissible if offered by the accused. N.M.R.Evid. 404, 405, N.M.S.A.1978.

New Mexico cases recognize the principle that in a homicide prosecution, the defendant may introduce evidence of the general reputation of the victim for lawless and violent character, but that a defendant cannot introduce specific acts of violence. *Territory v. Lobato,* 17 N.M. 666, 134 P. 222 (1913); *Territory v. Trapp,* 16 N.M. 700, 120 P. 702 (1911), *rev'd on other grounds,* 225 F. 968 (8 Cir.); *United States v. Densmore,* 12 N.M. 99, 75 P. 31 (1904). Except for the

fact that opinion evidence may now be used to prove character under Rule 405(a), the law as stated in *Lobato, Trapp* and *Densmore* is still the law in New Mexico.

An exception to the general rule is recognized in *State v. Ardoin,* 28 N.M. 641, 216 P. 1048 (1923). There, this Court held that evidence of specific acts of violence on the part of the deceased could be introduced by a defendant if there was evidence that the defendant had been informed of, or had knowledge of, those acts at the time of the homicide. Such evidence would have some bearing on the reasonableness of defendant's apprehension for his life.

In this case, appellant testified that he heard of instances where the victim had stabbed several persons, but there was no evidence that appellant knew that the victim had been convicted of aggravated battery. Under that evidence the aggravated battery conviction was not admissible. *State v. Ardoin, supra.*

In *State v. Alderette,* 86 N.M. 600, 526 P.2d 194 (Ct.App.1974), the court relied upon *Ardoin* for the principle that admission of evidence of specific acts of violence on the part of the victim lies in the discretion of the trial court. The court stated:

> In our opinion, the asserted specific violent act referred to in the offense report was not to be excluded solely because it was not shown that defendant knew of that act. It does not follow, however, that evidence of a specific violent act of a deceased is automatically admissible. Such evidence is directed to a collateral issue and the extent that evidence on a collateral issue is to be permitted is within the trial court's discretion.

Id. at 605, 526 P.2d at 199.

See also State v. Marquez, 87 N.M. 57, 529 P.2d 283 (Ct.App.1974).

A plea of self defense is an important factor in determining essential elements of a defense and in arriving at admissibility of specific acts of conduct. *See State v. Bazan,* 90 N.M. 209, 561 P.2d 482 (Ct.App.1977). Nonetheless, we are convinced under the state of the record in this case that the trial court properly applied the rules of evidence and that it did not err in excluding evidence of a plea of guilty of aggravated battery by the victim.

POINT III

Appellant contends that the testimony of a forensic psychologist that defendant had an IQ of 85 and that he had an anti-social personality disorder sometimes referred to as sociopathy or psychopathy, was sufficient evidence of a mental disorder as to mandate the giving of an instruction on diminished responsibility. However, according to the psychologist's own testimony, he stated that he could not testify as to this particular issue.

The trial court based its rejection of the offered instruction on the case of *State v. Hartley,* 90 N.M. 488, 565 P.2d 658 (1977), where this Court held that evidence of a defendant who:

> [H]ad a mental disorder, was inclined to be depressed, agitated, prone to act impulsively, capable of destructive behavior if something triggered his actions . . . does not meet the test of reasonably tending to show that defendant had a diseased mind.

Id. at 491, 565 P.2d at 661.

In *Hartley* the Court did not address the notion of "diminished responsibility" which it had previously considered in *State v. Padilla,* 66 N.M. 289, 347 P.2d 312 (1959). The Court in *Padilla* recognized a difference between an insanity defense and one of "diminished responsibility".

In *State v. Valenzuela,* 90 N.M. 25, 559 P.2d 402 (1976), the Court indicated that an instruction on "diminished responsibility" may be warranted under the facts of that case, which dealt specifically with a defense of insanity.

The severity of the psychological disorder described in *Padilla* and *Valenzuela* was of a greater magnitude than the evidence in the present case.

The question is really one of substantial evidence which is for the trial court. We find substantial evidence in the record to

sustain the trial court. Failure to instruct on diminished responsibility was not error.

POINT IV

The trial court properly interpreted and applied the rule on timeliness of the motion to suppress the confession. *State v. Helker,* 88 N.M. 650, 545 P.2d 1028 (Ct.App. 1975); N.M.R.Crim.P. 18, N.M.S.A.1978. No request was made at the trial for a hearing on the voluntariness of the confession; the explanation of rights form and the confessions were admitted in evidence without objection. No timely objections or motions were made to suppress the confession and no foundation was laid by appellant which required the trial court to give N.M.U.J.I.Crim. 40.40, N.M.S.A.1978. *See* Use Note to N.M.U.J.I. 40.40.

As such, we find that the trial court did not err in refusing to give the tendered instruction.

POINT V

Appellant lastly alleges error as a result of: (1) a limitation of defendant's cross-examination of a state's witness; (2) impugning of defense counsel's ability, and (3) the exclusion of defense evidence, such as to deprive appellant of his fundamental right to a fair trial.

Pursuant to Rule 611(a) of the New Mexico Rules of Evidence, the trial court has a right to exercise reasonable control over the interrogation of witnesses to make the interrogation and presentation effective for the ascertainment of truth, to avoid needless consumption of time, and to protect witnesses from harassment or undue embarrassment. We find that the trial court did not abuse the discretion granted to it under the rule. The trial court did not err in limiting cross-examination, making remarks to and concerning defense counsel or in excluding certain evidence tendered on behalf of appellant.

The reasons stated above under Point I, the trial court is reversed, the sentence vacated, and the cause remanded for a new trial.

IT IS SO ORDERED.

PAYNE and FELTER, JJ., concur.

605 P.2d 222

Margaret V. BURNWORTH, Petitioner-Appellee,

v.

Dewey BURNWORTH, Respondent-Appellant.

No. 12516.

Supreme Court of New Mexico.

Jan. 8, 1980.

Rehearing Denied Jan. 28, 1980.

Cohen & Aldridge, William F. Aldridge, Albuquerque, for respondent-appellant.

Patrick L. Chowning & Associates, Patrick L. Chowning, Albuquerque, for petitioner-appellee.

OPINION

FEDERICI, Justice.

This is an action for dissolution of marriage which was filed originally in the District Court of Bernalillo County. Following a hearing, a final decree was entered. Thereafter, an appeal was taken by respondent to the Supreme Court in Cause No. 11,987. A decision by the Supreme Court was handed down on December 1, 1978, and mandate followed on January 19, 1979. After mandate the district court entered an amended final decree which awarded appellee an additional $5,150, plus one-half of the reasonable rental value of one of the homes from March 17, 1978 to the date of final decree.

Appellant contends that in entering an amended final decree awarding additional amounts of property and rental, the trial court violated the mandate of this Court in Cause No. 11,987. We agree.

In our prior decision in Cause No. 11,987, the mandate is quite clear:

> The judgment of the trial court is affirmed as to items (1) through (6) above, and reversed as to item (7). Item (7) is the separate property of appellant. The judgment of the trial court is affirmed with respect to the $33,630 additional income and the award of attorney fees. The cause is remanded for entry of such order or judgment as may be consistent with this decision.

No new claims, no new causes of action and no new issues were involved. No amendment, no new pleading and no new evidence was contemplated or intended by the mandate in our previous decision in Cause No. 11,987.

New Mexico has long recognized the rule that a mandate of the appellate courts is binding upon and must be strictly followed by the trial court. In *Glaser v. Dannelley*, 26 N.M. 371, 374, 193 P. 76, 77 (1920), this Court said:

> It is well settled that it is the duty of the lower court on remand of a cause to comply with the mandate of the appellate court, and to obey the directions therein without variation, even though the mandate may be, or is supposed to be erroneous. [citation omitted]. . . .

"The mandate of the appellate tribunal is law to the trial court, and must be strictly obeyed. Where the mandate directs that a particular judgment be entered, that a specified ruling be made, or that a designated course be pursued, the inferior tribunal must yield obedience to the directions given."

See also Fortuna Corp. v. Sierra Blanca Sales Co., Inc., 89 N.M. 187, 548 P.2d 865 (1976); *Van Orman v. Nelson,* 80 N.M. 119, 452 P.2d 188 (1969).

Appellant would have us reconsider our previous decision in Cause No. 11,987. This we refuse to do. Appellant is bound by the mandate in our previous Cause No. 11,987. There must be an end to proceedings in the courts.

We find no merit in appellee's request that this Court impose damages against appellant for a frivolous appeal.

The trial court is hereby directed to enter an order and judgment in compliance with and as directed by the mandate of this Court in Cause No. 11,987, which mandate is governed by that language which is quoted above in this opinion. The parties shall bear their own costs and attorney fees.

IT IS SO ORDERED.

PAYNE and FELTER, JJ., concur.

605 P.2d 223

STATE of New Mexico, ex rel. Bob E. WOOD, Bill L. Lee, I. M. Smalley, John B. Irick, John E. Conway and Aubrey L. Dunn, Petitioners,

v.

Bruce KING, Governor, Shirley Hooper, Secretary of State, Jeff Bingaman, Attorney General, and Director, New Mexico Legislative Council Service, Respondents,

and

Theodore R. Montoya, Manny M. Aragon, Tito Chavez, Edmund J. Lang, Ronald Olguin, and Thomas T. Rutherford, Respondents-in-Intervention.

No. 12760.

Supreme Court of New Mexico.

Dec. 31, 1979.

Rehearing Denied Jan. 18, 1980.

Mickey D. Barnett, Portales, E. Douglas Latimer, Charles C. Spann, Albuquerque, for petitioners.

Jeff Bingaman, Atty. Gen., Jill Z. Cooper, Deputy Atty. Gen., Santa Fe, for respondents.

Freedman, Boyd & Daniels, John W. Boyd, Joseph Goldberg, Rodey, Dickason, Sloan, Akin & Robb, William S. Dixon, Albuquerque, Lanny D. Messersmith, Albuquerque, for intervenors.

Coors, Singer & Stratton, P.A., Harold D. Stratton, Albuquerque, for amicus curiae.

OPINION

PER CURIAM.

A petition for writ of mandamus was filed by certain members of the New Mexico State Senate and other intervenors (petitioners) directed against the Governor, Attorney General, Secretary of State, the Director of the New Mexico Legislative Council and other intervenors (respondents). The petitioners requested the Court to issue an alternative writ of mandamus commanding the respondents to: (a) Treat the attempted veto of Senate Bill No. 63 as a

nullity; (b) Execute and enforce Senate Bill No. 63 as a valid law of New Mexico; (c) Forward Senate Bill No. 63 to each County Clerk of the various counties in New Mexico with instructions to file it as a valid law of New Mexico; and (d) Include Senate Bill No. 63 in the annual bound session laws in the New Mexico Statutes Annotated.

This Court granted an alternative writ and set a date for hearing on whether to make the alternative writ permanent. Excellent and informative briefs were filed by petitioners, respondents and intervenors, and the parties submitted to the Court a stipulation of facts agreed to by them, and in addition, affidavits and exhibits covering facts upon which the parties could not agree.

The stipulation of facts, affidavits and exhibits before this Court reflect the following: Senate Bill No. 63, known as the "Right to Work" bill, was passed by a majority vote of the Senate and House of Representatives of New Mexico. Except for an amendment deleting the "emergency clause" provision, the bill passed in the exact form as originally introduced. The bill was duly enrolled and engrossed.

On February 20, 1979, the ribbon copy of the enrolled and engrossed Senate Bill No. 63, with the attached signature page, together with other "Xerox" copies of the enrolled and engrossed bill, and the blue jacketed copy of the Senate Bill No. 63, were transmitted to the Governor's office to be presented to the Governor for his approval or veto. The blue jacketed copy of all bills, including Senate Bill No. 63, contains the bill as originally submitted, plus any amendments to the bill and any committee reports indicating any actions taken by committees of the Senate or the House with respect to the bill. On the back cover of the blue jacketed copy of the bill is a "docketing" log, on which is noted actions taken by the House or the Senate or any committees thereof with respect to the bill. All notations on the back of the blue jacketed copy are attested to by either the Chief Clerk of the House or the Chief Clerk of the Senate.

On February 20, 1979, the blue jacketed copy of Senate Bill No. 63, the ribbon copy of the enrolled and engrossed version of Senate Bill No. 63 with an attached signature sheet and other "Xerox" copies of the enrolled and engrossed version of Senate Bill No. 63, were received in the Governor's office. On that day, Senate Bill No. 63 was presented to the Governor for his approval or veto. The Governor determined to veto Senate Bill No. 63 and executed a veto message, denominated Senate Executive Message No. 48, to that effect.

On February 20, 1979, a messenger from the Governor's office returned to the Senate the original and ten copies of Senate Executive Message No. 48, together with the blue jacketed copy of Senate Bill No. 63. A deputy Chief Clerk of the Senate received the Executive Message and Senate Bill No. 63 and executed a receipt for the same, indicating that "the original and ten (10) copies of Senate Executive Message No. 48 and Senate Bill No. 63 in blue folder" were received from the Governor's office. Also, at that time, a copy of the enrolled and engrossed bill was returned to the Chief Clerk's office in the Senate.

On February 20, 1979, the ribbon copy of the enrolled and engrossed version of Senate Bill No. 63, which had the signature page attached to it, together with two "Xerox" copies of the enrolled and engrossed version of Senate Bill No. 63 and a copy of Senate Executive Message No. 48, were delivered by a messenger from the Governor's office to the office of the Secretary of State of New Mexico. On February 21, 1979, Senate Executive Message No. 48 was entered into the Official Journal of the Senate. No motion to override the Governor's veto was made in the Senate at any time.

The issue presented is whether the Governor's veto of Senate Bill No. 63 was void and a nullity by reason of N.M.Const., Art. IV, § 22, for failure of the Governor to return to the Senate within the required three-day period the copy of the *enrolled and engrossed bill*, along with his veto message.

The parties admit that the enrolled and engrossed bill was not returned to the Senate within the required three-day period. The parties also admit, however, that within the required three-day period there was delivered to the Senate from the Governor's office the original and ten copies of Senate Executive Message No. 48 (veto message) and the original blue jacketed copy of Senate Bill No. 63.

N.M.Const., Art. IV, § 22 provides, insofar as applicable:

> Sec. 22. [*Governor's approval or veto of bills.*]
>
> Every bill passed by the legislature shall, before it becomes a law, be presented to the governor for approval. If he approves, he shall sign it, and deposit it with the secretary of state; otherwise, he shall return it to the house in which it originated, with his objections, which shall be entered at large upon the journal; and such bill shall not become a law unless thereafter approved by two-thirds of the members present and voting in each house by yea and nay vote entered upon its journal. Any bill not returned by the governor within three days, Sundays excepted, after being presented to him, shall become a law, whether signed by him or not, unless the legislature by adjournment prevent such return.

The words "enrolled and engrossed" do not appear in the above constitutional provision; only the words "the bill" appear. If the Legislature, in presenting the constitutional provision for ratification, had intended to use the words "enrolled and engrossed," it could easily have done so. If the words "enrolled and engrossed" had been incorporated in the language of Art. IV, § 22, then that language would have been exclusive and no other "bill" could have been effectively returned to the chamber of origin after veto. We are of the opinion that the words "the bill" or "it" (when referring to the bill) includes the original blue jacketed copy of the bill.

Since the word "bill," used in Art. IV, § 22 is not defined elsewhere in the New Mexico Constitution, resort to the normal rules of statutory construction is appropriate. *Keller v. City of Albuquerque*, 85 N.M. 134, 509 P.2d 1329 (1973); *Postal Finance Co. v. Sisneros*, 84 N.M. 724, 507 P.2d 785 (1973). These rules require that statutes be construed to achieve the purpose for which they are enacted. *Tijerina v. Bolser*, 78 N.M. 770, 438 P.2d 515 (1968).

Although this Court has not previously defined the purpose of the veto provisions of Art. IV, § 22, the United States Supreme Court has defined the purpose of Art. I, § 7, paragraph 2 of the United States Constitution, which, similar to Art. IV, § 22, provides that if the President does not return a bill with his objections to the house in which it originated within ten days, it shall become law. In *Wright v. United States*, 302 U.S. 583, 58 S.Ct. 395, 82 L.Ed. 439 (1938), it was alleged that a veto returned to the Secretary of the Senate while the Senate was temporarily recessed did not satisfy constitutional requirements. In language which we adopt, the Court said:

> The constitutional provisions have two fundamental purposes; (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes. . . . We should not adopt a construction which would frustrate either of these purposes.

302 U.S. at 596, 58 S.Ct. at 400.

See also Prevost v. Morgenthau, 70 App. D.C. 306, 106 F.2d 330 (D.C. Cir. 1939).

In construing Art. IV, § 11 of the Colorado Constitution, a provision virtually identical to Art. IV, § 22 of the New Mexico Constitution, the Supreme Court of Colorado, in the case of *In Re Interrogatories of the Colorado Senate of the Fifty-first General Assembly, Senate resolution No. 5*, 578 P.2d 216, 218 (Colo.1978), said:

> [T]he purpose behind the provision requiring the executive to return a vetoed bill to the house of origin is to insure that the legislative branch shall have suitable

opportunity to consider the Governor's objections to bills and on such consideration to pass them over his veto provided there are the requisite votes to do so.

The clear purpose of the veto provisions of Art. IV, § 22, is to give the house in which a bill originated, an opportunity to consider the Governor's veto of the bill and his objections thereto. That purpose neither suggests nor requires that the word "it," as used in the phrase "otherwise he shall return *it* to the house in which it originated" be construed to mean the enrolled and engrossed copy of the bill. The original blue jacketed copy of the bill gives to the House or Senate the notice to which it is entitled so that the Governor's veto may be overridden. The original bill copy in the blue jacket contains all the legislative history of the bill and provides full notice of the substantive matters contained in a bill when it is returned for consideration of a veto. For this purpose, the original copy in the blue jacket is as effective as the enrolled and engrossed copy. When the Governor returned to the Senate the original blue jacketed copy of Senate Bill No. 63, along with his veto message, he met the requirements of N.M.Const., Art. IV, § 22.

In arriving at the result we have reached in this opinion, we are not unmindful of the rule that constitutional provisions prescribing the exact or exclusive times or methods for certain acts are mandatory, and must be complied with, otherwise the enactment will be declared void. In the present case, the pertinent reference in the constitutional provisions as to which copy of the bill was to be returned to the Senate after veto was neither exact nor exclusive. To impose the restrictive interpretation upon the constitutional provision as urged by petitioners would frustrate the intent of the original framers of the Constitution.

Nor do we mean to imply that there is no significance to an "enrolled and engrossed" copy of a bill. There is. Under the "enrolled bill rule," an enrolled and engrossed copy, properly signed and authenticated, approved by the Governor and deposited with the Secretary of State, is conclusive as to the regularity of its enactment and the courts may not look behind it to the journals to determine whether constitutional requirements have been met. *Thompson v. Saunders*, 52 N.M. 1, 189 P.2d 87 (1948); but *see Dillon v. King*, 87 N.M. 79, 529 P.2d 745 (1974). The significance of the enrolled and engrossed bill attaches to its enactment and approval as a law, not to its veto. *See* N.M.Const., Art. IV, § 20.

The alternative writ of mandamus heretofore granted by this Court is quashed as having been improvidently issued.

IT IS SO ORDERED.

EASLEY, J. (dissenting).

605 P.2d 227

CITY OF ALBUQUERQUE, a Municipal Corporation, and Manzano Transportation Co., a New Mexico Corporation, Plaintiffs-Appellees,

v.

NEW MEXICO STATE CORPORATION COMMISSION, Defendant-Appellant,

and

Yellow Checker Cab Company and Albuquerque Cab Company, Intervenors-Appellants.

No. 12305.

Supreme Court of New Mexico.

Nov. 29, 1979.

Rehearing Denied Jan. 30, 1980.

Jeff Bingaman, Atty. Gen., W. Royer, Asst. Atty. Gen., Santa Fe, for defendant-appellant.

David L. Norvell, Toulouse, Krehbiel & Delayo, James R. Toulouse, Albuquerque, for intervenors-appellants.

Cornelius J. Finnen, Charles E. Barnhart, Albuquerque, for plaintiffs-appellees.

OPINION

FELTER, Justice.

Plaintiff-Appellee, City of Albuquerque (hereinafter "the City"), contracted with Manzano Transportation Company (hereinafter "Manzano"), as subcontractor for the City, for transportation of passengers to and from the Albuquerque International Airport. Defendant-Appellant, State Corporation Commission (hereinafter "the Commission"), ordered the City to refrain from putting into operation limousine or other motor carrier service as described in the contract with Manzano because no certificate of public convenience and necessity had been obtained from the Commission authorizing such activity. The City filed an original prohibition action in the District Court of Santa Fe County against the Commission alleging that it was without juris-

diction to require the City to refrain from carrying out its contract with Manzano. The District Court of Santa Fe County vacated the order of the Commission and restrained it from interfering with the City and Manzano in establishing the limousine service.

The Commission and Intervenor-Appellants, Yellow Checker Cab Company and Albuquerque Cab Company, appeal from the judgment of the district court, claiming that the Commission has sole jurisdiction on all matters of public convenience and necessity respecting carriers for hire within the State of New Mexico. We affirm the judgment of the district court.

The first issue involves the applicability of the following two constitutional provisions which in pertinent part read as follows:

N.M.Const. Art. XI, § 7:

> The commission shall have power and be charged with the duty of fixing, determining, supervising, regulating and controlling all charges and rates of * * * common carriers within the state and of determining any matters of public convenience and necessity relating to such facilities * * *.

N.M.Const., Art. X, § 6:

> D. A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter. * *
>
> E. The purpose of this section is to provide for maximum local self-government. A liberal construction shall be given to the powers of municipalities.

The Commission argues that Section 7, Art. XI specifically vests control of common carriers in the Commission, whereas Section 6, Art. X deals with common carriers generally by implication. The City responds that Section 6 treats with specificity the authority of a Home Rule Municipality, and that Section 7 covers such authority only in its general application.

The two constitutional provisions are *pari materia*, and lead to conflicting results in this case. Where, as here, provisions cannot be harmonized, the specific section governs over the general regardless of priority of enactment. *New Mexico Bureau of Rev. v. Western Elec. Co.*, 89 N.M. 468, 553 P.2d 1275 (1976); *State v. Blevins*, 40 N.M. 367, 60 P.2d 208 (1936); *Saiz v. City of Albuquerque*, 82 N.M. 746, 487 P.2d 174 (Ct.App.1971) (overruled on other grounds at *Galvan v. City of Albuquerque*, 87 N.M. 235, 237, 531 P.2d 1208 (1975)). *See also Santa Fe Downs, Inc. v. Bureau of Revenue*, 85 N.M. 115, 509 P.2d 882 (Ct.App. 1973).

The problem in applying the above rule to the question at bar is that one section is not readily identifiable as the more specific one of the two. This presents a case of first impression in New Mexico. In such instance, here in particular, we hold that the latter provision governs "as the latest expression of the sovereign will of the people, and as an implied modification pro tanto of the original provision of the Constitution in conflict therewith." *Asplund v. Alarid, Assessor of Santa Fe Co., et al.*, 29 N.M. 129, 135, 219 P. 786, 788 (1923). Therefore, Section 6 controls because it was adopted by amendment on November 3, 1970, whereas Section 7 was originally adopted on January 21, 1911, and amended on November 3, 1964. We note that this decision also incorporates the mandate in Section 6 that "[a] liberal construction shall be given to the powers of municipalities."

Further, we hold that the proposed limousine service is a proprietary rather than a governmental function and therefore within the Home Rule authority of the City. This Court reasoned in *Apodaca v. Wilson*, 86 N.M. 516, 525 P.2d 876 (1974) that the term "general law", as used in the Home Rule Amendment, means a law that applies generally throughout the state, or is of statewide concern, as contrasted to a "local" or "municipal" law. The Home Rule Amendment applied in that case to service charges for municipally owned sewer and water facilities and the use of funds received therefrom. Such matters are of

local concern. In the instant case, transportation of passengers between points and places within the City is not of any more statewide concern than the operation of the municipally owned sewer and water facilities of Albuquerque. Both activities are locally limited.

> In McQuillan, Municipal Corporations (2d Ed.) § 93, it is said: "The purpose (referring to the home rule amendments) was to give local communities full power in matters of local concern, that is, in those matters which peculiarly affected the inhabitants of the locality, not in common with the inhabitants of the whole state."

86 N.M. at 522, 525 P.2d at 882.

A test that may be applied to determine whether an activity is of general concern or merely of local or municipal concern is whether it is proprietary or governmental in character. *See City of Tucson v. Tucson Sunshine Climate Club*, 64 Ariz. 1, 8, 164 P.2d 598, 602 (1945) (cited with approval in *Apodaca*), where it is stated that:

> Some * * * activities are so noticeably local or state-wide that they are easily assignable, while in others the line of demarcation is very difficult of discernment, because the activity may be neither predominantly local nor statewide but may partake of both. Whether it is one or the other in such case depends upon whether the activity is carried on by the municipality as an agent of the state. If it is, it is of general public concern. If it is exercised by the city in its proprietary capacity, it is a power incidental to home rule. (Citation omitted.)

In *Southern Union Gas Company v. City of Artesia*, 81 N.M. 654, 472 P.2d 368 (1970), this Court held, inter alia, that the operation of a water and sewer system was a proprietary function of the defendant city, not a governmental function. Operation of a transportation facility by a municipality should likewise be categorized as a proprietary function, not a governmental function.

2 E. McQuillan, *Municipal Corporations* § 10.05, 744 (3d rev. ed. 1979) states that:

> In the exercise of governmental functions and powers municipal corporations execute the functions and possess the attributes of sovereignty by reason of authority delegated by the legislative department of government.
>
> Private, municipal, proprietary functions and powers are those relating to accomplishment of private corporate purposes in which the public is only indirectly concerned, and as to which the municipal corporation is regarded as a legal individual. Private functions are those granted for the specific benefit and advantage of the urban community embraced within the corporate boundaries. All functions of a municipal corporation not governmental have been said to be private.

The distinction between governmental and proprietary, and private or municipal functions is set out in *Britt v. City of Wilmington*, 236 N.C. 446, 451, 73 S.E.2d 289, 293 (1952), as follows:

> So then, generally speaking, the distinction is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and "private" when any corporation, individual, or group of individuals could do the same thing. Since, in either event, the undertaking must be for a public purpose, any proprietary enterprise must, of necessity, at least incidentally promote or protect the general health, safety, security, or general welfare of the residents of the municipality. (Citation omitted.)

Certainly no one would seriously contend that a limousine service possesses any of the attributes of sovereignty or that it is an undertaking in which only a governmental agency could engage. Such activity does fit within the criteria set out in *McQuillan, supra*, and in the *Britt* case defining proprietary functions.

It is argued by the Commission that the trial court erroneously admitted and considered evidence which was not presented or admitted in the hearing before the Commission. Numerous decisions of this

Court, including *Transcontinental Bus System v. State Corp. Commission*, 56 N.M. 158, 241 P.2d 829 (1952), are cited for the proposition that upon an appeal from an order of the Commission, additional evidence may not be considered, and the court is without authority to try the case anew upon the record. We agree with this well entrenched principle of law. Moreover, we are not persuaded by *Harris v. State Corporation*, 46 N.M. 352, 129 P.2d 323 (1942), cited by the City for the proposition that there are exceptions to that rule. The language relied upon in *Harris* is obiter dictum—that questions of constitutional right and power may be exceptions to the general rule in *Transcontinental.*

None of the authorities cited by the Commission has applicability to the case at bar. No application for a certificate of public convenience and necessity was made to and denied by the Commission in this case. Rather, the City was cited by the Commission to cease and desist from implementing and effectuating a contract for limousine service. No appeal was taken from any order of the Commission. Rather, the City filed in district court an original prohibition action against the Commission alleging that at all times it was without jurisdiction to prevent the City from its participation in the contract for limousine service, and was without jurisdiction to require its licensing of or regulation of such municipal activity.

Appeals from orders of administrative agencies are brought under and are subject to the requirements of the Administrative Procedures Act, §§ 12–8–1 to 12–8–25, N.M.S.A.1978. Section 12–8–21 specifically provides that in cases of appeal from an administrative agency decision:

> [T]he review shall be confined to the record, except that, in cases of alleged irregularities in the procedure before the agency not shown in the record, testimony thereon may be taken if the review is in the district court.

In this case, no action to review the decision of the Commission was brought under the Administrative Procedures Act. The action brought by the City was an original prohibition action brought under the authority of Section 65–2–66(A), N.M.S.A. 1978, which provides in part, that:

> Any motor carrier and any other person in interest being dissatisfied with any order or determination of the commission, not removable to the supreme court of the state of New Mexico under the provisions of Section 7, Article XI of the constitution of the State of New Mexico, *may commence an action in the district court for Santa Fe County against the commission as defendant, to vacate and set aside such order or determination,* on the ground that it is unlawful, or unreasonable. In any such proceeding the court may grant relief by injunction, mandamus or other extraordinary remedy. (Emphasis added.)

The Administrative Procedures Act does not prohibit the receipt and consideration of otherwise admissible evidence by a court of general jurisdiction in the exercise of its original jurisdiction over an extraordinary remedy such as prohibition. If it were otherwise, the exercise of unlawful jurisdiction by an administrative agency would go without effective challenge. No authority need be cited for the proposition that a court of general jurisdiction may receive and consider *all* admissible evidence while hearing and deciding cases invoking its original jurisdiction.

The final point raised on appeal by the Commission is that the district court erred in concluding that the City was exercising a right to contract for its special transportation needs pursuant to the Municipal Transit Law, §§ 3–52–1, *et seq.*, N.M.S.A.1978. Section 3–52–4(A) reads in pertinent part as follows:

> A. Any eligible municipal corporation having elected to invoke the powers set forth in the Municipal Transit Law [3–52–1 to 3–52–13, NMSA 1978] may engage in the business of transportation of passengers and property within the municipality by whatever means it may decide, and may acquire cars, motor buses and other equipment necessary for carrying on the business. * * * It may do

all things necessary for the acquisition and conduct of the business of transportation.

The Commission urges that the Motor Carrier Act, §§ 65–2–1, *et seq.*, N.M.S.A. 1978, controls instead, and that it mandates the City to require a certificate of public convenience and necessity from the Commission before contracting for limousine service—this because the Municipal Transit Law does not authorize the City to operate within the exemptions of the Motor Carrier Act.

Section 65–2–1(B), N.M.S.A.1978, in pertinent part reads:

> It is hereby declared to be the purpose and policy of the legislature in enacting this law to confer upon the [Corporation] commission the power and authority to make it its duty to supervise and regulate the transportation of persons and property by motor vehicle for hire upon or over the public highways of this state in all matters whether specifically mentioned herein or not * * *.

The statutes are *pari materia* with each other and with Section 6, Art. X. Enforcement of Section 3–52–4 and Section 65–2–1(B) would lead to a contradiction of Home Rule autonomy as guaranteed by Section 6, Art. X, and a construction of the express language in Section 3–52–4 of the Municipal Transit Law, which authorizes a municipality qualifying thereunder to engage in the business of transportation of passengers and property "by whatever means it made decide" and to "do all things necessary for the acquisition and conduct of the business of transportation." We apply the rule that the more specific section governs the general, because one section is clearly more specific here. The Motor Carrier Act deals with common carrier transportation by motor vehicle throughout the state generally, whereas jurisdiction of the Municipal Transit Law is limited to common carrier transportation within a municipality. The more specific Municipal Transit Law governs.

We find no error in the judgment of the district court, and therefore affirm its decision.

IT IS SO ORDERED.

PAYNE and FEDERICI, JJ., concur.

605 P.2d 232

STATE of New Mexico, Petitioner,

v.

Genaro TRUJILLO, Respondent.

No. 12505.

Supreme Court of New Mexico.

Jan. 10, 1980.

Jeff Bingaman, Atty. Gen., Janice Marie Ahern, Asst. Atty. Gen., Santa Fe, for petitioner.

Richard J. Knott, Corrales, for respondent.

OPINION

EASLEY, Justice.

Genaro Trujillo was convicted by a jury of heroin trafficking. The Court of Appeals reversed the conviction and remanded for a new trial. We granted certiorari. We affirm the reversal, but upon somewhat different grounds than those utilized by the Court of Appeals.

The issue is whether an incriminating statement made by Trujillo, which was made in the presence of police officers, his counsel, and an assistant district attorney shortly after a plea agreement was reached between the State and Trujillo, but which was not admitted in the State's case-in-chief, was improperly admitted to *impeach* Trujillo's testimony at trial. The Court of Appeals held that the statement was improperly admitted since the trial court had found the statement to have been made involuntarily, and cited *State v. Turnbow,* 67 N.M. 241, 354 P.2d 533 (1960).

It is unclear from the record whether the judge's ruling on the admissibility of the statement was based on a finding of involuntariness or on Rule 410, N.M.R.Evid. 410, N.M.S.A.1978. Regardless of the basis for the ruling, we hold that the statement was improperly admitted for impeachment purposes in the face of Rule 410, which excludes statements made in connection with plea negotiations in any subsequent proceeding.

The agreement between the State and Trujillo, which was reached with defense counsel present and after *Miranda* warnings had been given, provided that Trujillo should attempt to set up another individual for an arrest on heroin charges in exchange for Trujillo receiving from the State certain plea considerations. After this agreement was reached orally but before it was reduced to writing and while Trujillo was still in the presence of the assistant district attorney, a police officer and his counsel, an undercover agent walked into the room. The police officer asked Trujillo whether he recognized the agent. Trujillo identified the agent as the person to whom he had sold the heroin.

Trujillo allegedly did not fulfill his part of the agreement. He was subsequently re-arrested, pled not guilty, and stood trial. During a pre-trial hearing of a defense motion *in limine,* defense counsel attempted to preclude, on the basis of Rule 410, the admission of the incriminating statement made by Trujillo. The State did not contest the motion insofar as it went to the admissibility of the statement in its case-in-chief. The trial court ruled that the statement was inadmissible in the State's case-in-chief but reserved a ruling on whether it would be admissible for impeachment purposes. Against the advice of counsel, Trujillo took the stand during trial and denied making the heroin sale to the undercover agent. On cross-examination by the State, Trujillo was impeached with his prior inconsistent statement after the State had obtained the court's approval to do so. The court gave a cautionary instruction to the jury stating that the statement was to be considered only for impeachment purposes.

The interpretation of Rule 410 is a matter of first impression in New Mexico. The same rule is contained in the Rules of Criminal Procedure, N.M.R.Crim.P. 21(g)(6), N.M.S.A.1978. Since the two provisions are identical, our discussion applies equally to both. Rule 410 provides:

> *Evidence of* a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of *statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding* against the person who made the plea or offer. (Emphasis added.)

The State argues that the rationale in *Harris v. New York,* 401 U.S. 222, 91 S.Ct.

643, 28 L.Ed.2d 1 (1971), should apply by analogy to this Court's interpretation of Rule 410. The United States Supreme Court in *Harris* held that defendant's statements were admissible for impeachment purposes even though they were inadmissible in the State's case-in-chief under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Supreme Court stated that "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Harris,* 401 U.S. at 226, 91 S.Ct. at 646.

Although *Harris* is persuasive in its reasoning, it dealt with a technical violation of *Miranda* and not with statements inadmissible under Rule 410. These two situations involve different policy considerations.

The State contends that although Rule 410 prohibits the admissibility of statements made during plea negotiations, it is a privilege which should not be extended to exclude the use of the statements for impeachment purposes. *United States v. Tesack,* 538 F.2d 1068 (4th Cir. 1976).

In *United States v. Tesack,* which is cited by the State in support of its argument, the defendant's withdrawn guilty plea was introduced to impeach the credibility of his co-defendant. Inexplicably, the court there did not mention Rule 410 in its analysis. Instead it reasoned that *Harris* permitted it to hold that the plea was properly admitted for impeachment purposes. The guilty plea and statement made in connection therewith had been made on the record in open court under oath.

We found no federal or state cases in which off the record statements made in connection with pleas or plea negotiations were ruled admissible or inadmissible for impeachment purposes based on a judicial exception to Rule 410 or on some similar rule. *But cf. People v. Cole,* 584 P.2d 71 (Colo.1978) (The Colorado statute prohibited only the *fact* that plea discussions took place not the statements themselves.); *State v. Anonymous,* 30 Conn.Sup. 181, 307 A.2d 785 (1973–74) (No similar rule existed in Connecticut.).

In addition, an examination of similar state statutes or rules reveals that, like the New Mexico rule, they are of recent vintage and have not yet been under the judicial microscope. Also, for the most part, they do not deal with the issue of impeachment. *See e. g.,* Ariz.R.Evid. 410; Cal.Evid. Code § 1153 (West 1966); Minn.R.Evid. 410; Wis.Stat.Ann. § 904.10 (West 1975). *But see* Mont.R.Evid. 410.

Rule 410 was adopted verbatim from the federal version of Rule 410 originally promulgated by the United States Supreme Court. Although this particular version of Rule 410 was never enacted by Congress for use in the federal courts, a brief survey of the history of the federal rule is illuminating to our present analysis. The history of Rule 410 is intertwined with the history of Rule 11(e)(6) of the Federal Rules of Criminal Procedure. The rules are the same textually, and when one has been amended, the other has been amended to conform.

When Rule 410 and Rule 11(e)(6) came under discussion in Congress, the major dispute which arose was whether statements made by a defendant in connection with pleas or plea negotiations could later be used to impeach him if he subsequently stood trial, took the stand, and testified inconsistently. 2 Weinstein's Evidence ¶ 410[01], at 410–412 (1979). This is precisely the situation we are faced with here.

The Senate, quoting *Harris, supra,* would have permitted "voluntary statements of an accused made in court on the record" to be used for impeachment purposes, as well as in a subsequent prosecution for perjury. S.Rep. No. 1277, 93d Cong., 2d Sess. 11, *reprinted in* [1974] U.S.Code Cong. & Admin.News, pp. 7051, 7057. However, the House desired to limit the use of such statements to prosecutions for perjury if the statements were made under oath, on the record, and in the presence of counsel. H.R.Rep. No. 247, 94th Cong., 1st Sess. 7, *reprinted in* [1975] U.S.Code Cong. & Admin.News, pp. 674, 679. The conference committee adopted the House position on this issue. H.R.Rep. No. 414, 94th Cong.,

1st Sess. 10, *reprinted in* [1975] U.S.Code Cong. & Admin.News, pp. 713, 714. Thus, there was a repudiation by Congress of the *Harris* approach to the plea bargain process.

We agree with the Senate and the *Harris* Court that a defendant has the same duty as any witness under oath to speak truthfully on the stand, and that a court's primary function is truth finding.

However, the plain import of the language of Rule 410 is to prohibit the admissibility of statements made during plea negotiations in any proceeding. The other exclusionary rules which surround Rule 410 in the Rules of Evidence contain express exceptions to the general rule of inadmissibility. *See* N.M.R.Evid. 407, 408, 409, 411, N.M.S.A.1978. Rule 410 stands out among these rules because it contains no language which limits its exclusionary effect.

Rule 410 embodies the public interest in encouraging negotiations concerning pleas between the criminal defendant and the State. Guilty pleas are an essential part of our criminal justice system, and candor in plea discussions aids greatly in the reaching of agreements between the defendant and the State. This ultimately results in the speedy disposition of cases. A presidential commission discussed the role of plea bargaining as follows:

> The negotiated guilty plea serves important functions. . . . The quality of justice in all cases would suffer if overloaded courts were faced with a great increase in the number of trials. Tremendous investments of time, talent, and money, all of which are in short supply and can be better used elsewhere, would be necessary if all cases were tried.

President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society,* 135 (1967). The United States Supreme Court has made it clear that similar policy considerations were influential in its willingness to approve plea bargaining. *Santobello v. New York,* 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

The attorney for the State and the attorney for the defendant or the defendant acting pro se need to feel free to discuss the merits of the case, the alternatives for disposition, and the possible concessions each is willing to make. We interpret Rule 410 as closing the door on the admissibility of all of these matters as evidence at trial for either substantive or impeachment purposes.

For purposes of clarification, we wish to distinguish between the plea negotiation process and custodial police interrogations. As to the admissibility of statements made during each, Rule 410 applies to the former and established standards of voluntariness and relevancy apply to the latter. We are not making a decision as to whether Trujillo's statement meets the standard of voluntariness. Rule 410 does not set up standards of relevancy and trustworthiness, and we will not impose any on it. If a plea is never entered or entered and then withdrawn, at trial it is to appear as though the earlier plea and/or plea discussions never took place. The slate is wiped clean once plea negotiations fail or the defendant withdraws his plea.

We realize that some persons may be tempted to testify inconsistently with what they stated previously during plea discussions with the State. We do not condone these actions. But a weighing of conflicting policies demonstrates that the balance is tipped in favor of interpreting Rule 410 as the cloak of privilege around plea negotiation discussions.

The decision of the Court of Appeals is affirmed, and the cause is remanded to the district court for a new trial.

IT IS SO ORDERED.

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

605 P.2d 236

STATE of New Mexico,
Plaintiff-Appellee,

v.

Genaro TRUJILLO, Defendant-Appellant.

No. 3751.

Court of Appeals of New Mexico.

April 12, 1979.

Jeff Bingaman, Atty. Gen., Michael A. Kauffman, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Richard J. Knott, Corrales, Ken Cullen, Albuquerque, for defendant-appellant.

OPINION

WOOD, Chief Judge.

Defendant appeals his conviction of trafficking in heroin. Section 30–31–20, N.M.S.A.1978. 1. Three issues are answered summarily. 2. We discuss cross-examination of defendant on the basis of his involuntary statement.

Issues Answered Summarily

(a) Defendant was scheduled for trial on September 26, 1977 but did not appear for trial. Testimony as to the chain of custody of the heroin brought out that the heroin had been brought to court previously (on September 26, 1977). The claim that there was prosecutor misconduct by eliciting the chain of custody testimony is frivolous.

Officer Gallegos testified as to defendant's nonappearance for the scheduled trial in September, 1977, and that defendant was arrested in Utah within "the past several months" prior to trial on May 5, 1978. Defendant recognizes that evidence of flight is admissible, but asserts that such evidence was improperly admitted in this case. There was no objection to the "flight" evidence at trial; the propriety of the "flight" evidence is not properly before us for review. N.M.Crim.App. 308. We answer one of defendant's arguments under this issue because of defendant's misunderstanding of "flight" evidence.

Defendant contends there must be evidence of "consciousness of guilt" in order for "flight" evidence to be admissible. "Flight" evidence is admissible because that evidence "tends to show consciousness of guilt." *State v. Smith,* 89 N.M. 777, 558 P.2d 46 (Ct.App.1976), rev'd on other grounds, *Smith v. State,* 89 N.M. 770, 558 P.2d 39 (1976). "Consciousness of guilt" is an inference that may be drawn from the "flight" evidence and is not an evidentiary predicate for the admission of "flight" evidence. "Flight" evidence is admissible under Evidence Rule 404(b) "because probative of an absence of accident on defendant's part . . . ." *State v. Smith,* supra.

(b) When asked on direct examination if he had sold heroin on the date charged, defendant answered: "No. I can take a lie detector test too." The prosecutor cross-examined defendant on whether he had taken a lie detector test. The cross-examination brought out that defendant had taken a test and that the results of the test were inconclusive.

Defendant contends the cross-examination was prosecutor misconduct because the prosecutor knew that the results of an inconclusive test were inadmissible, because irrelevant.

State v. Bell, 90 N.M. 134, 560 P.2d 925 (1977) holds that the results of an inconclusive test are inadmissible because such results prove nothing. Here, however, defendant had sought to enhance his credibility by his offer, in the presence of the jury, to take the test. The prosecutor's cross-examination concerning a prior inconclusive test was a proper attack on defendant's credibility. Evidence Rule 607. The inconclusive results of the prior inconclusive test became available to the prosecutor when defendant interjected his willingness to take the test into the trial. See *State v. Gutierrez,* 91 N.M. 54, 570 P.2d 592 (1977).

(c) Defendant's testimony raised the question of mistaken identity; that the agent who purchased the heroin was mistaken as to the person who sold the heroin. Some of the questioning concerning identity involved defendant's tatoos and the possible similar markings of another person present at the scene of the heroin sale. A nonresponsive answer of defendant interjected that the police could have obtained information about defendant's tatoos from prior police reports; "it is not the first time that I have been pictured by the cops." After this answer and while questioning defendant on the identity issue, the prosecutor

asked defendant if he had been arrested by Officer Byford for selling marijuana. Defendant's motion for a mistrial was denied "in the posture in which the question was asked." The "posture" was defendant's mistaken identity defense and defendant's interjection that "his tatoo was of record . . . ." However, the trial court ruled that questions concerning marijuana sales were irrelevant, and instructed the jury to disregard the question and answer concerning a marijuana sale.

Subsequently in the prosecutor's cross-examination, by artful questions concerning defendant's sale of controlled substances, the prosecutor elicited that defendant had sold marijuana to Officer Byford. The trial court again sustained defendant's objection, and again ruled that the marijuana sale was irrelevant.

Questioning concerning the marijuana sale, after the trial court's ruling that the sale was irrelevant, was prosecutor misconduct. We need not decide whether this misconduct was reversible error; however, see *Albertson v. State,* 89 N.M. 499, 554 P.2d 661 (1976). This question is not decided because the cross-examination of defendant concerning his statement requires a new trial.

Cross-Examination of Defendant Concerning His Statement

At an evidentiary hearing, prior to trial, it was brought out that an agreement was reached between the State and the defendant. The agreement was that defendant was to attempt to "set up" another individual in connection with heroin offenses and that defendant's punishment in this case would vary, dependent upon defendant's efforts. There is evidence that defendant did not carry out his agreement; however, defendant's nonperformance is not involved in this issue.

The transcript indicates that shortly after the agreement was made, defendant made statements which tended to incriminate him in connection with the offense in this case. There is nothing indicating these incriminating statements were made after defendant breached his agreement. The trial court's view, which is not attacked on appeal, is that "defendant made these statements with the knowledge that he had a deal . . . ."

The trial court ruled the statements were involuntary and would not be admissible in the State's case-in-chief. The trial court reserved a ruling as to whether the statements were admissible for impeachment purposes.

Having denied, on his direct examination, that he sold the heroin in question, defendant was cross-examined concerning the statement that had been excluded from evidence during the State's case-in-chief. The trial court permitted this examination because the *Miranda* (*Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)) warnings had been given. Defendant asserts this cross-examination was error. We agree.

■ There are two prerequisites for the admissibility of statements—a prima facie showing of voluntariness and compliance with the advice of rights required by *Miranda v. Arizona,* supra. *State v. Gallegos,* 92 N.M. 336, 587 P.2d 1347 (Ct.App.1978).

■ Where the requirements of *Miranda* have not been met, a defendant's statement may not be introduced in the case-in-chief, but may be used to impeach a defendant who testifies, provided the statement meets other legal standards permitting use of the statement. *Oregon v. Hass,* 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); see *Harris v. New York,* 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). In this case there is no issue concerning compliance with the *Miranda* requirements.

The issue is compliance with another legal standard; the standard of voluntariness. The trial court ruled that defendant's statements, made in connection with the "deal" involving the crime charged, were involuntary. See *State v. Aguirre,* 91 N.M. 672, 579 P.2d 798 (Ct.App.1978). There is no issue as to the legal correctness of this ruling. The question is whether the State could use the involuntary statement for purposes of impeachment.

State v. Turnbow, 67 N.M. 241, 354 P.2d 533, 89 A.L.R.2d 461 (1960) states the better reasoned rule to be:

> Involuntary confessions of accused persons are inadmissible to impeach them as witnesses on the same ground that hearsay and all other incompetent evidence is inadmissible to impeach other witnesses, because they are unworthy of belief.

The State asserts the above-quoted language was overruled by implication in U.J.I. Crim. 40.34. We disagree. U.J.I. Crim. 40.34 is an instruction approved for use when a statement has been used for impeachment purposes; the instruction does not state when it is proper to use a statement for impeachment purposes.

The State asserts that U.J.I. Crim. 40.34 was based on *Harris v. New York,* supra. We assume that it was, but this does not aid the State. As the Committee Commentary to U.J.I. Crim. 40.34 points out, voluntariness of the statement was not an issue in *Harris.*

The State would distinguish between an involuntary statement and a statement that is not trustworthy. Relying on language in *Harris v. New York,* supra, the State contends that a statement may be trustworthy even if involuntary. *State v. Turnbow,* supra, answered this contention by stating that an involuntary statement is unworthy of belief.

The statement of the "better reasoned rule" in *State v. Turnbow,* supra, in 1960, is now federal constitutional law. In *Mincey v. Arizona,* 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), defendant's involuntary statement was used in an effort to impeach his trial testimony. *Mincey* states: "But *any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law . . . ." (Emphasis in original.) See also *New Jersey v. Portash,* 440 U.S. 450, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979).

The State contends that a comment in *State v. Turnbow,* supra, authorized the use of defendant's statements for impeachment purposes. The comment is:

> Absent a proper showing to the satisfaction of the court that the confession is voluntary in point of law, the state may initially cross-examine a defendant as to whether he has made a statement contrary to his testimony, but upon his denial thereof or his claimed inability to recall, may proceed no further.

The State's contention, based on the above-quoted sentence, is without merit.

The latter part of the comment deals with the procedure for use of prior statements under procedural rules in effect at the time *State v. Turnbow,* supra, was decided. Those procedural rules are no longer in effect; Evidence Rule 613 now governs the use of prior statements.

The phrase "[a]bsent a proper showing . . . that the confession is voluntary" does not mean that a statement, held to be involuntary, may nevertheless be used for impeachment purposes in disregard of the involuntariness ruling. Both *State v. Turnbow,* supra, and *Mincey v. Arizona,* supra, are to the contrary. The phrase is applicable only when a ruling as to voluntariness has not been invoked. Compare *State v. Gallegos,* supra.

Because the prosecutor used defendant's involuntary statement to impeach defendant's trial testimony, defendant was denied due process of law. The conviction is reversed; the cause is remanded with instructions to grant defendant a new trial.

IT IS SO ORDERED.

LOPEZ and WALTERS, JJ., concur.

605 P.2d 240

EL PASO NATURAL GAS COMPANY, a corporation, Plaintiff-Appellant and Cross-Appellee,

v.

KYSAR INSURANCE AGENCY, INC., and Raymond Kysar, Jr., Defendants-Appellees and Cross-Appellants.

Nos. 3828, 3812.

Court of Appeals of New Mexico.

Nov. 29, 1979.

John B. Pound, Montgomery, Andrews & Hannahs, Santa Fe, Damon Weems, Farmington, for plaintiff-appellant and cross-appellee.

James B. Cooney, Cooney & Curtis, Farmington, John R. Cooney, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for defendants-appellees and cross-appellants.

OPINION

HENDLEY, Judge.

El Paso Natural Gas (El Paso) filed a six count complaint seeking damages and declaratory relief against defendants Kysar Insurance Company and Raymond Kysar (Kysar) based on alternative claims sounding in rescission, reformation, breach of fiduciary duty, and breach of contract. Kysar counter-claimed alleging a breach of the covenant of quiet enjoyment. El Paso filed a motion to dismiss the counter-claim, which was treated as a motion for summary judgment, and Kysar filed a motion for summary judgment on the complaint. Both were granted in their entirety by the court below and were appealed to this court. We reverse in part and remand.

FACTS

During May, 1972, Western Building Associates (WBA), owners of the Petroleum Building in Farmington, New Mexico, a partnership in which Raymond Kysar was the managing partner and majority shareholder, entered into a lease with Kysar Insurance Company. The lease rented 1,953 square feet of office space for $200.00 per month for five years with an option to renew for two additional five year terms. Mr. Kysar stated that he received a more favorable rental rate than other tenants as compensation for his managing the Petroleum Building and for completing the construction of the office space in question.

On September 3, 1974, Kysar exercised its option to renew for the first additional five year term. El Paso alleged in its complaint that at that time Kysar knew that El Paso was giving serious consideration to exercising an option it held to purchase the building. The option was in El Paso's lease with WBA and was signed by Mr. Kysar.

On February 23, 1975, El Paso gave formal notice of its intent to exercise the option. Due to a dispute over the meaning of the option clause, WBA refused to convey the premises in question and El Paso filed a specific performance action in Federal District Court. *El Paso Natural Gas v. Western Building Associates*, No. 75–198 (USDC–D.N.M., 1976). On April 4, 1977, the federal court ordered WBA to transfer title to the building, along with all net profits acquired during the period in dispute. One of the court's findings of fact was that Kysar's rent was only $200.00 per month and that the management service performed by Mr. Kysar was not part of his rental consideration.

On or about July 1, 1977, El Paso began to manage the building itself. On July 29, 1977, El Paso sent a letter stating that it believed that the actual rent received by its predecessor included Mr. Kysar's services, thereby insisting that Kysar pay an increased cash rental fee. On August 11, 1977, El Paso sent Kysar another letter stating his new rental to be $976.50 per month. On November 29, 1977, El Paso gave Kysar notice to quit based on Kysar's continuing rendition of $200.00 rent. When Kysar refused to vacate the premises, El Paso initiated the instant lawsuit. Throughout all times relevant to this inquiry, Kysar remained in possession of its office space.

At the hearing on the motions for summary judgment, the court below indicated two bases for granting Kysar's motion, one being that the federal court litigation had resolved the controversy and the other being that in purchasing the written lease, El Paso could not contest its express terms. In granting El Paso's motion, the district court felt that Kysar had failed to suffer any damage despite presenting a valid claim.

RES JUDICATA/COLLATERAL ESTOPPEL

Our first inquiry is whether the related doctrines of *res judicata* and collateral estoppel form an appropriate basis for the granting of Kysar's motion. The doctrine of *res judicata* is inapplicable to the instant controversy. *Phillips v. United Serv. Auto. Ass'n*, 91 N.M. 325, 573 P.2d 680 (Ct.App.

1977), quoting from an early Supreme Court case, stated the legal standards required for a finding of *res judicata*.

> To make a matter res judicata there must be a concurrence of the four conditions following, viz: First, identity of the subject-matter; second, identity of cause of action; third, identity of persons and parties; and fourth, identity in the quality of the persons for or against whom claim is made. *Lindauer Mercantile Co. v. Boyd*, 11 N.M. 464, 475, 70 P. 568, 570 (1902).

See *Atencio v. Vigil*, 86 N.M. 181, 521 P.2d 646 (1974).

Since the federal court suit, which Kysar would have this court find as a bar to the present action, was a specific performance action, the causes of action are dissimilar and, therefore, the doctrine of *res judicata* is inapplicable.

In *State v. Tijerina*, 86 N.M. 31, 519 P.2d 127 (1973), the Supreme Court defined collateral estoppel as follows:

> It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that the issue cannot again be litigated between the *same parties* in any future lawsuit. (Emphasis added.)

Contrary to this view, Kysar would have this court adopt the "modern view of collateral estoppel" first announced by Justice Traynor in *Bernhard v. Bank of America*, 19 Cal.2d 807, 122 P.2d 892 (1942). That view holds that it is not essential for one seeking to collaterally enforce the earlier judgment to have been a party to the earlier proceeding, thereby rejecting the validity of the doctrine of mutuality. In *Atencio, supra*, the Supreme Court once again refused to adopt the "modern view of collateral estoppel." We cannot change that holding. *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973).

In this case, Mr. Kysar is a named party based on his affiliation with Kysar Insurance Company, a lessee in the building in question. In the earlier federal suit he was a named party based on his association with WBA. Therefore, Raymond Kysar cannot avail himself of the doctrine of collateral estoppel.

SUMMARY JUDGMENT ON EL PASO'S COMPLAINT

Summary judgment is only appropriately granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In determining whether any such material issues of fact exist, all reasonable inferences are to be drawn in favor of the party opposing a motion for summary judgment. *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972).

1. *RESCISSION*

El Paso's prayer for rescission, based on substantial failure of consideration, was properly dismissed. In *Samples v. Robinson*, 58 N.M. 701, 275 P.2d 185 (1954), the court stated that substantial failure of consideration is an appropriate ground for rescission, but only where the unperformed consideration goes to the essence of the contract and is not compensable damages. The failure of consideration alleged by El Paso is failure to perform services or to pay fair market value for those services. This did not go to the essence of the contract.

El Paso's claim for rescission, based on fraud and constructive fraud, was improperly dismissed. The rule in New Mexico is that an instrument may be cancelled where its creation was the product of a fraudulent or inequitable conduct. *Anderson v. Reed*, 20 N.M. 202, 148 P. 502 (1915). In *Anderson, supra*, the Supreme Court found that fraud must often be established by use of circumstantial evidence due to the fact that it generally relates to one's private intentions. It is this very nature of a count in fraud that led the Supreme Court to state, ". . . ordinarily claims of fraud present an issue of fact which cannot be determined on motion for summary judgment." *General Acceptance Corp. of Roswell v. Hollis*, 75 N.M. 553, 408 P.2d 53 (1965). The Supreme Court has defined constructive fraud as ". . . a breach of a legal or equitable duty irrespective of the moral guilt . . . it is not

necessary that actual dishonesty of purpose nor intent to deceive exist." *Snell v. Cornehl*, 81 N.M. 248, 466 P.2d 94 (1970). Therefore, constructive fraud, as well as actual fraud, may be the basis of cancellation of an instrument under *Anderson, supra*. The facts taken in their most favorable light to El Paso raise a material issue of fact as to fraud.

2. *REFORMATION*

El Paso's complaint also stated a prayer for reformation of Kysar's lease with WBA. The only supported basis for this relief is fraud. El Paso would have this court reform the contract to conform to the premises' fair market value. Reformation is appropriate where there is fraud in the execution; that is, where the two parties make an agreement and one of the parties fraudulently causes the contract to state a term varying from the parties' earlier agreement, since the purpose of reformation is to give fruition to what the parties actually agreed. Pomeroy, *Equity Jurisprudence* (5th Ed.), Vol. 3, Sec. 910, pp. 574–576; *Dolph v. Lennon's Inc.*, 109 Or. 336, 220 P. 161 (1923). But where fraud in the inception is alleged (a scheme by which both parties to a contract intentionally include an unfair term in an agreement in order to defraud a third party), reformation is unavailable as the parties' true intentions are already expressed in the agreement and cancellation is the appropriate remedy. *Pomeroy, supra*; *Dolph, supra*. Summary judgment was proper on this count.

3. *BREACH OF FIDUCIARY DUTY*

El Paso alleges that Kysar, by exercising its option, breached a fiduciary duty owed to El Paso. A lease does not create a fiduciary relationship between landlord and tenant. Nor does the inclusion of an option clause create a special equitable relationship between landlord and tenant. *Durfee House Furnishing Co. v. Great Atl. and Pac. Tea Co.*, 100 Vt. 204, 136 A. 379 (1927). It is only upon exercise of the option that a lessee acquires any equitable interest and rights in property. *Pomeroy, supra*, Sec. 105, Vol. 1, pp. 135–137; *Hardy v. Ramey*, 128 Ga.App. 875, 198 S.E.2d 360 (1973); *Ruark v. Peterson*, 30 Colo.App. 162, 491 P.2d 75 (1971). Since at the time of the alleged breach of fiduciary duty (see Part II, infra.), there existed no vendor-purchaser relationship, but only a landlord-tenant relationship, no such duty existed. Summary judgment was proper as to this count.

4. *BREACH OF CONTRACT*

El Paso's complaint alternatively states an action for breach of contract. The claim rests on the notion that despite the express statement of $200.00 per month rental, the actual intended consideration anticipated by the parties was that monetary value, plus the management services rendered by Mr. Kysar. This may properly be established by the conduct which occurred prior to the exercise of the option. *Schultz and Lindsay Construction Co. v. State*, 83 N.M. 534, 494 P.2d 612 (1972). Based on the affidavits and exhibits submitted below, most especially Mr. Kysar's own testimony that services were part of the rental consideration, we hold that a material issue of fact has been raised.

COVENANT OF QUIET ENJOYMENT

The general standards for recovery for a breach of the covenant of quiet enjoyment, whether express or implied, have been laid down in *Barfield v. Damon*, 56 N.M. 515, 245 P.2d 1032 (1952); *Kennedy v. Nelson*, 76 N.M. 299, 414 P.2d 518 (1966). In *Barfield, supra*, the court quotes from *McAlester v. Landers*, 70 Cal. 79, 11 P. 505 (1886), with approval:

> As to the covenant for quiet enjoyment, the rule is that there can be no breach without an eviction, actual or constructive. But what acts will constitute such an eviction it is often difficult to determine. It is settled, however, that there need not be an actual dispossession.

In *Kennedy, supra*, the court reacknowledged this broad principle:

> It is a well recognized general principle of law that one claiming constructive eviction must vacate the premises . . .

> However, the general rule is subject to an important qualification. Reoccurrence of conditions or reliance on promises by the landlord to correct the deficiency may create a justification for delay in vacating the premises.

The issue before this court is to determine whether the first of the two exceptions announced in *Kennedy, supra* (reoccurrence of interferences by the landlord) has occurred so as to find constructive eviction. When a landlord repeatedly acts with *malice* and in *bad faith* in his attempts to oust a tenant in rightful possession, there is constructive eviction even without actual vacation of the premises by the tenant, as the landlord has breached the covenant of quiet enjoyment.

In *Kuiken v. Garrett*, 243 Iowa 785, 51 N.W.2d 149 (1952), Iowa's Supreme Court found the issue of constructive eviction to turn on whether there was malice and bad faith by the landlord. The Iowa court then discussed its function in relation to this test:

> It is true that a landlord has a right to attempt to oust his tenant, *if he thinks he has just grounds therefor*; and in such case he is not to be held liable for damages if he fails. . . . If he serves repeated notices, and institutes repeated actions, alleging different grounds, and fails to prove any of them upon trial, we think a fair inference of malice may be drawn by a jury. Whether defendants were actually malicious is not for us to determine; we hold only that there was a jury question.

We agree that the determination of the existence of malice is a question to be left to a jury. Taking all reasonable inferences in a light most favorable to Kysar, summary judgment on this issue was improperly granted. *Goodman v. Brock, supra.*

The court below felt that Kysar had stated a valid claim, but had not suffered any damages. Kysar has alleged $7,500 in compensatory damages and should have an opportunity to prove them at trial.

Those portions of the trial court's order inconsistent with this opinion are reversed and the other portions are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

605 P.2d 245

WELLS FARGO BANK,
Plaintiff-Appellee,

v.

Earl DAX and Henry Jewell,
Defendants-Appellant.

No. 4116.

Court of Appeals of New Mexico.

Dec. 6, 1979.

Rehearing Denied Dec. 14, 1979.

Steven R. Fairfield, John E. Farrow, McCallister, Fairfield, Query, Strotz & Stribling, P.C., Albuquerque, for defendants-appellant.

Earl R. Norris, Vener & Fitzpatrick, Albuquerque, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

The complaint and counterclaim involve an automobile lease and Jewell's alleged conversion of the automobile. The appeal does not involve the merits of these claims.

The case was tried on October 3, 1978. The appeal presents issues concerning notice of trial. We discuss (1) a purported local rule concerning notice; (2) waiver of notice; and (3) adequacy of notice.

Judgment was entered against both defendants on December 27, 1978. Jewell moved for a new trial on January 5, 1979. An order denying the motion for a new trial was filed March 30, 1979. Jewell appeals from the order denying him a new trial. The motion for new trial claimed that Jewell was not given written notice of the trial, was unable to call witnesses, and was denied the opportunity to present evidence at the trial held October 3, 1978.

Purported Local Rule Concerning Notice

The record shows written notice of trial was twice given to counsel. Both of these trial settings were vacated. This case was tried on the basis of oral notice.

Jewell contends that Rule 16 of the Rules of the Second Judicial District require that written notice be given of a trial setting. Relying on decisions from other jurisdictions, Jewell asserts that compliance with a rule, providing for written notice, is mandatory. See *City and County of San Francisco v. Carraro*, Cal.App., 28 Cal.Rptr. 680 (1963).

Because this purported local rule is not before us, we do not quote the purported rule on which Jewell relies.

Rule of Civ.Proc. 40 states:

> The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties, or (2) upon request of a party and notice to the other parties, or (3) in such other manner as the courts deem expedient.

Rule of Civ.Proc. 83 states:

> Each district court by action of the judge of such court or of a majority of the judges thereof, may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court, shall, upon their promulgation be furnished to the supreme court of the state. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

Rule of Civ.Proc. 83 requires that local rules be "furnished" the Supreme Court. Rule of Civ.Proc. 83 does not say whether the local rule is invalid if the Supreme Court is not furnished a copy. Nor do we decide this question. See *Maestas v. Christmas*, 63 N.M. 447, 321 P.2d 631 (1958); *Hartford Accident and Indemnity Co. v. Beevers*, 84 N.M. 159, 500 P.2d 444 (Ct.App. 1972); *Tate v. New Mexico State Board of Education*, 81 N.M. 323, 466 P.2d 889 (Ct. App.1970).

The local rule relied on by Jewell does not appear in the record before us. The briefs refer to the local rule, but the briefs do not establish the record. See *Porter v. Robert Porter & Sons, Inc.*, 68 N.M. 97, 359 P.2d 134 (1961); *State v. Vallejos*, 86 N.M. 39, 519 P.2d 135 (Ct.App.1974). The local rule, not being in the record before, is not before us for review unless it is before us on some other basis. *Galvan v. City of Albuquerque*, 85 N.M. 42, 508 P.2d 1339 (Ct.App.1973).

This Court has held that we will judicially notice the records of the Supreme Court. *State v. Vigil*, 85 N.M. 328, 512 P.2d 88 (Ct.App.1973). The Supreme Court will judicially notice local court rules properly promulgated and filed with the Supreme Court. *Spingola v. Spingola*, 91 N.M. 737, 580 P.2d 958 (1978).

The Supreme Court clerk's office has informed us that the only rules of the Second Judicial District filed with the Supreme Court were those rules filed on September 6 and December 10, 1974. Rule 16 of the September 6, 1974 filing deals with pre-trial motions and is not applicable to the notice issue. Rule 24 of the September 6, 1974 filing deals with "Settings and Notice." Rule 24(a) deals with settings on the court's initiative; it does not require written notice from the court. Rule 24(b) deals with settings upon request by counsel and contains language somewhat comparable to the local

rule relied on by Jewell. Since this Rule 24(b) pertains solely to settings requested by counsel, and since the record does not show that counsel requested the disputed trial setting in this case, Rule 24(b) is not applicable. Rule 16 of the December 10, 1974 filing also deals with pre-trial motions and is not applicable to the notice issue in this case. Rule 18(c)(6) and (7) of the December 10, 1974 filing is similar to the local rule relied on by Jewell; these provisions, however, deal with settings requested by counsel, they make no mention of settings initiated by the trial court. We find nothing in the rules filed December 10, 1974 which deals with settings initiated by the trial court.

The Rule 16 on which Jewell relies cannot be considered because it is not in the appellate record, and not having been filed with the Supreme Court, may not be judicially noticed. Second Judicial District Rules filed with the Supreme Court do not require written notice of a trial setting initiated by the trial court.

Jewell's claim that a local rule required written notice of the trial setting has not been established. Accordingly, we do not reach the question of whether the local rule relied on by Jewell conflicts with Rule of Civ.Proc. 40.

Waiver of Notice

The record shows that Mr. Fairfield, a lawyer in the firm of defendant's counsel, received a telephone call from the judge's secretary on October 3, 1978. Fairfield took the call because he was the only attorney in the office at the time. This call was at about 2:15 p. m. and informed Fairfield that a hearing on the merits was to have begun at 2:00 p. m. of the same day. Fairfield "immediately" went to the courtroom. The record indicates that the trial court informed Fairfield that plaintiff's attorney was "just proceeding to get a default entered." Fairfield said: "If it is going to come down to a default, I guess I'd better do something." Fairfield informed the court that he had "absolutely no knowledge of this case" and that the firm's file did not show any notice of the trial setting. Fairfield asked: "Am I to assume we're going to try this case this afternoon, Your Honor?" The court replied: "If we're going to trial, it's today." After a recess of approximately 30 minutes, Fairfield announced that defendant was as "ready as he is going to be," and the case was tried. Fairfield cross-examined the two witnesses for plaintiff, made objections, and introduced a portion of Jewell's deposition into evidence.

■ In denying the motion for a new trial, the trial court ruled that defendants "were given adequate notice of the trial . . . ." We discuss the adequacy of notice subsequently in this opinion. Plaintiff contends that the failure of Fairfield to ask for a continuance, and his participation in the trial, was a waiver of any issue concerning notice. We disagree.

Fair v. Morrow, 40 N.M. 11, 52 P.2d 612 (1935), on which plaintiff relies, is not applicable. That case involved notice to the defendant litigants, not notice to counsel for the litigants. *Fair v. Morrow, supra*, does not discuss the question of notice to counsel who participated in the trial, and does not indicate there was an issue concerning notice to counsel.

The failure of Fairfield to move for a continuance does not show a waiver of the notice issue. The record indicates that Fairfield was faced with going to trial or having a default judgment entered against Jewell; "If we're going to trial, it's today." A motion for continuance, in this situation, would have been a useless act. Compare *Porter v. Mesilla Valley Cotton Products Co.*, 42 N.M. 217, 76 P.2d 937 (1938).

■ "Waiver" is the intentional relinquishment or abandonment of a known right. *Cooper v. Albuquerque City Commission*, 85 N.M. 786, 518 P.2d 275 (1974). Fairfield informed the trial court that his firm's file showed no notice of a trial setting and proceeded with the trial when faced with a default against Jewell. The record provides no basis for holding that Fairfield waived the notice issue.

Adequacy of Notice

Due process requires a reasonable notice of the trial setting so that the person bound by the results of the trial would have the opportunity to have his day in court. *State v. Allman*, 78 N.M. 1, 427 P.2d 886 (1967); see *In re Downs*, 82 N.M. 319, 481 P.2d 107 (1971); *Westland Development Co. v. Saavedra*, 80 N.M. 615, 459 P.2d 141 (1969); *In re Nelson*, 78 N.M. 739, 437 P.2d 1008 (1968).

The trial court found that defendants were given adequate notice of trial; this finding necessarily involves notice to the attorneys because there is nothing indicating Jewell had any notice that trial would be held on October 3, 1978. If "adequate notice" was given, due process was met.

It is undisputed that Fairfield received notice at 2:15 p. m. on the date of trial; this was fifteen minutes after the time the trial was scheduled to begin. This was not adequate notice. What other notice was given?

When Fairfield appeared in response to the telephone call, he raised the question of notice. The following occurred:

> MR. VENER: Mrs. Meyer [sic] outside says she called your office on August 18th and gave you notice.
>
> MR. FAIRFIELD: I don't dispute that. I don't know. I think that Mr. McCallister did have a conversation.

The remarks of plaintiff's attorney concerning notice did not establish that notice was given by the judge's secretary. Compare *State v. Maes*, 81 N.M. 550, 469 P.2d 529 (Ct.App.1970). Mr. Fairfield's response was not an admission of notice; he stated that he did not know.

The evidence as to notice appears in the record of the hearing on the motion for a new trial. Mrs. Myers testified that she did not give a written notice of the October 3rd trial setting; "I called all offices." When asked if she could have given notice by telephone, she responded:

> MS. MYERS: I might have, but I can't quite remember. I know I was concerned about that guy coming in from San Francisco, so let me check the docket. If it is not on the docket, I must have made the telephone call, and I could check in here and see if I check-marked calling everybody. That's why I always like to have a request for hearing. October 3rd, okay. I did call. Here is October 3rd, I called. This checkmark over here means I called to say that it was a definite setting. It was a backup. This is October 3rd, 1978. I have a checkmark by Mr. Harris, Mr. Vener, Mr. McCallister and Mr. McAtee stating that I called. That's my indication to show myself what I did, and that's it.

This testimony goes only to notice given on the day of trial, and was not constitutionally adequate. There is nothing else, other than speculation, concerning notice to defendant's counsel of the October 3, 1978 trial. The finding that adequate notice was given is not supported by the record.

The judgment is reversed and remanded for a new trial.

IT IS SO ORDERED.

SUTIN and WALTERS, JJ., specially concurring.

SUTIN, Judge (specially concurring).

I concur in the result.

Notice of date and time of a trial hearing is a matter of grave concern to parties in litigation. To deny a hearing on the merits without good reason defies what we commonly refer to as justice and fair play. This case is one of first impression, one that requires circumspection in dealing with a rule which requires district courts to place an action upon the trial calendar.

Rule 18(c)(6) of the Rules of the Second Judicial District reads:

> Requests for settings for trial alone may be sent directly to the assigned Judge who will make the setting. The Judge's secretary will enter the date and time of the setting for the trial and will file the original and send endorsed copies of the Request for Setting form to all persons entitled to notice.

A "Request for Hearing" and "Notice of Hearing" form is attached to the rules as an appendix. The "Request for Hearing" portion of the form is completed by the party seeking a trial. The "Notice of Hearing" form is completed by the judge or calendar clerk and is mailed to all persons entitled to notice. If ordered to do so, the person requesting the setting shall, not later than 3 days after being directed, file with the clerk of the court the completed original of the Request for Hearing-Notice of Hearing and serve copies on all counsel of record or parties appearing pro se.

This is the only rule provided for initiating a setting for trial. The assigned judge has no authority to initiate a trial setting. Rule 18(c) was created and adopted by the District Judges in the Second Judicial District. Each judge is mandated to follow these rules. Otherwise, the Rules will lose their meaning when violated by thirteen district judges. Settings for trial will become a haphazard proceeding. Rule 65 of the Rules of the Second Judicial District reads:

> Any infraction of these Rules shall, in addition to other appropriate remedies, subject the attorney or non-complying party to such disciplinary action as the Judge(s) of the Second Judicial District shall deem appropriate.

If a lawyer has a duty to comply with the rules, and does comply, the district judge will not be lead astray. If a lawyer fails to comply, the district judge has a duty to direct the lawyer to read the rules and follow them. Whether the fault be that of the lawyer or the district judge, the failure to comply with the "Request for Hearing-Notice of Hearing" procedure must result in reversible error for any action taken at the hearing unless the opposing lawyer or party voluntarily waives the Notice of Hearing requirement. Strict compliance is essential to the administration of justice. The rule must be uniform that the failure to give proper notice of trial to an adversary is reversible error. *Siano v. Spindel*, 136 Ga.App. 288, 220 S.E.2d 718 (1975).

We must not grant the trial judge discretion in initiating trial settings; to do so, is to create a host of excuses and various events that will destroy the fairness of the rule. The only discretion given to the district judge is to assign a trial date after proper notice, giving both sides an opportunity to be heard and state their reasons for or against. *Combs v. Griffith*, 429 S.W.2d 849 (Ky.1968).

We must not allow letters of attorneys or oral announcements to substitute for the "Notice of Hearing" requirement. To do so is to create strong disagreements on appeal. *Mansfield State Bank v. Cohn*, 573 S.W.2d 181 (Tex.1978). Notice of trial required by the civil rules must be given to the adverse party by the court and not counsel, *King v. King*, 55 Ohio App.2d 43, 379 N.E.2d 251 (1977), unless, of course, the district judge directs the lawyer to send the notice.

We must not follow the rule that a judge has no specific duty to inform individual attorneys of when their respective cases are set for trial; that the court records do, *Ed Martin Ford Co., Inc. v. Martin*, 363 N.E.2d 1292 (Ind.App.1977), nor that parties over whom a court has obtained jurisdiction are not entitled to notice of a trial setting in the absence of a rule or statute to the contrary, *Jack Adams Aircraft Sales, Inc. v. Hurley*, 569 S.W.2d 599 (Tex.Civ.App.1978), because parties are expected to keep themselves informed of the time a case is set for trial and not sleep on their rights. *Plains Growers, Inc. v. Jordan*, 519 S.W.2d 633 (Tex.1974); *Knight v. Davis*, 356 So.2d 156 (Ala.1978); *Forman & Zuckerman, P. A. v. Schupak*, 38 N.C.App. 17, 247 S.E.2d 266 (1978).

Furthermore, we must not follow the rule that when plaintiff's attorney comes into court to obtain a default judgment, one can be granted when both the attorney and the district judge know that defendant is entitled to three-days notice under Rule 55(b) of the Rules of Civil Procedure. *Ries Flooring Company, Inc. v. Dileno Const. Co.*, 53 Ohio App.2d 255, 373 N.E.2d 1266 (1977). This rule should put a district judge on notice that defendant should not be forced

to trial on the merits under the circumstances of this case. If defendant's attorney had walked out of the courtroom and default judgment were entered, defendant would be entitled to vacate the judgment and obtain a trial on the merits.

The only rule to follow in the Second Judicial District is Rule 18(c)(6) of the rules of that district.

In the absence of a district court rule, it must be kept in mind that notice of trial is an elementary essential of a judicial proceeding. No hard and fast rule for determining what notice is sufficient can be made. Any such rule would be arbitrary. But we do know that a reasonable notice of the trial setting must be given to satisfy due process requirements as pointed out in Judge Wood's opinion.

Rule 18(c)(6) not having been followed, defendant is entitled to a new trial.

WALTERS, Judge (specially concurring).

I especially agree with Chief Judge Wood's opinion, not only because a purported local rule was not of record or filed with the Supreme Court, but principally because due process demands adequate notice regardless of any rule, and regardless of who initiates the notice. The record denies its existence in this case.

I cannot agree with my esteemed colleague, Judge Sutin, that a district judge of the Second Judicial District is, by "mandate" of the local rules, without authority to initiate a trial setting. Local Rule 18(c)(6) referred to by both Judges Wood and Sutin is concerned with "Requests for Hearings," and provides that the attorneys "may" send such requests to the assigned judge for trial settings. Nothing in the rules prevents the trial judge from making a setting without such a request.

605 P.2d 251

AMERICAN DAIRY QUEEN CORPORATION, Appellant,

v.

TAXATION AND REVENUE DEPARTMENT of the State of New Mexico, Appellee.

No. 3907.

Court of Appeals of New Mexico.

Dec. 20, 1979.

Thomas J. Dunn, Nordhaus, Moses & Dunn, Albuquerque, John P. James, Gray, Plant, Mooty, Mooty & Bennett, Minneapolis, Minn., for appellant.

Jeff Bingaman, Atty. Gen., Sarah E. Bennett, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

SUTIN, Judge.

Taxpayer appeals a Decision and Order of the Director, Revenue Division, which imposed payment of gross receipts taxes based upon fees received from the lease of territorial franchises employed in New Mexico. We affirm.

The issue is whether the franchise fees paid by New Mexico territorial franchisees to Taxpayer are subject to the New Mexico Gross Receipts Tax Act.

International Dairy Queen, Inc. (IDQ) and Taxpayer are Delaware Corporations. Taxpayer is a wholly owned subsidiary of IDQ. IDQ and its subsidiaries are engaged in the business of developing, licensing, franchising and servicing a system of "Dairy Queen" stores which sell to the public various dairy desserts, food items and beverages under the "Dairy Queen," "Brazier" and "Mr. Misty" trade names. Taxpayer owns the trademarks as well as trade names and franchise rights. The stores for the most part are owned by independent third parties.

The "Dairy Queen" system was developed on a territorial basis under which national operators granted territorial franchise development and operating rights for special geographic areas ranging in size from a city or county to an entire state. The owners of such territorial rights are known as territory operators (TOs). Many of the TOs grant franchise sub-license agreements for individual store locations or sub-territories. TOs may, and some do, themselves operate "Dairy Queen" stores within their territories.

No "Dairy Queen" store in New Mexico has ever been owned or franchised by Taxpayer. The contacts of IDQ and Taxpayer with New Mexico are through franchise agreements with territory operators, sales of products by IDQ and occasional visits to New Mexico by employees of IDQ and subsidiaries.

The typical territory agreement is detailed and extensive. Briefly, Taxpayer is the owner of "Dairy Queen," a trade name registered in the United States Patent Office. Taxpayer granted the territory franchisee, called licensee, the exclusive right and license to engage in and conduct the "Dairy Queen" business in a defined territory and authorized the licensee to use the trademarks and trade name "Dairy Queen" in the operation of the business together with the right to sub-license the use of the trademark and trade name. The use of "Dairy Queen" and the operation of the business of the licensee and sub-licensee are under the strict supervision and control of Taxpayer. The licensee pays Taxpayer a computed license fee.

During the years 1972–1975, Taxpayer received $67,516.00 from Territory Operators. The receipts of those fees formed the basis for the assessment of the New Mexico Gross receipts tax against Taxpayer, the subject of this action.

Taxpayer contended (1) that it was not engaged in business in New Mexico and that it did not realize "gross receipts" as defined in § 7–9–3(F), N.M.S.A.1978, and

(2) several constitutional issues protected Taxpayer from taxation.

A. *Taxpayer was engaged in business in New Mexico.*

In *Aamco Transmissions v. Tax. & Rev. Dept.*, 93 N.M. 389, 600 P.2d 841 (Ct. App.1979) and *Baskin-Robbins Ice Cream Co. v. Revenue Div.*, 93 N.M. 301, 599 P.2d 1098 (Ct.App.1979), this Court held that a franchisor, a foreign corporation, which entered into agreements with licensees in New Mexico for use of franchisor's trade name and trademark are engaged in business in New Mexico. This conclusion comes from the definitions in the Gross Receipts Tax Act of "engaging in business," "leasing" and "property." Section 7–9–3(E), (J) and (I), N.M.S.A.1978. "Property" as defined includes "licenses, franchises and trademarks." Taxpayer is "engaging in business" in New Mexico by "leasing property" within this State. Taxpayer seeks to differentiate its operation from that of *Aamco*; that *Aamco* and *Baskin-Robbins* are not controlling.

First, Taxpayer claims that *Aamco* is not controlling because *Aamco* had a direct contractual relationship with the franchisee retail establishments on the sales of which the fees in question are calculated; that Taxpayer lacked such a relationship because it never owned a "Dairy Queen" store in New Mexico, nor one directly franchised by Taxpayer; that Taxpayer directly franchised Territorial Operators. This is a distinction without a difference because TOs stand in the shoes of *Aamco* retail establishments for purposes of taxation. Taxpayer's trade name, trademark and related intangibles are used in New Mexico by TOs. This fact establishes that Taxpayer is "engaged in business" in New Mexico and the consideration received by taxpayer from TOs is taxable as gross receipts.

Second, Taxpayer argues that it never granted any rights to anyone in New Mexico; that long prior to its formation, territorial rights to the entire State of New Mexico had been granted; that Taxpayer merely acquired the grantor's rights in those arrangements from its predecessors. Its predecessors were the TOs. This is also a distinction without a difference.

The issue is not whether Taxpayer failed to grant any rights to anyone in New Mexico. The issue is whether Taxpayer itself has been "engaged in business" in New Mexico since 1971, the beginning year for which it was taxed. Prior to 1971, taxpayer became the franchisor. It allowed TOs in New Mexico to use the trademarks and trade names and extended to them related intangibles. By this process, Taxpayer became "engaged in business" in New Mexico.

Third, Taxpayer argues that the *Aamco* fees subjected to the tax are denominated "franchise fees"; that "license fees" and "service fees" paid to *Aamco* by its franchisees were not included in the tax base; that Taxpayer's receipts at issue are its "service fee" receipts as found by the Director. The Director made no such finding. The fees which formed the basis for the assessment of the tax were those continuing fees paid by the TOs to Taxpayer. These fees were the franchise fees that are subject to the tax. An officer of IDQ who had the accounting responsibilities of Taxpayer testified that the "service fees" were called "license fees" in the territorial agreement. Whether called "license fees" or "franchise fees," name calling does not escape the Gross Receipts Tax Act. Taxpayer is engaged in business in New Mexico by allowing TOs to use Taxpayer's trade names and trademarks and related intangibles for which Taxpayer is paid by TOs.

Fourth, Taxpayer claims it has no tangible property in New Mexico. This fact is irrelevant. The Director found that Taxpayer had "a bundle of intangible property rights being employed in New Mexico"; that "A principal part of the taxpayer's business is the granting, in specified territorial areas, *the use of taxpayer's property rights* in its trademarks, trade name, business practices and certain patent rights." [Emphasis added.] Licenses, franchises and trademarks are property in New Mexico. Section 7–9–3(I), N.M.S.A.1978.

It is the presence of these properties in New Mexico that lays the foundation for the assessment of a tax regardless of any services rendered TOs from outside the State.

Fifth, Taxpayer differentiates *Aamco's* concession that its franchise agreement was a lease whereas Taxpayer does not lease property employed in New Mexico. This is also a distinction without a difference. Section 7–9–3(J) reads:

> "leasing" means *any* arrangement whereby, for a consideration, property is employed for or by any person other than the owner of the property. [Emphasis added.]

Under this definition, Taxpayer's arrangements with TOs fall within the definition of "leasing." Under the broad language of the Gross Receipts Tax Act, changes in names of any arrangement by which a Taxpayer is related to New Mexico are futile. The use of such names as "contractual agreements," "leasing agreements," "service agreements," or any others constitute an "arrangement." The "arrangement" as defined is controlling. *Baskin-Robbins, supra.*

We hold that *Aamco* and *Baskin-Robbins* are controlling.

B. *Constitutional questions raised do not exempt Taxpayer from taxation.*

Taxpayer has exhausted every available constitutional provision to seek relief from taxation: The Commerce, Due Process and Equal Protection Clauses of the Constitution of the United States. The Commerce and Due Process Clauses were decided adversely to Taxpayer in *Aamco* and *Baskin-Robbins.* We are not persuaded to the contrary. The issue remaining is whether taxation of Taxpayer for allowing TOs the use of its trade name and trademarks denies Taxpayer the equal protection of the law.

To arrive at a favorable conclusion, Taxpayer argues that a gross discrimination exists against licensors of trademarks; that this discrimination is present due to an improper classification. The classifications are described as follows: On the one hand, licensors of *intangible* property, such as trade names, incorporated in a product for sale to the public is taxed, whereas, on the other hand, persons who engage in the sale or lease of *tangible* personal property is another type of transaction (§§ 7–9–46, 7–9–47, 7–9–48, 7–9–49 and 7–9–50), and they are allowed deductions from gross receipts; that the Equal Protection Clause of the Fourteenth Amendment prohibits such arbitrary classifications.

If we understand Taxpayer's position correctly, it claims that it is irrational to exempt from taxation, property that will ultimately be incorporated in *another* transaction subject to the gross receipts tax, and yet tax a trademark incorporated in a product to be sold to the public *absent* "another transaction." Taxpayer is mistaken. It cited no authority in support of its position.

In enacting the Gross Receipts Tax Act, the legislature created a system of taxation under which a tax can be imposed upon and paid by a licensor who "leases" a trademark to a licensee. It granted an exemption to one who sells tangible personal property to another under a type of transaction wherein the seller receives a non-taxable transaction certificate. The exemption merely delayed the time that the seller would redeem the certificate and pay the tax. To contend that a delay in the payment of the tax by one seller and not another is irrational under the above circumstances does not constitute a rational argument that it was denied the equal protection of the law.

The equal protection clause is often invoked in support of a claim that a state taxing scheme is arbitrary. This is a familiar argument and the general principles are well settled.

We need research no further than *Michael J. Maloof & Co. v. Bureau of Revenue,* 80 N.M. 485, 458 P.2d 89 (1969). *Maloof* involved an amendment by the legislature of the Emergency School Tax Act, one that imposed a tax on one-half of one percent only upon the gross receipts of wholesalers of alcoholic liquors and beverages. Whole-

salers claimed that it violated their rights under the Fourteenth Amendment because of the discriminatory, arbitrary, and unreasonable distinction between wholesalers in the liquor business and wholesalers of other commodities. New Mexico cases of unconstitutional discrimination were cited. In distinguishing these cases, Mr. Justice Watson said:

> In the field of taxation, more than in other fields, the legislature possesses the greatest freedom in classification, and to attack such as a violation of the Fourteenth Amendment *places the burden on the one attacking to negative every conceivable basis which might support the classification.* [Emphasis added.] [Id. 486, 458 P.2d 90.]

To succeed on the equal protection argument, Taxpayer must not only overcome the presumption of constitutionality that attaches to every statute, but must also establish that there is no conceivable state of facts which would support the classification. The burden is on Taxpayer "to negative every conceivable basis which might support the classification."

This heavily weighted burden which is placed upon a taxpayer reduces its ability almost to the vanishing point to challenge a classification by way of the Equal Rights Clause of the Constitution. This challenge was accomplished where the difference in tax treatment of property for appraisal was based solely on whether a contractor used his equipment in more than one county. *Halliburton Company v. Property Appraisal Dept.*, 88 N.M. 476, 542 P.2d 56 (Ct.App. 1975). On the other hand, under the Gross Receipts Tax Act, where the legislature made a distinction with respect to tax liability as between purchasers and bailors, we held that there is a real substantial difference between those classes of persons who acquire title and ownership of property and those who acquire only the interest of a bailee under a lease agreement. *Rust Tractor Co. v. Bureau of Revenue*, 82 N.M. 82, 475 P.2d 779 (Ct.App.1970). Furthermore, where receipts derived from radio and television stations from advertising were exempt from gross receipts taxation, it was not a denial of equal protection to exempt such advertising revenues, while taxing gross receipts received by a newspaper publisher, including receipts obtained from out of state advertising locally published. *New Mexico Newspapers, Inc. v. Bureau of Revenue*, 82 N.M. 436, 483 P.2d 317 (Ct.App. 1971).

In the instant case, Taxpayer could be denied equal protection of the law if it paid the tax as a licensor of trademarks and other such licensors did not pay. "Under the stringent statutory provisions of the Gross Receipts Tax Act, no franchise can escape payment of the tax. Relief can be obtained only in the legislature, not in the courts." *Aamco, supra* (600 P.2d 846), Sutin, J., specially concurring. In *New Mexico Newspapers, Inc., supra*, Judge Spiess said:

> If inequities are occasioned taxpayer which result from classification its remedy is with the Legislature. [82 N.M. at 442, 483 P.2d at 323.]

In the instant case, the classification was reasonable and did not constitute a denial of equal protection.

Affirmed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HERNANDEZ, J., concurs in result.

605 P.2d 256

STATE of New Mexico,
Plaintiff-Appellee,

v.

John DOE, a child, Defendant-Appellant.

No. 4385.

Court of Appeals of New Mexico.

Jan. 15, 1980.

John B. Bigelow, Chief Public Defender, Santa Fe, Joseph W. Gandert, Asst. Public Defender, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

The child appealed and filed a docketing statement raising certain issues, which if true, would require a reversal. We calendared the cause for summary reversal, listing our reasons for the reversal. The State did not respond or contest the proposed summary reversal. Accordingly, the cause is reversed for the reasons hereinafter stated.

The central issue relates to time limits concerning the Children's Court. The child had had several prior scrapes with the law which resulted in the filing of several petitions by the Children's Court attorney. In response, the Court initially ordered probation, then considered several petitions to revoke probation, and finally ordered that the child be committed to the Boys School upon a prior suspended commitment. The subsequent events will be reviewed in chronological order.

September 21, 1978 Child ordered committed to the Boys School for a full term commitment.

August 3, 1979 Petition filed requesting an extension of custody of the child at the Boys School since "legal custody of John Doe to the Department of Corrections will terminate on 9–21–79." A hearing on the petition was scheduled for September 6, 1979.

August 26, 1979 The child left the Boys School without permission. The court entered a pickup order on September 6, 1979.

September 18, 1979 The child was arrested and booked into the Juvenile Detention Center. The child was returned to the Boys School on September 27, 1979. The hearing on the peti-

tion to extend custody was then set for October 24, 1979.

October 22, 1979 The child filed a motion to dismiss the petition to extend custody.

October 24, 1979 The hearing on the petition to extend custody and the child's motion to dismiss was held. The Court ordered that the legal custody be extended.

The docketing statement asserts that prior to the hearing the Children's Court attorney and the child's attorney stipulated that the dates in the child's motion were correct. The above chronological outline proceeds upon that assumption. *State v. Calanche*, 91 N.M. 390, 574 P.2d 1018 (Ct.App.1978).

Section 32–1–38, N.M.S.A.1978, states in part:

A. A judgment vesting legal custody of a child in an agency shall remain in force for an indeterminate period not exceeding two years from the date entered, except that not more than one year in an institution for the housing of delinquent children may be authorized without further order of the court, and except that a judgment transferring legal custody of an adjudicated delinquent child to an agency responsible for the care and rehabilitation of delinquent children divests the court of jurisdiction at the time of transfer of custody in accordance with Section 32–1–12 NMSA 1978, and:

* * * * * *

F. 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.

* * * * * *

I. The court may dismiss a motion if it finds after preliminary investigation that the motion is without substance. If the court is of the opinion that the matter should be reviewed, it may, upon notice to all necessary parties, proceed to a hearing in the manner provided for hearings on petitions alleging delinquency. The court may terminate a judgment if it finds that the child is no longer in need of care, supervision or rehabilitation, or it may enter a judgment extending or modifying the original judgment if it finds that action necessary to safeguard the child or the public interest.

We conclude that subsection (I) requires that the time limits set for petitions alleging delinquency apply to motions to extend custody. See *State v. Doe*, 90 N.M. 568, 566 P.2d 117 (Ct.App.1977)—time periods apply to petitions to revoke parole.

The relevant time periods in the New Mexico Children's Court Rules, N.M.S.A. 1978, are:

Rule 28(a)—A detention hearing must be held within one day.

Rule 46(a)(5)—The adjudicatory hearing must be held within 30 days from the date the child is taken into custody after a failure to appear.

Rule 46(b)(5)—The adjudicatory hearing must be held within 90 days after the child's arrest on the failure to appear if the child is not in detention.

The commitment of the child was effective until September 21, 1979. No detention hearing was held subsequent to that date; however, Rule 29(a), N.M. Children's Ct. R., N.M.S.A.1978, imposes upon the child the obligation of requesting a detention hearing. In any event, failure to hold the hearing within the time limits requires release of the child, not dismissal of the petition. See Rule 29(a).

We hold that the procedural rules applicable to adjudicatory hearings are applicable to motions to extend custody. The hearing on the motion to extend custody must be held within 30 days. Rule 46. The 30 days begins to run after the later of (1) the termination date of the prior custody, or (2) the date the child is arrested after his failure to appear. In this case, the child was arrested on September 18, 1979, after his failure to appear—the termination date of his prior commitment was September 21, 1979. Thirty days from September 21, 1979, would be October 21, 1979, which was

a Sunday. Therefore, pursuant to Rule 7(a), the thirty days would expire on October 22, 1979. The hearing was not held until October 24, 1979.

The docketing statement suggests that the State argued that since the child was placed in Springer, arguably an institution for the care and rehabilitation of delinquent children, he was not in a "detention facility" as defined in § 32–1–3(Q), N.M.S.A.1978, and as required for application of the time limits in Rule 46(a). Where the child is not "in detention", the relevant time limit is 90 days. Rule 46(b). We would agree with the State up until the date when the child's original commitment term had expired, however, after that date, he was "in detention" under the definition in § 32–1–3(Q). The definition refers to detention "pending court hearing". After September 21, the child was in detention pending the hearing on the motion.

Reversed and remanded with instructions to dismiss with prejudice. Rule 46(e).

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

605 P.2d 1151

MOBILE INVESTORS, a General Partnership, Plaintiff-Appellant,

v.

Virgil A. SPRATTE and Garnet B. Spratte, Defendants-Appellees.

No. 12415.

Supreme Court of New Mexico.

Jan. 24, 1980.

Sutin, Thayer & Browne, Irwin S. Moise, Marianne Woodard, Albuquerque, for plaintiff-appellant.

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

OPINION

FELTER, Justice.

Plaintiff partnership, Mobile Investors, filed suit in Bernalillo County District Court seeking specific performance of an option agreement in which defendants, Virgil A. and Garnet B. Spratte, agreed to sell a mobile home park to plaintiff upon exercise of the option. The case was tried on the merits to the court sitting without a jury. From a judgment entered for defendants, plaintiff appeals. We affirm.

John Henderson III, a commercial realtor and one of the plaintiff partners, had prepared the option contract and its addendum.

The "Option to Purchase Agreement", dated December 9, 1977, fixed a closing date "no later than December 10, 1978." The "Addendum to Option to Purchase", of the same date, provided that:

> The OPTIONEE should advise the Sellers of their intention to exercise their option to Purchase, in writing on or before December 1, 1978. Failure on the part of the Optionee to exercise their option to purchase prior to 11 December 1978 will

cause all monies remaining in the Escrow account described above to revert to the Sellers. On the other hand, should the option be exercised in a timely manner, any monies remaining in the Escrow Account mentioned above will become the sole property of the OPTIONEE who would then be the Purchaser/Owner.

As reflected by the trial court's unchallenged findings of fact, plaintiff gave oral notice of intent to exercise the option on December 8, 1978. The exercise of the option required, inter alia, that plaintiff close the transaction on or before December 10, 1978. Plaintiff, on December 10, 1978, and at all times thereafter, was ready, willing and able to pay all sums due, and to perform all other acts required to complete the purchase.

The sole question raised on appeal is whether the trial court erred in construing the option agreement to require that notice of intention to exercise the option be given in writing on or before December 1, 1978.

The primary objective in construing a contract is to ascertain the intention of the parties. *Schultz & Lindsay Construction Co. v. State*, 83 N.M. 534, 494 P.2d 612 (1972); *Jones v. Palace Realty Co.*, 226 N.C. 303, 37 S.E.2d 906 (1946). Such an objective is best achieved by giving great weight, if not the controlling weight, to the construction of the contract adopted by the parties, as reflected by available evidence. *Old Colony Trust Co. v. Omaha*, 230 U.S. 100, 33 S.Ct. 967, 57 L.Ed. 1410 (1913); *Schultz & Lindsay Construction Co. v. State, supra; Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.*, 84 N.M. 524, 505 P.2d 867 (Ct.App.1972), *cert. denied*, 84 N.M. 512, 505 P.2d 855 (1972). But the problem here is that the provisions in the option and its addendum are ambiguous. It is unclear whether written notice of intent to exercise the option must be given on or before December 1, 1978; whether plaintiff's rights would be forfeited upon failure of this condition; or whether plaintiff could instead exercise its option by giving notice and doing all things to complete the purchase at any time on or before December 10, 1978. "The applicable rule [in such cases of ambiguity] requires the construction of . . . [the] uncertainties in a contract most strongly against the party who drafted the contract." *Schultz & Lindsay Construction Co. v. State, supra. See also Boswell v. Chapel*, 298 F.2d 502 (10th Cir. 1961); *East & West Ins. Co. of New Haven, Conn. v. Fidel*, 49 F.2d 35 (10th Cir. 1931).

The "ambiguity" rule is applicable in this case because of the uncertainty in the option and its addendum, caused by plaintiff. Therefore, the ambiguities must be resolved against the plaintiff, and the decision of the trial court is affirmed.

IT IS SO ORDERED.

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

605 P.2d 1152

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY and its Attorney, Eric D. Lanphere, seeking permission to close the Hobbs, New Mexico Agency Station.

MISSOURI PACIFIC RAILROAD COMPANY and Eric D. Lanphere, Appellants,

v.

STATE CORPORATION COMMISSION, Appellee.

No. 12715.

Supreme Court of New Mexico.

Jan. 25, 1980.

Johnson & Lanphere, Eric D. Lanphere, Albuquerque, for appellants.

Jeff Bingaman, Atty. Gen., W. W. Royer, Patrick T. Ortiz, Asst. Attys. Gen., Santa Fe, for appellee.

OPINION

FEDERICI, Justice.

This action arises out of an application by the Missouri Pacific Railroad Company (Missouri Pacific) to the State Corporation Commission (Commission), seeking permission to discontinue the use of a mobile agent at Hobbs, New Mexico. Appellant Missouri Pacific has removed this cause to this Court pursuant to N.M.Const., Art. XI, § 7.

The relevant portion of the foregoing constitutional provision states that:

> In addition to the other powers vested in the supreme court by this constitution and the laws of the state, the said court shall have the power and it shall be its duty to decide such cases *on their merits* . . . . (Emphasis added.)

Given this constitutional mandate, our review is not one of the substantiality of the evidence presented to the commission, but rather, involves a weighing of such evidence and arriving at a result in accordance with a preponderance thereof.

Prior to the present application, Missouri Pacific installed a systemwide computer system at an approximate cost of $51,000,000 with 38 field offices, known as Customer Service Centers. The service center for the Hobbs, Lovington, Jal and Eunice area is located in Odessa, Texas, approximately 2 hours by car from Hobbs, and may be reached by any customer by dialing a toll-free telephone number 24 hours a day, seven days a week. This system had been in effect for some fifteen months prior to the filing of Missouri Pacific's petition. Five letters of support for the telephone system from firms whose businesses represent 98% of the traffic in the Hobbs area were entered into the record as exhibits.

In sum, Missouri Pacific's installation of a computer network has enabled it to offer a superior 24-hour a day, seven-day a week service, as opposed to the previous 8-hour a day, five-day a week service to its customers. As a consequence, the local agent's job has become a nullity. The function is a mere redundancy of all duties handled by the Odessa Customer Service Center.

Appellee urges that the factors to be considered in an agency station closing are: (1) the volume and nature of the business

transacted at the station; (2) the proximity and accessability of other stations; (3) the ratio of cost of maintaining the station agency, including both out-of-pocket and overall expense, to revenues received; (4) the inconvenience to the public resulting from removal of the agent; and (5) the nature of the service remaining or to be substituted. *Railroad Commission v. Chesapeake and Ohio Ry. Co.,* 490 S.W.2d 763, 765 (Ky.Ct.App.1973). This Court applied standards similar to these in *Seward v. D. & R. G.,* 17 N.M. 557, 131 P. 980 (1913). In so doing, the Court stated that it would not confine itself to a formula and would consider all of the circumstances, including the interests of the carrier. The rationale behind the decision in *Seward* was that the maintenance of station agents is only an incident to the railroad's absolute duty to transport freight and customers; and "when the duty is only an incident to the main duty then the question of expense [to the carrier] becomes of more importance . . . ." *Id.* at 592, 131 P. at 992. The Court in *Seward* went on to state:

> The Constitution does not confer upon the corporation commission the right to arbitrarily establish a station or to require a station agent regardless of the expense entailed upon the company, or the benefit to be derived by the public. It is only authorized to make such an order in this regard, as "the public interests demand, and as may be reasonable and just." It is not to consider alone the interests of the public affected by the order, but must determine whether or not, taking into consideration both the interests of the public and the expense entailed upon the railroad company, the order is just and reasonable.

17 N.M. at 594, 131 P. at 993.

The principles set out in *Seward* have been controlling in all subsequent decisions dealing with the removal of local station agents. *See Southern Pacific Co. v. State Corporation Com'n.,* 76 N.M. 257, 414 P.2d 489 (1966); *Petition of Town of Grenville,* 46 N.M. 3, 119 P.2d 632 (1941); *Denton Bros. et al. v. A. T. & S. F. Ry. Co. et al.,* 34 N.M. 53, 277 P. 34 (1929).

As such, we feel the most salient consideration in a case such as this, which involves the removal of a mobile agent, should be a balancing of the inconvenience to the shipper and benefit to the public in maintaining the agent, compared to the potential economic waste to the railroad of having to maintain an agent. *Southern Pacific, supra.*

The evidence contained in the record convinces us that the service provided by the Customer Service Center at Odessa is equal, if not superior, to the service provided by the mobile agent at Hobbs. We find no corresponding benefit to the public by maintaining the mobile agent. Absent a showing of corresponding public benefit to require appellant to maintain a mobile agent in the Hobbs area at an approximate cost of $25,000 to $26,000 per year would result in economic waste.

The decision of the Commission is hereby set aside. The application by Missouri Pacific for permission to discontinue the use of a mobile agent at Hobbs, New Mexico is granted.

IT IS SO ORDERED.

PAYNE and FELTER, JJ., concur.

605 P.2d 1154

Ralph A. GUTIERREZ, Mary S. Gutierrez, his wife, and Ruth H. Lucero, aka Aline Lucero, Petitioners,

v.

RIO RANCHO ESTATES, INC. and Amrep Construction Corporation, Respondents.

No. 12502.

Supreme Court of New Mexico.

Jan. 28, 1980.

Mercer & McCash, Joseph H. Mercer, Albuquerque, for petitioners.

Jerrald J. Roehl, Richard A. Winterbottom, Albuquerque, for respondents.

OPINION

FEDERICI, Justice.

Petitioners-Gutierrez are the owners of land which lies adjacent to and below the development of Rio Rancho Estates, the property of respondents—Rio Rancho Estates, Inc. Respondents constructed retention dams and drainage facilities from which water is discharged onto petitioners' land, resulting in periodic flooding and silting on petitioners' property. Among the court's instructions to the jury were the following:

> 7. An upstream or adjacent landowner has a duty to the lower and downstream landowner not to collect in an artificial channel or reservoir or pond, surface water and discharge it upon his neighbor's land to his injury in a different manner from that which it would naturally flow, if not interferred with, or to cast it in a greater volume or permit it to escape thereon in a more injurious way.
>
> 8. If you find that the Defendants have collected surface water in an artificial channel and allowed it to flow in increased quantities on the land of Plaintiff in a manner different from which it would naturally flow, then the Defendants are *strictly liable even in the absence of negligence.* (Emphasis added.)

The jury returned a verdict for the petitioners. Respondents appealed and the Court of Appeals reversed. The case is before us on a writ of certiorari filed by petitioners. Although we agree with the Court of Appeals that the trial court should be reversed, we do not agree with the reasoning applied by the majority and deem an opinion necessary.

The question before us is whether the trial court erred in submitting to the jury an instruction on strict liability. We hold that the trial court erred. The applicable case law governing the question before us is set forth in *Little v. Price*, 74 N.M. 626, 397 P.2d 15 (1964); *Martinez v. Cook*, 56 N.M. 343, 244 P.2d 134 (1952); *Rix v. Town of Alamogordo*, 42 N.M. 325, 77 P.2d 765

(1938); *Groff v. Circle K Corporation*, 86 N.M. 531, 525 P.2d 891 (Ct.App.1974).

In *Little*, this Court quoted the following language with approval from *Canon City & C.C.R. Co. v. Oxtoby*, 45 Colo. 214, 100 P. 1127 (1908):

> "* * * In our view of the facts, however, we do not think it makes any difference which rule is to be followed; for whether the relative rights of adjacent landowners as to surface waters is to be determined by the civil-law, or the common-law, or the so-called modified rule, under neither has one owner the right to collect in an artificial channel, or reservoir, or pond, surface water, and discharge it upon his neighbor's lands to his injury, in a different manner from that in which it would naturally flow, if not interfered with, or to cast it in a greater volume, or permit it to escape, thereon in a more injurious way, either upon the surface, or under the surface, by the natural law of percolation."

74 N.M. at 640, 397 P.2d at 25.

As we interpret the law set forth in the above cases, the legal principle applicable to the issue involved is not "ordinary negligence" nor "strict liability" nor "res ipsa loquitur." Instead, under the above authorities, once the plaintiff proves the elements of liability stated by the rule, no more is required, and plaintiff will have established that the defendant's activity constitutes negligence. The burden then shifts to defendant, in order to avoid liability, to plead and prove any defense which would have been applicable in any ordinary negligence case.

Some states apply the doctrine of "strict liability" to the impounding of waters in artificial channels or reservoirs under the doctrine of "abnormally dangerous activity," formerly denominated as "ultrahazardous activity." Restatement (Second) of Torts §§ 519, et seq. (Tent. Draft No. 10, 1964).

The doctrine of strict liability has been followed in many jurisdictions where water is stored in large quantities in a dangerous location in cities. On the other hand, the doctrine has not been followed in many jurisdictions where water is stored in rural areas. Restatement (Second) of Torts, Note to the Institute § 520, comment 3 at 58 (Tent. Draft No. 10, 1964).

N.M.U.J.I. Civ. 16.1, N.M.S.A.1978, provides an instruction on "ultrahazardous activities" and strict or absolute liability. It is restricted to the "use of explosives." The Committee Comment under this instruction reads:

> The rule of absolute liability stated in the foregoing instruction is proper under the case of *Thigpen v. Skousen & Hise*, 64 N.M. 290, 327 P.2d 802 (1934). There are no New Mexico cases on ultrahazardous activities other than blasting and, therefore, the instruction is limited to blasting situations.

We are not at this time prepared to extend the doctrine of strict liability to all impounded waters, and prefer to reaffirm and follow the principle announced in *Little, Martinez, Rix* and *Groff, supra*, as interpreted above in this opinion.

The trial court erred in giving a strict liability instruction. The trial court is reversed, and the cause remanded for a new trial consistent with the views expressed in this opinion.

IT IS SO ORDERED.

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

605 P.2d 1156

The CITY OF ALBUQUERQUE, New Mexico, a Municipal Corporation, Petitioner,

v.

Lorie Mary REDDING, Respondent.

No. 12568.

Supreme Court of New Mexico.

Feb. 1, 1980.

Klecan & Roach, Mark Klecan, Albuquerque, for petitioner.

Ortega & Snead, Michael D. Bustamante, Albuquerque, for respondent.

OPINION

FELTER, Justice.

This suit was brought in the District Court of Bernalillo County to recover damages for personal injuries to Plaintiff-Appellant suffered while riding her bicycle in the southbound curb lane of Yale Avenue, near the intersection of Yale and Silver Avenues in Albuquerque. Her front tire slipped through a drain grate located in the road and she was thrown from her bicycle. Defendant-Appellee, City of Albuquerque, a municipal corporation, (hereinafter the "City") denied negligence and asserted that the complaint failed to state a claim upon which relief could be granted and that Plaintiff-Appellant was barred from recovery by her contributory negligence. After the deposition of the Plaintiff, the City moved for summary judgment. Plaintiff appealed from an order granting summary judgment to the Court of Appeals, which reversed the order of the trial court granting summary judgment. The City petitioned this Court for a writ of certiorari, and the petition was granted. We now affirm the decision of the Court of Appeals.

The memorandum opinion of the Court of Appeals by Judge Hernandez correctly identifies the only two grounds upon which the summary judgment could have been granted by the trial court. The validity of those grounds is the issue here on appeal. Paraphrased, and more broadly stated, they are: (1) whether sovereign immunity as a

matter of law affords the City immunity from the suit; and (2) whether the Plaintiff was contributorily negligent as a matter of law?

The City asserts that it is immune from suit under the provisions of Section 41–4–11(B), N.M.S.A.1978, which reads in pertinent part as follows:

> The liability for which immunity has been waived pursuant to Subsection A of this section shall not include liability for damages caused by:
>
> (1) a defect in plan or design of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area; . . .

Thus, it is contended that the case falls within an exception to the New Mexico Tort Claims Act, §§ 41–4–1 to 41–4–25, N.M.S.A.1978, and immunity from suit attaches.

Although the drain grate in the curb lane of the street formed a part of the street surface, it was only incidental to the plan or design of the roadway, and not a primary part of that plan or design. Its direct purpose was not to facilitate the use of or flow of traffic upon the roadway. Its direct and primary purpose obviously was to care for solid or liquid waste collection and disposal from the roadway, and in this manner, incidentally to facilitate the flow of traffic upon the roadway.

Admittedly the situation in the case at bar does not fit squarely within any specific provisions of the Tort Claims Act. However, we believe that the more specific statutory provision within the Tort Claims Act which may be applicable is contained in Section 41–4–8(A), N.M.S.A.1978, which insofar as applicable reads:

> The immunity granted pursuant to Subsection A of Section 4 [41–4–4, NMSA 1978] of the Tort Claims Act does *not* apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of the following public utilities and services: . . . *solid or liquid waste collection or disposal*; . . . (Emphasis added.)

A sewer grate can serve no other primary purpose than to afford disposal of waste water, silt and debris from the roadbed of the street. They are not, indeed, a part of the plan or design of roadways generally apart from their primary purpose.

It is well established in the law that as between two conflicting statutory provisions, the specific shall govern over the general. *City of Albuquerque v. New Mexico State Corporation Commission*, 18 N.M. St.B.Bull. 883, 93 N.M. 719, 605 P.2d 227 (1979); *New Mexico Bureau of Rev. v. Western Elec. Co.*, 89 N.M. 468, 553 P.2d 1275 (1976); *State v. Blevins*, 40 N.M. 367, 60 P.2d 208 (1936); *Accord Saiz v. City of Albuquerque*, 82 N.M. 746, 487 P.2d 174 (Ct.App.1971) overruled on other grounds at 87 N.M. 237, 531 P.2d 1210 (1975).

We therefore hold that in the case at bar the City was not immune from suit.

As to the issue of contributory negligence, the uncontroverted evidence shows that on the day of the accident, the weather was clear and there was nothing to obstruct Plaintiff's view of the roadway. The accident happened about 3:30 P.M. on a sunny day. Immediately before the accident, Plaintiff was looking straight ahead and saw a bicycle sign next to the grate, but she did not see the grate in the portion of the roadway over which she was travelling.

The City claims that such facts support the premise that Plaintiff was contributorily negligent as a matter of law. Plaintiff contends that the facts present a genuine issue as to the material fact of contributory negligence, and therefore summary judgment was not proper.

In New Mexico and other jurisdictions, where the rule of contributory negligence has not as yet been replaced by the more enlightened rule of comparative negligence, courts have softened the impact of contributory negligence to a limited degree. For example, it is the rule in New Mexico that contributory negligence is almost always a question of fact to be determined at

trial. *Proctor v. Waxler*, 84 N.M. 361, 503 P.2d 644 (1972); *Behymer v. Kimbell-Diamond Company*, 78 N.M. 570, 434 P.2d 392 (1967); *Lujan v. Reed*, 78 N.M. 556, 434 P.2d 378 (1967); *Gray v. E. J. Longyear Company*, 78 N.M. 161, 429 P.2d 359 (1967); *Stephens v. Dulaney*, 78 N.M. 53, 428 P.2d 27 (1967); *Jones v. Gibberd*, 77 N.M. 222, 421 P.2d 436 (1966); *Mozert v. Noeding*, 76 N.M. 396, 415 P.2d 364 (1966).

■ The general rule of law is to the effect that a person has the duty to keep a careful lookout for his or her own safety, and that failure to do so may constitute contributory negligence as a matter of law. *See Cupps v. Southwestern Public Service Co.*, 91 N.M. 639, 578 P.2d 340 (Ct.App. 1978). *See generally Catalano v. Lewis*, 90 N.M. 215, 561 P.2d 488 (Ct.App.1977); *Werner v. City of Albuquerque*, 89 N.M. 272, 550 P.2d 284 (Ct.App.1976).

In *Cupps v. Southwestern Public Service Co., supra*, appellant's son sustained death by electrocution. While covering a load of hay with a tarpaulin, he came in contact with wires carrying 7,200 volts of electricity, which wires had a clearance of 16′9″ from the ground. Decedent had been warned numerous times by four separate persons about the existence of the electric lines in question and their danger. Further, he had been instructed specifically to back his tractor trailer away from those lines in order that he could cover the hay without coming in contact with the lines. He had plenty of room to park his truck away from the lines, but instead parked the truck in a manner that left a portion of the cab under the wires. The court found contributory negligence as a matter of law.

In *Catalano v. Lewis, supra*, plaintiff's daughter, while exceeding the speed limit, zig-zagged past other cars in a reckless fashion, turned left across four lanes of traffic from the outside lane without keeping a proper lookout or yielding the right of way, and collided with defendant's vehicle coming in the opposite direction. The court found contributory negligence as a matter of law.

In *Werner v. City of Albuquerque, supra*, plaintiff sustained injuries when an explosion resulted from his use of a "pigtail" bulb and socket to test voltage, within a 480-volt, three phase system, after a fuse had blown. At the time of the accident, plaintiff was a licensed electrician with approximately 15 years experience. He knew that the proper method for testing high voltage was by use of a "Wiggins" tester, and he owned one. Further, he knew that it was dangerous to test voltage over 110 volts by use of a "pigtail" light bulb and socket, but he did so anyway. The court found contributory negligence as a matter of law.

It is principally upon the authority of the three cases last cited that the City relies for its claim of contributory negligence as a matter of law. But here we have a situation where the Plaintiff had no prior knowledge, warning, or notice that any permanent part of the roadway was dangerous to bicycle traffic. Indeed, the City had designated the area in question as a bicycle path, and had erected a sign so stating in very close proximity to the dangerous sewer grate itself. Certainly reasonable men could differ as to whether an ordinarily careful person would rely upon the sign and bicycle path designation, and perforce, in his or her mind's eye, not measure the spacing of the grids in the sewer grate in relation to the width of a bicycle tire.

■ An ordinarily careful person is not denied access to justice in New Mexico merely because he or she did not actually see everything that could have been seen before being injured.

In *Garcia v. Barber's Super Markets, Inc.*, 81 N.M. 92, 463 P.2d 516 (Ct.App.1969), contributory negligence was held to be a question for the jury. Plaintiff slipped and fell on water slick tile in defendant's store. She had observed a puddle of water on the floor and stepped around it. She then took another step and looked up to get a towel when her right foot slipped and she fell. The fact of reaching for the towel, instead of looking at the floor could support a finding of contributory negligence as a matter of fact, but not as a matter of law.

In *Hale v. Furr's Incorporated*, 85 N.M. 246, 511 P.2d 572 (Ct.App.1973), it was held that an invitee is not required to be constantly watching the floor to avoid being contributorily negligent. The Court held that a customer of defendant's store, who slipped and fell on pinto beans, where, inter alia, the customer was carrying her one-year old grandchild and the beans were spilled near a check-out counter, was not contributorily negligent as a matter of law.

The court in *Mozert v. Noeding*, 76 N.M. 396, 415 P.2d 364 (1966), found contributory negligence to be a question for the jury where the plaintiff fell down an unguarded stairwell of a dimly lit storeroom.

We are satisfied that upon the facts of this case that reasonable minds could differ as to whether the Plaintiff was or was not contributorily negligent. Therefore, as to this issue, the trial court committed reversible error in granting summary judgment.

The decision of the Court of Appeals is affirmed, and the decision of the trial court is reversed. The case is remanded to the trial court to vacate the order granting summary judgment and to place the case on its trial calendar.

IT IS SO ORDERED.

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

605 P.2d 1160

STATE of New Mexico, Plaintiff-Appellee,

v.

Johnny ALVAREZ, Defendant-Appellant.

No. 3159.

Court of Appeals of New Mexico.

Feb. 21, 1978.

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

John B. Bigelow, Chief Public Defender, Martha Daly, Asst. Appellate Defender, Santa Fe, Michael L. Stout, Asst. Public Defender, Roswell, for defendant-appellant.

OPINION

WOOD, Chief Judge.

Defendant appeals his conviction of trafficking in heroin. The issues involve: (1) unavailability of the informer at trial; (2) entrapment as a matter of law, and (3) jury selection.

Unavailability of the Informer at Trial

Three persons were present at the heroin sale—defendant, an undercover police officer and the informer. Although the trial court authorized the taking of the informer's deposition, this was not accomplished because of defendant's inability to subpoena the informer or otherwise secure his presence at the scheduled deposition.

The informer was involved in several narcotics cases in Chaves County. Defense attorneys in these several cases, as well as the prosecutor, desired to locate the informer. Acting upon information that the informer was in Amarillo, Texas, on June 2, 1977, the defense attorney in one of the cases went to that city to try to locate and interview the informer. The prosecutor and various New Mexico law enforcement officials also went to Amarillo and secured the cooperation of Texas law enforcement officials. Various things happened—the defense attorney was arrested, the informer was contacted by telephone but either skipped or went into hiding after the telephone call.

Thereafter, the trial court conducted an evidentiary hearing and, on conflicting evidence, ruled that the prosecutor's activities in Amarillo were not the cause of defense counsel's inability to make contact with the informer. The trial court also ruled that the prosecutor's Amarillo activities were for the purpose of making the informer available as a witness in the several narcotics cases. Defendant concedes that the evidence supports these trial court rulings.

Defendant's claim in this appeal is that the State did not exercise due diligence in attempting to locate the informer and that the State's activities throughout, in connection with making the informer available, were negligent. Defendant contends the charges against him should have been dismissed because the asserted negligence of the State deprived defendant of an opportunity to interview the informer and to properly prepare his defense. The result, according to defendant, was that the State denied defendant a fair trial.

State v. Carrillo, 88 N.M. 236, 539 P.2d 626 (Ct.App.1975) holds that when the in-

former disappears or becomes unavailable to the defense, upon the defendant's timely demand, the State must either locate the informer or must "satisfy the court as to why it could not reasonably be expected to produce the informer and satisfy the court as to the State's diligence as regards the disappearance."

It is undisputed that defendant's efforts to interview the informer were timely. The State could not produce the informer. Defendant moved to continue the trial until the informer could be produced or, in the alternative, to dismiss. At the hearing on these motions the State had to meet the two requirements stated in *State v. Carrillo,* supra. Whether the State met this burden was a question of fact to be decided by the trial court. *State v. Carrillo,* supra.

At the hearing both parties relied on the evidentiary hearing held in connection with the Amarillo affair. The evidence at that hearing shows: 1. The informer left Chaves County before arrests were made on the several narcotics indictments; this was in December, 1976 or January, 1977. 2. Local officers thought the informer went to Las Cruces. 3. Not knowing the informer's location, in early March, 1977, a teletype message was sent to police departments in areas where the informer might have contacts—Amarillo, Lubbock, Dallas, El Paso, Clovis, Las Cruces, Santa Fe and Albuquerque. The message asked for information on the informer's whereabouts subsequent to January 1, 1977. There was a negative response from each department. 4. After this negative response, a warrant for the informer's arrest as a material witness was issued in March, 1977 and information as to the existence of this warrant was sent to various police departments. 5. New Mexico state police narcotics agents were verbally informed of the outstanding warrant. 6. Contact with the informer was through an Amarillo telephone number; this number turned out to be the telephone number of the informer's father; the informer had given this number to Officer Franco to use in an emergency. Franco had been given this number before the informer left Chaves County. When Franco first called this number, during the Amarillo affair, the informer's father advised Franco that he had not seen his son in two months. 7. Later, however, Officer Franco talked to the informer on the telephone, the informer refused to reveal his location, indicated he was scared of being killed and told Franco he would call back in 30 minutes. He did not do so.

There is nothing indicating the whereabouts of the informer was known to any of the parties at the time of trial or would ever be available as a witness. Thus, the motion for continuance was properly denied. *State v. Brewster,* 86 N.M. 462, 525 P.2d 389 (Ct.App.1974).

Defendant emphasizes that Franco, a state police narcotics officer, presumably aware of the material witness warrant, never tried to contact the informer by using the telephone number (item 6 above) prior to the Amarillo affair. However, during argument the defense attorney informed the trial court that even if Franco had used the telephone number at an earlier time, there was no assurance that the informer could have been located.

The above facts support the trial court's denial of the motion to dismiss, support the trial court's implied finding that the prosecutor could not be reasonably expected to produce the informer, and support the trial court's implied finding that the State had been diligent regarding the informer's disappearance. The essence of defendant's appellate contention is that the facts require us to hold the prosecutor was negligent as a matter of law. We disagree; under the facts, the decision was properly made by the trial court.

Entrapment as a Matter of Law

According to the defendant, (1) the informer told defendant he wanted to "burn" a guy to make some money, and asked defendant's help in doing so; (2) defendant refused, but after the informer "bugged" him for 20 minutes, agreed to help in order to get the informer "off my back"; (3) that when the informer and de-

fendant approached the place of sale, the informer handed defendant a balloon; that at that time defendant did not know the contents of the balloon; (4) that the informer told defendant that the contents were "bad stuff that was no good", "you wouldn't get a high fly"; (5) that at the sale, the price was agreed on between the informer and the agent; and (6) after the sale, defendant gave the money to the informer.

Inasmuch as this testimony goes to dealings between the unavailable informer and defendant, it is not directly contradicted. Defendant asserts that this evidence shows entrapment as a matter of law. We disagree.

Defendant and the agent agree that defendant is the one that sold the balloon, containing heroin, to the agent and took the money in payment. Defendant admitted to at least one prior use of heroin and had heard that the informer was a heroin user. Defendant testified that he had known the informer for a "couple of months" prior to the sale, but was not a close friend of the informer. This evidence and the inferences therefrom raise question as to the credibility of defendant's testimony that he was an unwary innocent who cooperated with an acquaintance to pass "bad stuff" to a stranger, with no monetary reward for doing so.

Under the evidence, the issue of entrapment was properly submitted to the jury; there was no entrapment as a matter of law. *State v. Fiechter,* 89 N.M. 74, 547 P.2d 557 (1976).

Jury Selection

In *State v. Herrera,* 82 N.M. 432, 483 P.2d 313 (Ct.App.1971), cert. denied, 404 U.S. 880, 92 S.Ct. 217, 30 L.Ed.2d 161 (1971), the defendant contended that he had been denied a fair and impartial trial because some of the members of defendant's trial jury had served as jurors at the trial of other defendants charged with similar but independent offenses, and prosecution witnesses at the trials of other defendants also testified against defendant at his trial. We did not answer defendant's claim in *Herrera* because it lacked a factual basis.

In this case there is a factual basis for such a claim. Seven of defendant's trial jurors had served on at least one heroin trafficking case in which there were convictions; prosecution witnesses in those trials would also be called at defendant's trial. Do those facts show that defendant was denied a fair and impartial jury?

Annot., 160 A.L.R. 753 (1946) refers to the following situations:

1. At page 755, the Annotation states:

> [I]t seems to be well settled that where a juror has sat on the trial of one defendant in a criminal proceeding resulting in a conviction, he is not competent to serve thereafter on the jury in a proceeding against another defendant also charged with the commission of the same single offense involved in the prior case . . .

2. At page 762, the Annotation states:

> A juror is not disqualified to serve in a criminal case upon the ground of impartiality, or otherwise, merely by reason of the fact that he theretofore sat on the jury in the trial of another defendant for a like offense, but arising out of a separate and distinct transaction from that in the pending cause, and having no connection therewith other than the similarity in the nature of the crime charged, and thus distinguishable from the situation where there are successive trials of defendants charged with the commission of the same single offense . . . .

3. At page 767, the Annotation states:

> While there is virtually complete agreement in the cases upon the proposition that a juror is not disqualified to serve in a criminal trial merely by reason of his prior jury service in the trial of another defendant charged with a similar but independent criminal offense, a sharp conflict has arisen with respect to the effect of the fact that identical witnesses are used by the prosecution to establish the similar but disconnected criminal acts . . . .

Item 1, above, is not involved in this appeal. Item 2 does not support defendant;

rather, it supports the jury selection in this case because defendant's offense was separate and distinct from the prior narcotics trials. Item 3 is the situation before us; the prior trials and defendant's trial involved the same prosecution witnesses. The sharp conflict reported as to the item 3 situation is reflected in the differences among the judges in *Casias v. United States,* 315 F.2d 614 (10th Cir. 1963).

The asserted denial of a fair and impartial jury was raised in two ways: (1) defendant moved to strike the jury panel or, alternatively, to continue the case until a new jury panel was called, and (2) defendant challenged for cause the jurors with prior service in the item 3 situation.

Inasmuch as the asserted unfairness involves specific jurors, in this case eleven jurors of a panel of fifty-one, the attack on the entire panel was without merit. *Government of Virgin Islands v. Williams,* 476 F.2d 771 (3rd Cir. 1973); see *Casias v. United States,* supra. The item 3 situation is before us on the basis of the challenges for cause.

The essence of defendant's claim is that prior jury service involving the same prosecution witnesses in itself disqualified the jurors from service as jurors at defendant's trial. We do not believe such a per se rule of disqualification is appropriate. Our view is stated in *Government of Virgin Islands v. Williams,* supra:

> [A]bsent some evidence of actual partiality, a juror is not disqualified merely because he previously sat in a similar case arising out of a separate and distinct set of circumstances even though the offenses charged in the cases are similar and some of the same prosecution witnesses testify in each case.

See *United States v. Ragland,* 375 F.2d 471 (2d Cir. 1967), n. 2; *Wilkes v. United States,* 291 F. 988 (6th Cir. 1923), cert. denied, 263 U.S. 719, 44 S.Ct. 181, 68 L.Ed. 523 (1924); *Hill v. State,* 348 So.2d 848 (Ala.Cr.App. 1977); *Holland v. State,* 260 Ark. 617, 542 S.W.2d 761 (1976); *State v. Dixon,* 560 P.2d 318 (Utah 1977).

The voir dire in this case failed to establish partiality upon the part of any juror. The trial court asked prospective jurors about service in prior narcotics cases and about cases involving the same witnesses. They indicated they could try defendant solely on the evidence and instructions in defendant's case. Defense counsel asked prospective jurors whether they thought certain police officers were believable; most thought they were. The State then asked whether the prospective jurors would believe police officers any more than any other witness; the response was they would not. See *State v. Alderette,* 86 N.M. 600, 526 P.2d 194 (Ct.App.1974). There is nothing indicating the jurors who served at defendant's trial were not fair and impartial. Thus, there is no basis for holding the trial court abused its discretion in denying the challenges for cause. *Government of Virgin Islands v. Williams,* supra.

The judgment and sentence are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

605 P.2d 1164

STATE of New Mexico,
Plaintiff-Appellee,

v.

Jerry Lewis MESTAS,
Defendant-Appellant.

No. 4092.

Court of Appeals of New Mexico.

Jan. 3, 1980.

John B. Bigelow, Chief Public Defender, Michael Dickman, Asst. Appellate Defender, Santa Fe, Charles Finley, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Arthur Encinias, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant appeals an order denying his double jeopardy claim. We discuss: (1) whether the order is appealable, and (2) prosecutor misconduct which prohibits a retrial.

Whether the Order is Appealable

Defendant was convicted of criminal sexual penetration in the second degree and kidnapping. These convictions were reversed by memorandum opinion of this Court in *State v. Mestas*, (Ct.App.) No. 3608, decided August 22, 1978. A second trial in February, 1979 terminated when a mistrial was declared by the trial court. Defendant then moved for dismissal of the charges on the grounds of double jeopardy. This motion was denied in April, 1979 and defendant appealed.

The State has not challenged defendant's right to appeal the order denying defendant's motion. We discuss whether the order is appealable because it involves this Court's jurisdiction to hear the appeal.

The right of appeal is a matter of substantive law. *State v. Arnold*, 51 N.M. 311, 183 P.2d 845 (1947). Section 39–3–3(A), N.M.S.A. 1978 provides for appeals as of right, by a defendant, from an order denying relief on a petition to review conditions of relief. This provision is not applicable. The statute also provides for appeals as of right, by a defendant, from the entry of final judgment. The order denying defendant's motion, prior to the third trial, was not a final judgment. *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

This Court has authority to grant interlocutory appeals. Section 39–3–3(A)(3), supra. We treat the docketing statement as an application for an interlocutory appeal, which we hereby grant. *State v. Garcia*, 91 N.M. 131, 571 P.2d 123 (Ct.App.1977). Since the case is before us as an interlocutory appeal, we do not reach the question of whether "final judgment" in § 39–3–3(A)(1), supra, should be construed to include an order denying a double jeopardy claim raised by pretrial motion. Compare *Abney v. United States*, supra.

Prosecutor Misconduct Which Prohibits a Retrial

In the first trial, defendant sought a mistrial because of improper closing argument of the prosecutor. The convictions were reversed because the prosecutor's argument was in bad faith and because the cumulative impact of the prosecutor's references to an absent witness denied defendant a fair trial. "The trial court erred in not granting defendant's motion for a mistrial."

Defendant contended, at the motion hearing before the trial court, that he had not sought a mistrial at the second trial. The trial court ruled that the mistrial was granted at defendant's request, and the tapes support this ruling.

The factual predicate, then, is that defendant sought a mistrial at each of the first two trials.

United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976) states:

> The Double Jeopardy Clause does protect a defendant against governmental *actions intended to provoke mistrial requests* and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "*bad-faith conduct* by judge or prosecutor," . . . threatens the "*[h]arassment* of an accused by successive prosecutions or declaration of a mistrial so *as to afford the prosecution a more favorable opportunity to convict*" . . . (Our emphasis.)

United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), at footnote 12, states:

> [W]here a defendant's mistrial motion is necessitated by judicial or prosecutorial *impropriety designed to avoid an acquittal*, reprosecution might well be barred. (Our emphasis.)

The wording we have emphasized in *Dinitz* and *Jorn* points out that the actions of the prosecutor must have been in bad faith, and must have been designed to afford the prosecution a more favorable opportunity to convict in the trial at which the mistrial motion was made. *Lee v. United States*, 432 U.S. 23, 97 S.Ct. 2141, 53 L.Ed.2d 80 (1977) applied "these principles" and did not, in our opinion, expand the standard to be followed in determining whether reprosecution was barred.

We followed the language of *Dinitz* in *State v. Dunn*, 93 N.M. 239, 599 P.2d 392 (Ct.App.1979) and *State v. Hogervorst*, 90 N.M. 580, 566 P.2d 828 (Ct.App.1977). However, in *State v. Quintana*, 93 N.M. 644, 603 P.2d 1101 (Ct.App.1979) our paraphrasing of *Dinitz* was inexact. The standard to be followed is the one announced in *Dinitz*.

The memorandum reversing defendant's convictions at the first trial stated: "We view the closing remarks of the prose-

cutor, together with some of the questionable questioning at trial, to have been made in bad faith." Although the prosecutor's actions were in bad faith, defendant does not claim that these actions were designed to afford the prosecutor a more favorable opportunity to convict. Defendant properly failed to claim that the second trial (which ended in a mistrial) was barred by double jeopardy. In denying the mistrial motion at the first trial, the trial court ruled that the prosecutor's improper comments came after defendant " 'opened the door' . . ." As to the improper questioning "[s]ome objections were sustained—some were overruled and properly so . . . ." Although the prosecutor's bad faith conduct amounted to error requiring a new trial, there was nothing indicating the conduct was for the purpose of causing a mistrial or a reversal on appeal so as to afford the prosecutor a more favorable opportunity to obtain a conviction at a subsequent trial. Compare the facts in *State v. Callaway*, 92 N.M. 80, 582 P.2d 1293 (1978).

At the second trial the prosecutor asked an improper question; because of this question a mistrial was declared. Defendant's double jeopardy claim is based on this question. The trial court ruled that the question was not asked in bad faith, and was not designed to provoke a mistrial; "She had everything to lose from that . . . [question], nothing to gain. She had a very favorable jury." These rulings were not incorrect as a matter of law. The improper question at the second trial did not bar the scheduled third trial. Compare *State v. Quintana*, supra; *United States v. Buzzard*, 540 F.2d 1383 (10th Cir. 1976).

The order of the trial court is affirmed.

IT IS SO ORDERED.

ANDREWS, J., concurs.

SUTIN, J., specially concurring.

SUTIN, Judge (specially concurring).

I concur in the result.

A. *An interlocutory appeal was properly granted.*

Judge Wood treated a docketing statement as an application for an interlocutory appeal. *State v. Garcia*, 91 N.M. 131, 571 P.2d 123 (Ct.App.1977). I agree. By this process of construing § 39–3–3(A)(3), N.M. S.A.1978, and Rule 203 of the Rules of Appellate Procedure for Criminal Cases, we take the view that the Supreme Court follows a policy of construing rules liberally, to the end that cases on appeal may be determined on the merits where it can be done without impeding or confusing administration or perpetrating an injustice. *Olguin v. State*, 90 N.M. 303, 563 P.2d 97 (1977).

I concur in this procedural device and in any similar device used in every criminal case wherein a defendant suffers because of the fault of an attorney. Defendants in a criminal case are entitled to the protection of the law. Their attorneys are not whenever the statutes and rules of procedure are not followed.

B. *The trial court erred in declaring a mistrial.*

The prosecutor asked the defendant this question on cross-examination.

> Isn't it true that on that evening your sister accused you of raping her friend?

Based on this question the trial court granted a mistrial. The ruling was erroneous. The question as to the scope of the cross-examination has been ruled upon by the Supreme Court on many occasions. The cross-examination of a witness should be limited to those facts and circumstances connected with the matters inquired of in the direct examination, except as to those tending to discredit or impeach the witness. It is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief by the witness on direct examination. It is much safer to resolve the doubts in favor of the cross-examiner than to risk excluding testimony that should be admitted. *State v. Wilcoxson*, 51 N.M. 501, 188

P.2d 611 (1948); *State v. Anaya*, 79 N.M. 43, 439 P.2d 561 (1968); *State v. Baca*, 80 N.M. 488, 458 P.2d 92 (Ct.App.1969).

The State's question was not improper or prejudicial. It was within the realm of permissible questions on cross-examination. The defendant could have answered the question "yes" or "no." His answer would have been "no" because he claimed an alibi. The State would then have the right to attack the credibility of the defendant and impeach his testimony. For the purpose of impeachment, evidence is not barred because it is hearsay. *Weiland v. Vigil*, 90 N.M. 148, 560 P.2d 939 (Ct.App.1977).

The propriety of a mistrial is to be determined by whether there was a manifest necessity for the mistrial order, or by whether the ends of public justice would be defeated by carrying this trial to its final verdict. *State v. Dunn*, 93 N.M. 239, 599 P.2d 392 (Ct.App.1979). A question asked on cross-examination of a witness cannot trespass on this rule of law. The question only calls for a ruling over objection as to whether the question was relevant or permissible. The trial court erred in declaring a mistrial. On this ground, defendant is subject to a third trial.

Defendant's motion for dismissal of the charges on grounds of double jeopardy was properly denied because it was not an issue in the case.

To allow double jeopardy as an issue in this appeal raises serious questions on whether defendant should be discharged. To discuss this issue would require an extensive discussion of the facts and application of the doctrine of double jeopardy. There is no doubt that the prosecutor sought "a more favorable opportunity to convict" defendant when the question was asked. The State concedes that the question was improper.

On September 29, 1979, in *State v. Quintana,* 93 N.M. 644, 603 P.2d 1101, Judge Wood said that "overreaching" which bars retrial requires bad faith conduct "which seeks for the prosecutor a more favorable opportunity to convict." In the first trial, there were constant references to defendant's sister as well as a wrongful accusation made by the prosecutor in closing arguments. In case No. 3608, the court said:

> We view the closing remarks of the prosecutor together with some of the questionable questioning at trial, to have been made in bad faith.

A serious question arises whether the reference to defendant's sister in the second trial was made in good faith.

Furthermore, in the first trial, the prosecutor acted in bad faith. Did this fact preclude the initiation of the second trial irrespective of whether it was intended to provoke a mistrial? It would appear so, but this question was not raised in the first and second trials.

Reluctantly, I have decided not to answer these difficult double jeopardy problems. To me, the question asked on cross-examination was permissible. The trial court erred in granting a mistrial and defendant is subject to a third trial.

Defendant has been charged with a serious criminal offense. He must be tried until, absent reversible error, he is found guilty or not guilty.

605 P.2d 1168

STATE of New Mexico,
Plaintiff-Appellee,

v.

James B. WALKER,
Defendant-Appellant.

No. 4182.

Court of Appeals of New Mexico.

Jan. 3, 1980.

Dick A. Blenden, Paine, Blenden & Diamond, Carlsbad, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Sammy L. Pacheco, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of possession of marijuana with intent to distribute contrary to § 30–31–22 A(1)(a), N.M.S.A.1978, defendant appeals. The sole issue is the legality of a search and seizure. We reverse.

Defendant and Fierro were stopped at a routine border patrol check point between Alamogordo and Las Cruces, New Mexico. New Mexico State Police Officer Skinner was checking drivers licenses and vehicle registrations. Defendant rolled down his window when he produced his driver's license and Skinner smelled the odor of burnt marijuana coming from inside the vehicle. (Skinner testified he had training regarding the odor of marijuana.) Skinner then directed defendant to a secondary check area and asked for the vehicle registration. It was produced and in order. Skinner directed the subjects to get out of the vehicle and he "advised them that I would be searching the vehicle for marijuana."

The following colloquy regarding the search then occurred:

Q. Can you please describe this search to the Court?

A. Both the subjects were out, and they had been advised that the vehicle would be searched. I entered the vehicle from the driver's side, first of all, and then went to the passenger side, and in a boot in the motor hump in the van, I removed a plastic film container that had an odor of burnt marijuana in it and also had some small portion of what appeared to be marijuana residue. I then advised both subjects of their *Miranda* warning, and they stated they understood their warning. I advised them, do you understand; and the reply was, yes.

Q. Were they under arrest at that point?

A. No, Ma'am, they were not under arrest.

Q. Why did you advise them of their *Miranda* rights at that point?

A. There was several containers in the rear of the van, and I wanted to determine whose they were, and I wanted to ask them pertinent questions pertaining to those containers.

Q. Okay. Did you search the glove compartment?

A. The entire front of the van was searched first, and then the search

proceeded behind the seats into the rear area. I asked Mr. Fierro whose items they were, first of all, and he pointed out the two suitcases which he said were his. Those two suitcases were searched first. From one of those suitcases, I recovered a package of Zig-Zag rolling paper, and then the search went on to a yellow suitcase which Mr. Walker said was his.

Q. Was that suitcase locked?

A. It was not key locked. It was just clamped.

Q. It was closed, but didn't have a lock on it?

A. That's correct.

Q. And who did the yellow suitcase belong to?

A. Mr. Walker said it was his suitcase.

Q. Did you ask him for permission to search that suitcase?

A. Just asked him the ownership of the suitcase, who it belonged to, then I entered the suitcase.

Q. What did you find in the suitcase?

A. The first item I removed was a paper bag containing thirteen plastic baggies of suspected marijuana. I removed that item from the suitcase and reached back into the suitcase area from the same area where I had pulled the paper bag. I pulled a white plastic bag containing approximately one pound of suspected marijuana.

Q. What did you do at that point?

A. Maintained the evidence with myself and continued the search of the vehicle. The search went further into the rear of the van where I found a suspected marijuana roach in the ashtray in the rear of the Chevrolet van.

Q. Can you describe where in the rear?

A. It was similar to a table with an ashtray sitting on top of it, right along in the area where the back doors would be in the van, and the roach was in this ashtray of the table.

Q. Did you do any other further searching of the vehicle?

A. The entire area of the inside of the vehicle was searched, and that was the extent of the items that I recovered, and then the arrests were made at that time, when the search was completed.

Q. All right. Now, you could not tell if there was any smell of marijuana coming from those bags, could you?

A. That is correct.

Q. So, as far as you knew at that time, they were just luggage and in the vehicle?

A. That is correct.

Defendant and Fierro were placed under arrest after the search was completed.

In *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), the police acting on information of a reliable informant who provided detailed information that Sanders would arrive at the airport carrying a green suitcase in which he would be carrying marijuana. The police observed this and watched Sanders place the green suitcase in the trunk of a taxi. The police then stopped the taxi. At the request of the officers the taxi driver opened the trunk where the officer found the green suitcase. Without asking anyone's permission, the police opened the green suitcase and discovered what proved to be marijuana.

The *Sanders* court stated that the sole question to be decided was "whether the police, rather than immediately searching the suitcase without a warrant, should have taken it, along with respondent, to the police station and there obtained a warrant for the search."

The State in its Answer Brief states that the foregoing quoted testimony "makes it difficult for the State to argue in good faith that the officer had some much less sufficient probable cause to believe that the suitcase contained marijuana." We agree.

We hold that the instant case is analogous to and controlled by *Sanders*. We quote liberally from *Sanders*:

We conclude that the State has failed to carry its burden of demonstrating the need for warrantless searches of luggage properly taken from automobiles. A closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides. But as we noted in *Chadwick*, the exigency of mobility must be assessed at the point immediately before the search—after the police have seized the object to be searched and have it securely within their control. See 433 U.S. 1, at 13, 97 S.Ct. 2476, at 2484, 53 L.Ed.2d 538. Once police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by the place from which it was taken. Accordingly as a general rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places.

Similarly, a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations. One is not less inclined to place private, personal possessions in a suitcase merely because the suitcase is to be carried in an automobile rather than transported by other means or temporarily checked or stored. Indeed, the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them. Accordingly, the reasons for not requiring a warrant for the search of an automobile do not apply to searches of personal luggage taken by police from automobiles. We therefore find no justification for the extension of *Carroll* and its progeny to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police.

In sum, we hold that the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations. Thus, insofar as the police are entitled to search such luggage without a warrant, their actions must be justified under some exception to the warrant requirement other than that applicable to automobiles stopped on the highway. Where—as in the present case—the police, without endangering themselves or risking loss of the evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained. In this way, constitutional rights of suspects to prior judicial review of searches will be fully protected.

Since we are dealing directly with a suitcase we do not concern ourselves with footnote 13, which states:

> Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. See *Harris v. United States*, 390 U.S. 234, 236, 88 S.Ct. 992, 993, 19 L.Ed.2d 1067 (1968) (per curiam). There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile.

The warrantless search cannot be justified and, accordingly, defendant's motion to suppress the contents of the suitcase should have been granted.

Reversed.

IT IS SO ORDERED.

LOPEZ and WALTERS, JJ., concur.

606 P.2d 183

STATE of New Mexico,
Plaintiff-Appellee,

v.

Michael LUNA, Defendant-Appellant.

No. 12131.

Supreme Court of New Mexico.

Jan. 28, 1980.

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[redacted]

Martha A. Daly, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Lawrence A. Gamble, Charlotte H. Roosen, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SOSA, Chief Justice.

Defendant appeals his convictions of first-degree murder, under the felony-murder doctrine, and aggravated burglary. He was sentenced to life imprisonment for the murder charge and to a ten to fifty year sentence for the aggravated burglary charge.

The defendant raises seven issues on appeal:

I. Were the stop, arrest and searches of the defendant valid?

II. Did the trial court abuse its discretion by denying defendant's motion for a bifurcated trial?

III. Did the trial court commit reversible error by refusing to allow lay witnesses to express their opinions regarding defendant's sanity?

IV. Did the trial court commit reversible error by failing to instruct the jury on the defendant's theories of the case?

V. Did the trial court commit reversible error by failing to direct a verdict of not guilty by reason of insanity as to the felony-murder charge?

VI. Did the trial court commit reversible error by refusing to instruct the jury on the consequences of a verdict of not guilty by reason of insanity?

VII. Did the trial court commit cumulative error, amounting to an absence of a fair trial?

We affirm the conviction of the defendant.

On April 5, 1977, Officer Homer was investigating a residential burglary of the Taylor residence in Roswell. During the investigation, the officer went next door to the Nelson residence and discovered the body of Nina Nelson in a bedroom. She died from a massive blunt trauma to her head; she had also been stabbed over 40 times. Later a purse taken from the Taylor residence was discovered three houses down from the Nelson home. A footprint was beside the purse, and officers made a plaster cast of the print.

On April 6, 1977, Officer Fabry saw defendant pull away from a street intersection at a high rate of acceleration, causing the rear tires of his car to spin on the pavement. Fabry followed defendant for about one and one-half miles, pulled him over, and cited him for exhibition driving. § 20–84.1, Roswell City Code (1962) (Supp. 1970) (current version at Section 66–8–115, N.M.S.A.1978, by adoption). While talking to defendant, Fabry noticed that defendant's breath smelled of alcohol. The officer then arrested defendant for violating an ordinance prohibiting a minor from allowing himself to be served outside the presence of his parents or guardian. § 6–10(b), Roswell City Code (1962). He then searched the inside of the car, finding a bottle of liquor, two knit ski caps and some bullets. Fabry testified that the bottle was in plain view from outside the car, but nowhere stated that he saw it before arresting defendant. A pat-down search of defendant on the scene disclosed a pocketknife and a marijuana pipe. The officer had not had a previous encounter with the defendant and knew nothing about him previous to the arrest. The defendant was taken to the police station where he was interrogated for fifteen to twenty minutes regarding the Nelson murder. Police seized defendant's tennis shoes to compare with the footprint found next to the Taylor purse. Defendant was again searched prior to incarceration, revealing a baggie of marijuana in his undershorts. Police then searched defendant's car, which had been taken to the police station. No items were seized.

On April 7, 1977, defendant's car was again searched. Two officers had been assigned on that day to investigate a burglary at the Sanchez residence. They realized that the liquor bottle which had been seized from the defendant's car the night before had come from the Sanchez home, so they searched the car for further evidence. The search produced two stolen speakers from the rear of the car, which were in plain view. Sanchez identified the speakers as hers.

A search warrant for defendant's home was then procured, and the search produced evidence leading to defendant's arrest for the Nelson murder.

Defendant filed a motion to suppress all of the physical evidence seized by the police. The district court ruled that the initial stop was based on probable cause, that the subsequent arrest for the liquor violation was also based on probable cause, that the initial search by Fabry was proper, and that seizure of defendant's pipe and shoes was proper. The court also found that the searches of defendant's car on April 6 and 7 were improper warrantless searches and ordered the suppression of all evidence seized in the April 7 search. The state appealed the order to the Court of Appeals pursuant to Section 39–3–3, N.M.S.A.1978. The Court of Appeals reversed the trial court in part, holding that the trial court should not suppress the items seized in the April 7 search. Defendant then applied to this Court for a writ of certiorari, which was denied. *State v. Luna,* 91 N.M. 560, 577 P.2d 458 (Ct.App.1978), *cert. denied,* 91 N.M. 610, 577 P.2d 1256 (1978).

I. At the outset, we are presented with the issue of whether it is proper for this Court to decide issues which were once presented to us in this same case, but which we declined to decide. At this stage, however, we are compelled to review those issues in this appeal by Art. VI, Section 2 of the New Mexico Constitution. That section provides for a direct appeal to this Court from a judgment of a district court imposing a sentence of capital punishment or life

imprisonment. To refuse now to hear the issues which we once declined to review by writ of certiorari would be to effectively deny defendant his right to appeal his conviction to this Court. We therefore review the arrest, search and seizure issues presented in this appeal.

Defendant argues first that the stop was invalid because his acts were not proscribed by the exhibition driving ordinance. The ordinance reads in pertinent part:

> It shall be unlawful for any person to drive a vehicle on a street or highway in any race, speed competition or contest, drag race or acceleration contest, test of physical endurance, exhibition of speed or acceleration, or for the purpose of making a speed record, whether or not the speed is in excess of the maximum speed prescribed by law, and no person shall in any manner participate in any such race, drag race, competition, contest, test or exhibition.

§ 20–84.1, Roswell City Code, *supra.* The defendant maintains that he could not be stopped for exhibition driving unless there was some type of public display. The facts of this case do not support this argument. Defendant was driving on a public street, and at least one other person, the police officer, witnessed the event. Even if some type of public display were necessary, a question we do not reach, it was present here, so the stop was reasonable and valid.

Defendant next argues that his arrest was invalid. He was arrested under an ordinance which provides in pertinent part:

> It shall be unlawful for any minor to buy, receive or permit himself to be served with any alcoholic liquor, except when accompanied by his parent, guardian, spouse or an adult person into whose custody he has been committed for the time by some court who is actually, visibly and personally present at the time such alcoholic liquor is bought or received by him or served or delivered to him.

§ 6–10(b), Roswell City Code, *supra.* The violation of a municipal ordinance constitutes a petty misdemeanor because imprisonment may not exceed ninety days. § 3–17–1, N.M.S.A.1978; § 30–1–6(C), N.M.S.A.1978. *See also* Section 60–10–16(B), N.M.S.A.1978 (Cum.Supp.1979). A warrantless arrest of a person for violation of a misdemeanor is valid only if the offense occurred in the arresting officer's presence. *Cave v. Cooley,* 48 N.M. 478, 152 P.2d 886 (1944). Defendant contends that the officer had no reasonable grounds to believe that the act of allowing himself to be served occurred in his presence. He also argues that the officer had no grounds for believing that he was unaccompanied by his parents when he was served.

There is no testimony that the officer ever saw the defendant drinking or being served before the arrest. We therefore agree that the officer had no reasonable grounds to believe that the specific misdemeanor of allowing oneself to be served had been committed in his presence. The evidence does however support a reasonable determination by the officer that the defendant committed the misdemeanor of exhibition driving while in his presence. § 20–84.1, Roswell City Code, *supra.* The evidence also supports a reasonable determination by the officer that the defendant may have been driving while intoxicated, in violation of Section 66–8–102, N.M.S.A.1978 (Cum.Supp.1979). An arrest for such a violation is allowable pursuant to Section 66–8–122(B), N.M.S.A.1978 (Cum.Supp.1979). The grounds supporting these determinations were known to the officer at the time of the arrest.

We believe that where there are reasonable grounds supporting the warrantless arrest of a person for the commission of a misdemeanor, the arrest is not invalidated because the officer gave the wrong reasons for the arrest. *State v. Cloman,* 254 Or. 1, 456 P.2d 67 (1969); *see United States v. Richerson,* 461 F.2d 935 (10th Cir. 1972), *cert. denied,* 409 U.S. 883, 93 S.Ct. 172, 34 L.Ed.2d 139, *reh. denied* 409 U.S. 1119, 93 S.Ct. 916, 34 L.Ed.2d 704 (1973). The proper misdemeanor charge must, however, be based upon facts known to the officer at the time of the arrest, and the offense must have been committed in his presence. *Cave*

v. Cooley, supra. If the proper charge is a felony, the arrest must be based upon probable cause. *United States ex rel. La Belle v. La Vallee,* 517 F.2d 750 (2d Cir. 1975), *cert. denied,* 423 U.S. 1062, 96 S.Ct. 803, 46 L.Ed.2d 655 (1976).

The arrest of the defendant in the present case was valid because the officer could have properly arrested him for driving while intoxicated.

After the stop and arrest, the defendant was subjected to a pat-down search. A marijuana pipe and a pocket knife were seized. This search and seizure is not challenged on appeal. While still on the scene, the arresting officer removed a whiskey bottle, two knit caps and some bullets from defendant's car. This is also not challenged.

Defendant was then taken to the police station where he was apparently recognized as a person who had been implicated in several burglaries in the area, and so was questioned about the Nelson murder. The police at that time seized the tennis shoes defendant was wearing, which appeared to match the footprint found next to the Taylor purse. It is claimed that the warrantless seizure of the shoes was unreasonable. We disagree. It was reasonable for the officers to believe that the shoes were possible evidence of a crime, because the defendant had been implicated in other burglaries, and the police already knew of the footprint found near the Taylor purse. The intrusion was justified. *United States v. Edwards,* 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974); *State v. Luna, supra.*

Defendant was given a further search of his person prior to his incarceration. This search produced a baggie of marijuana. This is not challenged on appeal.

Defendant's car, which was in the custody and control of the police, was searched after the interrogation. The search was warrantless, and the trial court ruled it unreasonable. The Court of Appeals reversed. *State v. Luna, supra.* We hold that the trial court was correct and reverse the Court of Appeals on this issue. The Court of Appeals reasoned that because the initial search was justified, the subsequent search was not an unreasonable intrusion. Relying on *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), *reh. denied,* 400 U.S. 856, 91 S.Ct. 23, 27 L.Ed.2d 94 (1970), and *Texas v. White,* 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209 (1975), *reh. denied,* 423 U.S. 1081, 96 S.Ct. 869, 47 L.Ed.2d 91 (1976), the Court held that exigent circumstances present at the time of the initial search, do not need to be independently established at the time of the delayed search at the stationhouse. We do not agree that the rationale used in those cases is applicable to the facts of this case. At the time of the initial stop, arrest and search of the defendant, the officer had no reason to believe that the defendant may have committed any crimes other than exhibition driving, driving while intoxicated and possession of contraband. There was no reason to suspect the defendant of having evidence relating to burglary or homicide until he was taken to the police station. When the stationhouse search of the car was conducted, it was for the purpose, in one officer's mind, of finding evidence relating to the murder. This intrusion was different in scope from the initial intrusion at the scene, so it cannot be justified on that basis. *Compare Preston v. United States,* 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964) with *Chambers v. Maroney, supra,* 399 U.S. at 47, 90 S.Ct. at 1979.

While there may have been probable cause to search the car at the station, there were no exigent circumstances. It is clear that probable cause alone is not enough, in most circumstances, for a valid search. Probable cause must be coupled with a warrant or exigent circumstances in order to justify a search. *See Arkansas v. Sanders,* 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979). Here, the defendant was incarcerated and the car was in the custody and control of the police. Probable cause to search for evidence relating to the homicide was not present until that time. There is no reason, under this set of facts, not to interpose a neutral and detached

magistrate between the police and a person whose rights must be protected. This search of defendant's car, however, did not produce any evidence.

On the following day, a second warrantless search of the car was made. Two speakers which had been seen previously, and which were suspected of having been stolen from the Sanchez home were seized along with some related items. The trial court found this search and seizure unreasonable, but was reversed by the Court of Appeals. We reverse the Court of Appeals on this issue as well. The Court of Appeals justified this search with the plain view exception to the warrant requirement. However, plain view alone is not enough. Additional requirements are that the officers be lawfully in the position from which they observe the evidence, that they discover it inadvertently, and that the incriminating nature be immediately apparent. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), *reh. denied*, 404 U.S. 874, 92 S.Ct. 26, 30 L.Ed.2d 120 (1971); *United States v. Berenguer*, 562 F.2d 206 (2d Cir. 1977). Here, at the time the speakers were first seen, their incriminating nature was not apparent, and at the time they were seized, the discovery was no longer inadvertent. The speakers, and anything else discovered as a result of this search should be suppressed as evidence. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

The harm complained of, however, was not that the speakers were introduced as evidence at trial, but that they were a basis for a search warrant being issued for defendant's home. After reading the affidavits for the search warrant, it is our judgment that there remained sufficient independent cause for the warrant to have issued. Even if the particular items seized from the car, and anything connected with them had not been included as reasons in support of the warrant, it still could have been validly issued. The affidavit contained information that defendant had been arrested for three burglaries where property was recovered from him and those he sold it to; that he was implicated in three more burglaries; that a footprint matching defendant's shoe was found next to a purse taken from the Taylor residence; that keys taken from the Taylor residence were found at the point of entry of the Nelson burglary and homicide; and that defendant was identified by reliable persons as being in the area prior to the burglary. This information alone was sufficient for the issuance of the search warrant. The only supporting factor which could not have been used was that "items taken in [the Sanchez] burglary were found in Mike Luna's car." Those items, being the speakers which were illegally seized, could not have been used in support of the warrant. The liquor bottle, also stolen in the Sanchez burglary, was seized validly and could have been properly used. Thus the search of the defendant's home was valid, and the items seized therefrom not suppressable.

II. The defendant claims that the trial court abused its discretion in denying defendant's motion for a bifurcated trial. He argues that when an insanity defense is raised, the trial court, in order to avoid a violation of a defendant's fifth amendment rights and due process rights, should separate the issue of insanity from the issue of guilt. In order to effectively present his defense of insanity, the defendant argues, he had to introduce evidence of prior acts and self-incriminating statements made to psychologists and psychiatrists. He further argues that an admonition to the jury that such evidence should not be used on the issue of guilt is insufficient, so the trial should be divided into two stages. In one stage the jury would determine whether the defendant was sane at the time of the offense and whether he was capable of forming a specific intent. The other stage of the trial would be for the determination of whether the defendant committed the physical acts. The same jury could be used for both stages, or separate juries could be used, depending on which stage comes first.

We agree that there may be circumstances where a bifurcated trial might be preferable to an ordinary trial. We are

not willing to hold, however, that due process requires bifurcation. *See Higgins v. United States*, 130 U.S.App.D.C. 331, 401 F.2d 396 (D.C.Cir.1968); *Holmes v. United States*, 124 U.S.App.D.C. 152, 363 F.2d 281 (D.C.Cir.1966). Moreover, a bifurcated trial may itself, in some circumstances, violate a person's due process rights where an ordinary trial would not. *State v. Shaw*, 106 Ariz. 103, 471 P.2d 715 (1970), *cert. denied*, 400 U.S. 1009, 91 S.Ct. 569, 27 L.Ed.2d 622 (1971); *Sanchez v. State*, 567 P.2d 270 (Wyo.1977); *contra, Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952). We hold, on this issue, that until our Rules of Criminal Procedure for the District Courts are amended to accommodate for such a change in the order of a trial, the order prescribed by Rule 40 of the Rules of Criminal Procedure for the District Courts should be followed. N.M.R.Crim.P. 40, N.M.S.A.1978.

III. The defendant's next claim is that the trial court committed reversible error by not allowing lay witnesses to give their opinion as to defendant's sanity. We do not agree. The witnesses, two cellmates and an acquaintance of defendant, were allowed to testify before the jury as to their observations of defendant's behavior. This Court has held that the opinion testimony of laymen may be received on the question of insanity, in the court's discretion, based upon the opportunity and knowledge of the witness to form an opinion. *State v. Lujan*, 87 N.M. 400, 534 P.2d 1112 (1975) *cert. denied*, 423 U.S. 1025, 96 S.Ct. 469, 46 L.Ed.2d 400 (1975), *see* N.M.R.Evid. 701, N.M.S.A.1978. We find no abuse of discretion on the part of the trial court, which based upon the evidence, could have properly ruled that the witnesses did not have a sufficient basis on which to form an opinion, or that their opinion would not have been helpful to a clear understanding of the issue.

IV. The defendant also argues that the trial court committed reversible error by failing to instruct the jury on the defendant's theories of the case. The defendant tendered an instruction stating that even if he was found sane at the time of the crime, the jury must still determine whether he had an ability to form an intent to commit the underlying felony. *See* N.M. U.J.I.Crim. 41.00, Use Note 4, N.M.S.A. 1978. Though this may be a correct statement of the law, the matter was adequately covered by other instructions given which unambiguously instructed on intent to commit aggravated burglary. N.M.U.J.I.Crim. 16.22 N.M.S.A.1978. Under the circumstances of this case, we are of the opinion that the tendered instruction could not have been beneficial, in any way, to the defendant, particularly when considered by a jury of lay people. The refusal to give the requested instruction was not error. *See State v. Valenzuela*, 90 N.M. 25, 559 P.2d 402 (1976).

Defendant argues that an instruction on diminished capacity should have been given. N.M.U.J.I.Crim. 41.11, N.M.S. A.1978. The record, however, does not contain any evidence which reasonably tends to show that defendant's claimed intoxication rendered him incapable of acting in a purposeful way. The tendered instruction was properly refused. *State v. Gardner*, 85 N.M. 104, 509 P.2d 871 (1973), *cert. denied* 414 U.S. 851, 94 S.Ct. 145, 38 L.Ed.2d 100 (1973).

V. Defendant's next claim is that the trial court committed reversible error by failing to direct a verdict of not guilty by reason of insanity as to the felony-murder charge. We disagree with this claim for two reasons. First, the necessary *mens rea* for first-degree murder is presumed where the underlying felony is inherently or foreseeably dangerous to human life. *State v. Harrison*, 90 N.M. 439, 564 P.2d 1321 (1977). There was sufficient evidence that the defendant could form the intent to commit aggravated burglary, and the jury found that he did have the requisite intent. Secondly, the record contains conflicting evidence as to the defendant's sanity at the time the stabbing was initiated. There was testimony that defendant knew his acts could kill Ms. Nelson, that he knew his actions were wrong, and that he

could have stopped himself from stabbing her. This evidence was sufficient to allow the issue of defendant's sanity to go to the jury. If the defendant could have stopped himself from stabbing the victim, knew the nature and quality of his act and knew that it was wrong, the jury could find the defendant sane. *State v. White*, 58 N.M. 324, 270 P.2d 727 (1954). The test for insanity is not whether the defendant is incapable of terminating his wrongful act. The trial court acted properly in allowing the jury to consider the issue.

VI. The defendant's next claim is that the trial court committed reversible error by refusing to instruct the jury on the consequences of a verdict of not guilty by reason of insanity. In *State v. Chambers*, 84 N.M. 309, 502 P.2d 999 (1972), this Court held that it was not error for a court to refuse to give such an instruction to the jury. Defendant asks that we overrule that case, but we decline to do so. We are of the opinion that "[t]he tendered instruction presented an irrelevant issue for consideration by the jury." *Id.* at 310, 502 P.2d at 1000.

VII. The defendant's final contention is that certain of the trial court's errors had a cumulative effect amounting to the absence of a fair trial. We disagree on the basis that any cumulative effect was slight in comparison with the evidence of guilt which was properly admitted. The claimed errors did not contribute to the conviction. *State v. Thurman*, 84 N.M. 5, 498 P.2d 697 (Ct.App.1972).

For the foregoing reasons the Court of Appeals is reversed and the trial court affirmed as to the warrantless searches of the automobile at the police station. We further find, however, that suppressing said evidence obtained and deleting it from the affidavit for the issuance of a search warrant of the defendant's home would not have led to the denial of the issuance of the search warrant. The claimed errors, therefore, not being prejudicial, and the defendant having been accorded a fair trial, the judgment of conviction is affirmed.

PAYNE and FEDERICI, JJ., concur.

606 P.2d 191

James T. FORRESTER, Plaintiff-Appellant,

v.

Samuel B. PARKER and the Chaves County Community Action Program, Inc., Defendants-Appellees.

No. 12546.

Supreme Court of New Mexico.

Feb. 11, 1980.

Kenneth B. Wilson, Roswell, for plaintiff-appellant.

Atwood, Malone, Mann & Cooter, Randal W. Roberts, Roswell, for defendants-appellees.

OPINION

EASLEY, Justice.

Forrester appeals the entry of summary judgment against him in his suit alleging

that he was unlawfully discharged from defendant Chaves County Community Action Program, Inc. (CAP) by Parker. We reverse.

At issue is whether CAP's personnel policy guide controlled the employee-employer relationship. The trial court held that it did not because Forrester was an employee at will who could be discharged even without cause. Therefore, Parker did not have to comply with the personnel policy guide's guidelines when terminating Forrester.

At the time Forrester started employment with CAP, this personnel policy guide was in effect. As provided by this guide, Forrester went through a probationary period, during which time he could have been discharged without cause. At the end of the probationary period, he was notified in writing that he had successfully completed it. Between March 1975 and March 1977, Forrester worked as a full time CAP employee. The letter of termination Forrester received in March 1977 recited that he was being terminated pursuant to paragraph XIX of the personnel policy guide. Parker stated in his deposition that the guide's general goal and purpose was as a "guide in giving directions to the staff, and it is something they can refer to as something like a standard operating procedure, so far as policy is concerned." Forrester alleges that his termination did not comport with the procedures spelled out in the guide.

We think it clear that under these circumstances the guide did control the employee-employer relationship here in question. Forrester should have and did expect Parker to conform to the procedures for terminating him as spelled out in the guide. For the guide constituted an implied employment contract; the conditions and procedures provided in it bound both Forrester and Parker. The words and conduct of the parties here gave rise to this implied contract. *Trujillo v. Chavez*, 76 N.M. 703, 417 P.2d 893 (1966); *Roan v. D.W. Falls, Inc.*, 72 N.M. 464, 384 P.2d 896 (1963).

The trial court was wrong as a matter of law in holding that the personnel policy guide did not control the employee-employer relationship between Forrester and Parker/CAP. We do not address whether or not the procedures provided in the guide were complied with; only on the basis of a full evidentiary hearing or trial can that determination be made.

We reverse and remand.

IT IS SO ORDERED.

SOSA, C. J., and FELTER, J., concur.

606 P.2d 192

STATE of New Mexico,
Plaintiff-Appellee,

v.

Dan O. BARBER, Defendant-Appellant.

No. 3966.

Court of Appeals of New Mexico.

Oct. 25, 1979.

J. E. Casados, Gallagher, Casados & Martin, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Sammy Lawrence Pacheco, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

ANDREWS, Judge.

Defendant was convicted on charges of extortion, in violation of § 30–16–9, N.M.S.A. 1978, and battery, in violation of § 30–3–4, N.M.S.A. 1978.

Three issues are presented for review on appeal:

A. Whether there is sufficient evidence to support the defendant's conviction on extortion;

B. Whether the trial court erred in submitting an instruction on extortion in light of the defendant's claim that there was insufficient evidence of extortion;

C. Whether the trial court erred in refusing the defendant's instruction defining "threat".

On October 17, 1977, the victim, William Harris, entered into a lease with the defendant, Dan O. Barber, for the rental of commercial space in an Albuquerque shopping center. Harris began his business, selling mopeds, during the first week of November, and, although he remained "current" in his monthly rental payments, by the following summer he recognized that the moped business was not doing well. Harris then decided to move to a different location which offered more favorable rental terms. The defendant first learned of the victim's intended move while on a trip

out of town and when he returned to work several days later he summoned Harris to his office for a meeting.

When Harris entered the office, the defendant asked him to sit down in a "peaceful" tone of voice, but the defendant quickly became agitated and accused Harris of skipping out on the lease and cheating the defendant out of the rent. Harris protested but the defendant called the explanation a lie. Without any provocation, the defendant struck the victim on the right side of the forehead causing him to fall and sustain lacerations on the back of the head and on the chin. The victim fell within the opening of a nearby credenza and, when he attempted to crawl to the other side, he was crudely ordered to return to his chair by the defendant. He complied with this order, resumed his seat, felt the lump on his head and asked to be taken to the hospital. The defendant replied, "you are not going anywhere until you sign this piece of paper. You are going to sell me five mopeds."

The piece of paper referred to was a previously prepared agreement which released the victim from his rental obligation totalling $1,735, in exchange for five mopeds, with an approximate wholesale value of $2000. Harris and Barber discussed the agreement and Harris again requested that he be taken or be allowed to leave to drive to the hospital. The defendant then stated, "sit down, you are going to be alright—I'll be right back." The defendant then left the room and returned shortly with an ice pack and several paper towels for the victim's injuries. During the defendant's absence, the victim stated that he was too scared to leave, and when the defendant returned he became very red in the face, very angry. He started "screaming", "yelling" and "ranting", and when Harris thought he would be hit again, he signed the agreement. Barber dictated a release which purported to absolve him of all liability for injuries resulting from the battery which Harris wrote out and signed. The defendant then ordered Harris to unlock his store and the defendant removed the five mopeds.

I. *Sufficiency of the evidence.*

Defendant contends that the jury should not have been instructed as to the elements of extortion, *see Smith v. State*, 89 N.M. 770, 558 P.2d 39 (1976), and that a directed verdict of acquittal on the extortion count should have been entered upon defendant's motion at the close of the State's case. Both of these claims turn on the sufficiency of the evidence which was adduced at trial, and thus we will treat them together. The crime of extortion is defined as follows:

> Extortion consists of the communication or transmission of any threat to another by any means whatsoever with intent thereby to wrongfully obtain anything of value or to wrongfully compel the person threatened to do or refrain from doing any act against his will.
>
> Any of the following acts shall be sufficient to constitute a threat under this section:
>
> A. a threat to do an unlawful injury to the person or property of the person threatened or of another. § 30–16–9, *supra.*

The jury was instructed to N.M.U.J.I. Crim. 16.32, N.M.S.A. 1978, as follows:

> For you to find the defendant guilty of extortion as charged in Count I, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The defendant threatened to injure the person of William Harris, intending to obtain a thing of value, title to five mopeds, from William S. Harris.
>
> 2. This happened in New Mexico on or about the 20th day of July, 1978.

The defendant claims an insufficiency of the evidence to support the charge. The defendant makes two initial suggestions: that the crime actually committed was robbery, not extortion; and that the case should never have been in criminal court because it was purely a civil matter. These suggestions are meritless. Our review is whether the evidence is sufficient to support the verdict on the charge actually submitted to the jury—not whether the evi-

dence supports other crimes or legal remedies. In making this review, this Court will review the evidence in the light most favorable to the judgment entered, will resolve all conflicts and indulge all inferences in support of the judgment, and will not weigh the credibility of the witnesses nor the evidence. *State v. Lankford*, 92 N.M. 1, 582 P.2d 378 (1978); *State v. Driscoll*, 89 N.M. 541, 555 P.2d 136 (1976); *State v. Day*, 91 N.M. 570, 577 P.2d 878 (Ct.App.1978).

The defendant claims that the evidence (1) fails to show that a threat was made to induce the release of the mopeds; (2) fails to show that the victim consented to the transfer; and (3) fails to establish that Barber made an oral or written threat, the evidence showing only that he made threatening actions. A review of the facts recited above establishes that Harris signed the agreement to sell the mopeds under the threat of further physical injury. Mr. Harris testified:

> I started to say let's talk about this (the agreement). He became very red in the face, very angry, he started screaming, yelling and was ranting. I had no idea what he was really saying. He was very close to me, grabbed my lapel and I thought he was going to hit me again. At that point, I said, I'll sign anything, I'll sign. I'll sign anything you want.

There was substantial evidence of threat to injure.

Next, the defendant contends that the consent of the victim is the element which distinguishes extortion from the crime of robbery. Further, the defendant states that the consent of the victim was lacking in this case. The focus is on Mr. Harris' testimony during cross-examination.

> Question: Mr. Harris, did you turn over the mopeds willingly?
>
> Answer: No, I did not.
>
> Question: Did you consent to Mr. Barber's taking the mopeds?
>
> Answer: No, I did not consent to it.

It seems clear that the language of the New Mexico extortion statute does not require a showing of a "consented to taking". *Compare People v. Peck*, 43 Cal.App. 638, 185 P. 881 (1917)—interpreting a statute defining extortion to be "the obtaining of property from another, with his consent, induced by a wrongful use of force or fear." *See also Commonwealth v. Burdell*, 380 Pa. 43, 110 A.2d 193 (1955). The difference between the statute in *People v. Peck, supra*, and the New Mexico statute is obvious. Section 30–16–9, *supra*, does not require the victim's consent.

Finally, defendant asserts that the threat which gives rise to the extortion may be either written or oral but that there is "no authority that the threat may be by actions." The defendant concludes that when the threat is made by actions, the crime committed is robbery, not extortion.

This argument, which focuses on the type of threat to distinguish robbery vis-a-vis extortion, is unpersuasive. The short answer is that the New Mexico extortion statute is not so limited as he suggests. The statute embraces "communication or transmission of any threat to another by any means whatsoever." § 30–16–9, *supra*. This broad language includes both written and oral threats and also includes actions constituting threats. *Accord United States v. Spears*, 568 F.2d 799 (10th Cir. 1978) interpreting 18 U.S.C. § 894 which prohibits collecting or attempting to collect extensions of credit by extortionate means; *People v. Maranian*, 359 Mich. 361, 102 N.W.2d 568 (1960). The type of threat made is not determinative of the crime committed. Extortion can be committed where the threat is by action.

As we have shown, defendant's arguments concerning the distinction between robbery and extortion have disregarded the statutory language in New Mexico. Robbery, as defined in § 30–16–2, N.M.S.A. 1978, is an aggravated form of larceny. *State v. Puga*, 85 N.M. 204, 510 P.2d 1075 (Ct.App.1973). Robbery requires a taking. N.M.U.J.I. Crim. 16.10, N.M.S.A. 1978. Extortion, as defined in § 30–16–9, *supra*, does not require a taking, but requires a "threat . . . with intent thereby to wrongfully

obtain anything of value or to wrongfully compel the person threatened to do or refrain from doing any act against his will." Defendant need not have actually taken the mopeds to have committed extortion. The victim need not have signed the agreement for defendant to have committed extortion. These items are evidence of defendant's intent to wrongfully obtain a thing of value; in themselves, they were not elements of the crime of extortion in New Mexico. The extortion was a completed crime when defendant's threat was communicated to the victim with the requisite statutory intent.

II. *Instruction on the Essential Elements of Extortion.*

Because the evidence was sufficient for the charge of extortion to go to the jury, the defendant's argument that N.M.U.J.I. Crim. 16.32, N.M.S.A. 1978, should not have been given is without merit.

III. *Instructions on "threat".*

Under this point on appeal, the defendant argues that the trial court committed reversible error in refusing the defendant's requested instruction which defined the term "threat". The instruction tendered stated as follows:

> "Threat" means a declaration of intention or determination to inflict punishment, loss or pain on another, or to injure another by the commission of some unlawful act.

In order to premise error on the refusal of the trial court to instruct, the defendant must tender a legally correct statement of the law. *State v. Robertson*, 90 N.M. 382, 563 P.2d 1175 (Ct.App.) *cert. denied*, 90 N.M. 636, 567 P.2d 486 (1977); *State v. Dutchover*, 85 N.M. 72, 509 P.2d 264 (Ct.App.1973). As discussed above, the threat which induced the victim to part with his property need not be written or verbally communicated. The tendered instruction refers to "a declaration of intention" and thus implies that the jury should consider only those threats verbally communicated. But the threat which results from a victim's reasonable fear of additional violence after he has once been beaten is sufficient. The tendered instruction was an incorrect statement of the law and would only have served to confuse the jury. Thus, the requested instruction was properly refused.

Finding no error, the conviction is affirmed.

IT IS SO ORDERED.

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

606 P.2d 196

Gil CANDELARIA, Plaintiff-Appellant,

v.

Ira ROBINSON and Robert Singer, Defendants-Appellees.

No. 4017.

Court of Appeals of New Mexico.

Jan. 3, 1980.

James L. Brandenburg, Albuquerque, for plaintiff-appellant.

Stephen M. Williams, Shaffer, Butt, Thornton & Baehr, Albuquerque, for Ira Robinson.

Robert M. Strumor, Santa Fe, Coors, Singer & Stratton, P. A., Albuquerque, for Robert N. Singer.

OPINION

WOOD, Chief Judge.

Claiming defamation, three counts of the complaint sought damages from Singer and Robinson. These counts were dismissed on the basis that the alleged defamation was absolutely privileged. Plaintiff appeals. We (1) identify the immunity (privilege)

claims applicable to this case, (2) discuss the procedural posture of the appeal, and (3) discuss the duties of Singer and Robinson.

Applicable Immunity Claims

Velton (we use plaintiff's spelling) was murdered in February, 1974. The four defendants in *State v. Morrison*, Sup.Ct. No. 10084, were convicted of the murder. Subsequent proceedings resulted in the convictions being set aside and in the discharge of these four defendants. Lee was charged with the Velton murder in January, 1978. He was convicted of second degree murder with firearm enhancement. Sentence was imposed June 16, 1978. Lee's conviction was affirmed by memorandum opinion in *State v. Lee*, (Ct.App.) No. 3687 decided February 22, 1979.

The events referred to in plaintiff's complaint took place after the discharge of the four defendants in *State v. Morrison*, supra, and after the conviction of Lee.

The count against Singer alleged that in August and September, 1978, at the request of District Attorney Robinson, Singer prepared a report "regarding the investigation of the WILLIAM VELTON murder case in 1974"; that Singer submitted this report to Robinson; that statements by Singer in the report defamed plaintiff. One of the counts against Robinson alleged that Robinson wrote a letter to the sheriff on September 21, 1978. A copy of this letter was attached to the complaint. The letter quoted a portion of Singer's report, referred to plaintiff's investigation of the Velton case as "highly improper gestapo-type tactics," agreed with Singer that plaintiff "could not be prosecuted" due to the statute of limitations, and recommended that plaintiff's employment with the sheriff's department "be terminated immediately." This count alleged that Robinson's letter to the sheriff defamed plaintiff. The second count against Robinson alleged that comments made by Robinson at a "press conference" on September 14, 1978, defamed plaintiff.

There is no issue in this appeal concerning the sufficiency of pleading defamation; rather, the issues involve the immunity of Singer and Robinson. The trial court ruled that the alleged defamation was "absolutely privileged as a matter of law, and the New Mexico Tort Claims Act prohibits this suit . . . ." *Salazar v. Bjork*, 85 N.M. 94, 509 P.2d 569 (Ct.App.1973) stated that "immunity" is a more precise description than "privilege" in describing the protection afforded in this case. See *Franklin v. Blank*, 86 N.M. 585, 525 P.2d 945 (Ct.App.1974).

The trial court's ruling was in two parts: 1) an absolute immunity as a matter of law, and 2) immunity under the Tort Claims Act, §§ 41–4–1 through 41–4–25, N.M.S.A.1978 (Supp.1979).

The ruling of absolute immunity as a matter of law involves the concepts of judicial immunity and executive immunity. Judicial immunity is involved because the office of district attorney is a quasi-judicial office. *Ward v. Romero*, 17 N.M. 88, 125 P. 617 (1912). Executive immunity is involved because the office of district attorney has duties which cannot be properly classified as quasi-judicial. See § 36–1–18(B) and (C), N.M.S.A.1978.

The ruling of absolute immunity as a matter of law also involves the concepts of absolute immunity and qualified immunity. Robinson was the district attorney and Singer was his special assistant. On the basis of these positions, Robinson and Singer contend they have an absolute immunity; plaintiff contends their immunity is qualified. Involved in this aspect of the immunity argument is the fact that Robinson and Singer are attorneys; they claim an absolute privilege on that basis as well as on the basis of their official positions.

Attorney immunity is not involved. Absolute immunity is accorded to attorneys for defamation reasonably related to communication preliminary to, in the institution of, or during the course and as a part of judicial proceedings in which the attorney participates as counsel. *Romero v. Prince*, 85 N.M. 474, 513 P.2d 717 (Ct.App. 1973). This immunity does not apply to defamation on the attorney's part which occurs after final disposition of the judicial proceeding. Prosser, Law of Torts (4th ed.

1971) page 780. There is nothing indicating the alleged defamation involved judicial proceedings; the only showing is to the contrary. The alleged defamation occurred after the Lee conviction in 1978, involved the 1974 investigation of the Velton murder and, according to Robinson's letter, occurred after any criminal offense by plaintiff was barred by the statute of limitations.

It is unnecessary to determine whether the immunity involved in the first part of the trial court's ruling was judicial, executive, absolute or qualified. No immunity under these categories is involved unless the alleged defamation occurred during the performance of some duty by Robinson and by Singer. Restatement of The Law, Torts 2d (1977), §§ 585, 591, 593; see *Adams v. Tatsch*, 68 N.M. 446, 362 P.2d 984 (1961); *Mahona-Jojanto, Inc., N. S. L. v. Bank of New Mexico*, 79 N.M. 293, 442 P.2d 783 (1968); *Salazar v. Bjork*, supra; *Neece v. Kantu*, 84 N.M. 700, 507 P.2d 447, 60 A.L.R.3d 1030 (Ct.App.1973). Compare *Torres v. Glasgow*, 80 N.M. 412, 456 P.2d 886 (Ct. App.1969).

Section 41–4–4, supra, was amended in 1978 and this amendment was in effect at the time of the defamation alleged in the complaint. As amended, § 41–4–4(A) provided:

> A governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by Sections 41–4–5 through 41–4–12 NMSA 1978.

The only waiver section, remotely applicable, was § 41–4–12, supra, which pertains to law enforcement officers. Neither Robinson nor Singer was a "law enforcement officer" as that term is defined in § 41–4–3(D), supra. Robinson and Singer were public employees under § 41–4–3(E), N.M.S.A.1978.

"[I]mmunity from liability for any tort" § 41–4–4(A), supra, applies to Robinson and Singer if their alleged defamation occurred "while acting within the scope of duty . . . ." Section 41–4–3(F), supra, states:

> "[S]cope of duties" means performing any duties which a public employee is requested, required or authorized to perform by the governmental entity regardless of the time and place of performance[.]

If either Robinson or Singer was acting within the scope of his duty as a public employee at the time of his alleged defamation, he is immune from liability under the Tort Claims Act regardless of any other immunity afforded to a district attorney or assistant district attorney. The question of judicial, executive, absolute or qualified immunity need not be decided because in this case, such immunity involves no duty different than the duty defined in the Tort Claims Act.

The applicable immunity claim, in this case, is the immunity provided by the Tort Claims Act. This holding is not to be taken as a suggestion that the converse is true. Section 41–4–2(A), supra, limits the liability of public employees; however, § 41–4–14, supra, preserves "any defense available . . . ."

The Procedural Posture

At oral argument, counsel agreed that depositions included in the record were not before the trial court, that the defamation counts were dismissed for failure to state a claim upon which relief can be granted. Rule of Civ.Proc. 12(b)(6). In considering such a motion, all facts well pleaded must be accepted as true; the motion may be granted only when the plaintiff cannot be entitled to relief under any state of facts provable under the claim. *Runyan v. Jaramillo*, 90 N.M. 629, 567 P.2d 478 (1977).

Robinson points out that the complaint "alleges no tort committed by Ira Robinson outside the scope of his duties." Robinson seems to assert that the absence of such an allegation brings the complaint within the immunity of the Tort Claims Act. We disagree. Immunity is a defense. *Prosser*, supra, page 776. Plaintiff was not required to anticipate this defense. *Jamison v. McMillen*, 26 N.M. 231, 190 P. 726 (1920); *Pople v. Orekar*, 22 N.M. 307, 161 P.

1110 (1916); see Rule of Civ.Proc. 8(a) and (c).

Plaintiff asserts the complaint contains no allegation that Robinson and Singer "were acting within the scope of their duties at the time the remarks and statements were made." On the basis of an absence of allegations concerning the duties of Robinson and Singer, plaintiff asserts that there was no basis for an immunity ruling and no basis for a ruling that the defamation allegations failed to state a claim upon which relief could be granted. We agree only in part with this contention. The specific allegations of the complaint are discussed in the next point.

Duties of Singer and Robinson

A. Singer

The complaint alleges that Robinson was the district attorney, that Singer "acting as a Special Assistant District Attorney . . prepared a report at the request of . . [Robinson] regarding the investigation of the . . . [Velton] murder case in 1974 and this report was submitted to . . . [Robinson]." Singer's alleged defamation was based on statements made by Singer in the report.

The district attorney may appoint assistant district attorneys and assign their duties. Section 36–1–5, N.M.S.A.1978. The allegation that Singer was a "special" assistant district attorney has no legal significance in this case. *Petition of Dusablon*, 126 Vt. 362, 230 A.2d 797 (1967).

Taking the allegations of the complaint as true, *Runyan v. Jaramillo*, supra, the complaint alleged that while acting as an assistant district attorney, Singer prepared his report at the request of Robinson and submitted the report to Robinson. This was an allegation that Singer's report was requested or authorized by the district attorney; this was an allegation that in preparing and submitting the report, Singer acted within the scope of his duty. See § 41–4–3(F), supra. Under the allegations of the complaint, Singer was immune from liability for his alleged defamation. Section 41–4–4(A), supra.

B. District Attorney Duties

The Constitution and statutes "prescribe and delimit" the authority of the district attorney. *State v. Reese*, 78 N.M. 241, 430 P.2d 399 (1967). Pertinent statutory duties of the district attorney, stated in § 36–1–18, N.M.S.A.1978 are:

> A. prosecute and defend for the state in all courts of record of the counties of his district all cases, criminal and civil, in which the state or any county in his district may be a party or may be interested;
>
> * * * * * *
>
> C. advise all county and state officers whenever requested[.]

N.M.Const., art. VI, § 24 states the district attorney "shall be the law officer of the state and of the counties within his district . . . ."

In connection with the powers of the state police board, *Winston v. New Mexico State Police Board*, 80 N.M. 310, 454 P.2d 967 (1969), it was held "that the authority of the agency is not limited to those powers expressly granted by statute, but includes, also, all powers that may fairly be implied therefrom." A similar rule of implied authority applies to district attorneys. New Mexico district attorneys' constitutional and statutory duties include duties incidental and necessary to the discharge of duties prescribed by the Constitution or statutes. *Withee v. Lane & Libby Fisheries Co.*, 120 Me. 121, 113 A. 22 (1921); *Adams v. State*, 202 Miss. 68, 30 So.2d 593 (1947).

The district attorneys' statutory duty to prosecute criminal cases includes the duty to investigate to determine whether a criminal charge should be filed; " 'it is his duty to inquire into the facts . . .' " *Adams v. State*, supra; *Hall v. State*, 136 Fla. 644, 187 So. 392 (1939).

The district attorney's request to Singer, acting as an assistant district attorney, to report on the investigation of the Velton murder was within the scope of the district attorney's duty stated in § 36–1–

18(A), supra. But no issue is made of this; the question of the scope of the district attorney's duty involves the district attorney's use of the report.

C. Robinson's Letter to the Sheriff

Robinson's letter to the sheriff quoted portions of Singer's report and referred to plaintiff's use of "highly improper gestapo-type tactics" in investigating the Velton murder. The letter agreed with Singer that plaintiff could not be prosecuted due to the statute of limitations. The letter recommended that plaintiff be terminated immediately. Was this letter in the scope of the district attorney's duty? Yes.

Section 36–1–18(C), supra, makes it the duty of the district attorney to advise the sheriff "whenever requested[.]" There being nothing indicating the sheriff requested the advice in Robinson's letter, we do not consider the statutory provision further.

The Constitution designates the district attorney as the "law officer" of his district. What are the duties of a law officer? They are not defined in the New Mexico Constitution or statutes. Webster's Third New International Dictionary (1966) defines "law officer" as "a public official employed to administer or advise in legal matters[.]" *Withee v. Lane & Libby Fisheries Co.*, supra, indicated that the duties of an attorney general as chief law officer included the exercise of all power and authority as the public interest may require in the absence of express legislative restriction to the contrary. We do not suggest that a district attorney, as law officer, has the powers indicated for the attorney general in *Withee* because the statement in *Withee* is based on common law powers non-existent in New Mexico. *State v. Reese*, supra. *Withee* does, however, indicate that as law officer, the district attorney may take action in the public interest. *State ex rel. Jacobs v. Sherard*, 36 N.C.App. 60, 243 S.E.2d 184 (1978) suggests a district attorney has an implied duty to act as an "advocate of the State's interest in the protection of society."

The letter stating the investigation's conclusion as to plaintiff's conduct, stating the conclusion that the statute of limitations had run on any prosecution and recommending that plaintiff be terminated, was incidental to the district attorney's duty as law officer to advise on legal matters in the public interest and in the protection of society.

The recommendation for termination, stated in the letter, was made "as Chief Law Officer of Bernalillo County[.]" Plaintiff attached the letter to his complaint as an exhibit and thus made it a part of his pleading. The complaint showing that the letter was written as law officer and the letter being incidental to the duties of a law officer, the letter was authorized and within the "scope of duty" defined in § 41–4–3(F), supra. Robinson was immune from liability for the alleged defamation in the letter. Section 41–4–4(C), supra.

D. Robinson's Press Conference

Adams v. Tatsch, supra, quotes with approval from *Matson v. Margiotti*, 371 Pa. 188, 88 A.2d 892 (1952). The quotation is to the effect that an attorney general is immune from liability for defamatory remarks made at a press conference because it was in the public interest to permit the attorney general " 'to keep the public advised of his official acts and conduct where such actions are . . . within the scope of his official duties or powers.' " Thus, if the defamatory remarks occurred at a press conference advising of action taken by the attorney general within the scope of his official duties, the remarks also occurred within the scope of the attorney general's duties. This approach, which involves informing the public of action taken within the scope of duty, is applicable to the district attorney's press conference. To the extent Robinson's press conference informed the public of action taken within the scope of the district attorney's duties, Robinson was immune from liability for alleged defamation at the press conference.

Plaintiff's complaint does not allege what Robinson stated at the press conference.

We do not know whether the press conference involved Singer's report, the letter to the sheriff, or other matters. Nor do we know in what context the alleged defamatory remarks were made. Inasmuch as the issue is the propriety of dismissing the complaint for failure to state a claim upon which relief can be granted, and inasmuch as immunity from liability for the press conference remarks cannot be determined from the complaint, dismissal of this claim was improper. There being nothing showing that Robinson's press conference remarks were immune, plaintiff could be entitled to relief under this claim.

The order dismissing the claim against Singer is affirmed. The order dismissing the defamation claim based on Robinson's letter to the sheriff is affirmed. The order dismissing the defamation claim based on Robinson's press conference remark is reversed. The cause is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

SUTIN, J., concurring in part and dissenting in part.

SUTIN, Judge (Concurring in Part and Dissenting in Part).

I concur and dissent.

Based solely on defendant's motion to dismiss for failing to state a claim, the trial court found:

> [T]hat the comments, remarks and statements of the defendants . . . are absolutely privileged as a matter of law, and the New Mexico Tort Claims Act prohibits this suit against defendants . . . .

The trial court entered an Order:

> [T]hat the Second, Third and Fourth Causes of Action in plaintiff's Complaint are dismissed with prejudice and that defendants . . . are dismissed with prejudice.

Dismissed with prejudice means that plaintiff cannot state a claim for relief under any set of facts. I disagree.

Under the Tort Claims Act, immunity is granted defendants if their acts or conduct were done within the scope of their duties.

The second count alleged that Singer "prepared a report at the request of the Defendant, IRA ROBINSON, regarding the investigation." Under this allegation, Singer's report was prepared in the scope of his duties. After the Order was entered dismissing Count II, plaintiff learned by way of Singer's deposition that the final report was not mentioned in his contract or his appointment as an assistant to the district attorney or the attorney general. In other words, if plaintiff could amend his Count II and allege that the district attorney did not request the investigatory report, that it was prepared outside the scope of his duties, plaintiff would state a claim for relief under the Tort Claims Act, and the disclosed contents of the report would not grant Singer absolute immunity.

As to Singer, the Order of the District Court should be reversed.

I concur in the remainder of the majority opinion.

606 P.2d 203

LOVELACE CENTER FOR the HEALTH SCIENCES, a non-profit corporation, Plaintiff-Appellee-Cross-Appellant,

v.

George W. BEACH, Tax Assessor of Bernalillo County, Board of County Commissioners of Bernalillo County and Timothy Eichenberg, Treasurer, Bernalillo County, Defendants-Appellants-Cross-Appellees.

No. 3931.

Court of Appeals of New Mexico.

Jan. 3, 1980.

Pedro G. Rael, Asst. Co. Atty., Albuquerque, for defendants-appellants-cross-appellees.

Jeffrey W. Loubet, Joe R. G. Fulcher, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for plaintiff-appellee-cross-appellant.

OPINION

WOOD, Chief Judge.

Plaintiff sought a refund of property taxes paid for 1976 and 1977 on the basis that the property involved was constitutionally exempt from taxation. Plaintiff also asked that defendants be enjoined from assessing, collecting or attempting to collect real property tax against the property involved in future years so long as the constitutional exemption applied. The trial court ordered a refund for the 1977 tax year and granted the injunction. Defendants appeal this ruling. The trial court denied a refund for 1976 on the basis that the refund claim was untimely; plaintiff appeals this ruling. We discuss: (1) the finding that the property was constitutionally exempt; (2) the statutory procedure as to constitutionally exempt property; and (3) the authority for claiming a refund of property taxes paid on constitutionally exempt property.

The Finding that the Property was Constitutionally Exempt

The trial court found that the property involved "is operated as part of a hospital," "is and has been used for charitable and educational purposes," and "is and should be exempt from New Mexico property tax under Article VIII, Section 3 of the Constitution of the State of New Mexico."

These findings are the basis for the trial court's ruling in favor of plaintiff, that plaintiff was entitled to a refund of the 1977 taxes and that plaintiff was entitled to an injunction in connection with future tax years. Defendants' claim on appeal is that plaintiff is not a charitable institution within the meaning of the constitutional provision. One answer to this contention is that defendants did not (nor did plaintiff) submit requested findings of fact or conclusions of law. Consequently, defendants are not entitled to a review for determining whether substantial evidence supports the findings made by the trial court. *McNabb v. Warren*, 83 N.M. 247, 490 P.2d 964 (1971).

However, because this appeal involves procedures in connection with property constitutionally exempt from taxation, we have reviewed the evidence. The trial court's finding that the property involved is operated as a hospital, and used for charitable and educational purposes, has substantial evidentiary support. The trial court properly concluded that the property was exempt under N.M.Const. art. VIII, § 3, which exempts from taxation "property used for educational or charitable purposes * * *." See *Santa Fe Lodge No. 460 v. Employment Security Com'n*, 49 N.M. 149, 159 P.2d 312 (1945); *Retirement Ranch, Inc. v. Curry Cty. Val. Protest Bd.*, 89 N.M. 42, 546 P.2d 1199 (Ct.App.1976).

The Statutory Procedure as to Constitutionally Exempt Property

Defendants do not challenge the propriety of the injunction if, in fact, the property was constitutionally exempt from taxation. We discuss the statutes pertaining to constitutionally exempt property because they bear on the refund procedure, discussed under the following issue.

If the property involved was subject to valuation for tax purposes, it was to be reported to the county assessor. See § 7–38–8(B), (D) and (E), N.M.S.A.1978. If subject to valuation for tax purposes, the county assessor was responsible for the valuation. Section 7–36–2(A), N.M.S.A.1978.

Section 7–36–7(B)(1), N.M.S.A.1978 states that property exempt from property taxation under the state Constitution "is not subject to valuation for property tax purposes * * *." Being constitutionally exempt from taxation under N.M.Const., art. VIII, § 3, the property involved was not required to be reported and the assessor had no authority to value the property. This legislative intent is illustrated by the fact

that § 7–38–17, N.M.S.A.1978 contains provisions for claiming a veteran or head of household exemption and by the fact that there are no statutory provisions for claiming a constitutional exemption.

The foregoing raises the practical question of how the assessor will learn when property is no longer constitutionally exempt. Section 7–38–8, supra, provides in Paragraph (D) that if the property is subject to valuation it is to be reported. Civil and criminal penalties are provided in Paragraphs (F) and (G) of § 7–38–8, supra, for non-reporting. Whether these provisions are sufficient administratively is a matter for the Legislature.

Refund of Property Taxes Paid on Constitutionally Exempt Property

Our starting point in determining the authority to refund the taxes paid by plaintiff is: 1) the property involved was constitutionally exempt from taxation for both 1976 and 1977, and 2) in addition to being exempt from taxation, the property was not to be valued for tax purposes. The trial court granted a refund for the 1977 taxes but refused to grant a refund for 1976 taxes. The different rulings came about because the trial court was of the view that the time provisions of § 7–38–40, N.M.S.A. 1978 were applicable; that the refund claim for 1977 was timely and the refund claim for 1976 taxes was not timely. Section 7–38–40, supra, was not applicable to either of the refund claims.

In re Blatt, 41 N.M. 269, 67 P.2d 293, 110 A.L.R. 656 (1937) distinguishes between an erroneous or illegal assessment and an excessive assessment. An erroneous assessment includes an assessment of property that is exempt from taxation. An error of judgment in valuing property that is subject to taxation is not an erroneous assessment but an excessive assessment. *In re Blatt*, supra; *Sandia Savings and Loan Association v. Kleinheim*, 74 N.M. 95, 391 P.2d 324 (1964).

■ If a statutory procedure exists either for recovery of taxes collected erroneously or for disputing an excessive assessment, that procedure must be followed. *In re Blatt*, supra; *Lougee v. New Mexico Bureau of Revenue Commissioner*, 42 N.M. 115, 76 P.2d 6 (1937).

■ The 1976 and 1977 property taxes paid by plaintiff were based on erroneous assessments because the property was constitutionally exempt from taxation. Until the repeal of § 72–5–4, N.M.S.A.1953 (Repl. 1961, 1975 Supp.) by Laws 1973, ch. 258, § 156, there was a statutory procedure for obtaining a refund of property taxes "erroneously or illegally charged." Since the repeal of § 72–5–4, supra, our statutes have not specifically referred to refunds of erroneous or illegally charged taxes. Are erroneous or illegally charged taxes included within other statutory language?

The refund procedures of § 7–1–26, N.M. S.A.1978 are not applicable to real property taxes. Section 7–1–2, N.M.S.A.1978.

The district court action authorized by § 7–38–78, N.M.S.A.1978 is limited to changes in the property tax schedule and does not apply to refunds.

Sections 7–38–22 and 7–38–24, N.M.S.A. 1978 authorize property owner protests of "value determined." These provisions are not applicable in this case because constitutionally exempt property is not subject to valuation for property tax purposes. Section 7–36–7(B)(1), supra.

Although § 7–38–38(B), N.M.S.A.1978 refers to an "erroneous payment," the context is clear that the reference is to a refund of excess tax payments where the property is subject to taxation.

Defendants claim that §§ 7–38–39 through 7–38–41, N.M.S.A.1978 provide a statutory procedure for the refund of property taxes paid on constitutionally exempt property. They particularly rely on § 7–38–40, supra, which states time requirements for the bringing of a refund suit. Their position, with which the trial court agreed, was that plaintiff's refund claim for 1977 property taxes was timely under § 7–38–40, supra, but untimely for 1976 property taxes. We do not agree.

Section 7–38–39, supra, refers to a protest of "the value determined * *." Section 7–38–40, supra, refers to "a civil action in the district court for the county in which the valuation was determined * *." Both of these statutes require property that is subject to valuation; property constitutionally exempt from property taxes is not to be valued for property tax purposes. Section 7–36–7(B)(1), supra. That neither § 7–38–39 nor § 7–38–40, supra, refers to constitutionally exempt property is made clear by § 7–38–41, supra. Section 7–38–41, supra, authorizes refunds only when the "property taxes are reduced as a result of a decrease in value of the property taxed or a change in the allocation of the value of the property to a particular governmental unit * * *." This wording does not authorize a refund of property taxes paid on property that was constitutionally exempt from taxation and, under the statute, was not to be valued for property tax purposes.

Under our present statutes, there is no procedure for the refund of property taxes paid on constitutionally exempt property. *Sisters of Charity, Etc. v. County of Bernalillo*, 93 N.M. 42, 596 P.2d 255 (1979), on which defendants rely, does not support the defendants. *Sisters* involved the refund procedure of § 72–5–4, supra; that procedure is not applicable in this case because § 72–5–4, supra, has been repealed.

There being no statutory procedure for the refund of the property taxes involved in this case, on what basis may plaintiff's suit be maintained? A district court may order the refund of the taxes paid on erroneously assessed property if the taxes were paid involuntarily. *Jaynes v. Heron*, 46 N.M. 431, 130 P.2d 29, 142 A.L.R. 1191 (1942); *Johnson v. Greiner*, 44 N.M. 230, 101 P.2d 183 (1940); See *In re Blatt*, supra; *Lougee v. New Mexico Bureau of Revenue Commissioner*, supra.

In the trial court, plaintiff contended that taxing of the property involved came about because of a ruling of the Property Tax Department, that plaintiff attempted to obtain a change in this ruling and did not pay the taxes until its attempts were unsuccessful. These contentions presented an issue as to whether the property taxes were paid voluntarily. Compare *Jaynes v. Heron*, supra; *Johnson v. Greiner*, supra. The trial court made no determination of the voluntariness of the payments.

Defendants' position, throughout, as to the 1977 property taxes, was that the property was not exempt from taxation; defendants never challenged the propriety of a refund of the 1977 taxes on any other ground. Defendants may not change their theory on appeal. *Southwestern Public Service Co. v. Chaves County*, 85 N.M. 313, 512 P.2d 73 (1973). Inasmuch as the property was constitutionally exempt, the order that the 1977 taxes be refunded is affirmed.

The only contest of the injunction was also on the ground that the property was not exempt. Inasmuch as the property was constitutionally exempt, the injunction against defendants from assessing, collecting or attempting to collect real property tax against the property "in the absence of a substantial change in the use of the property" is affirmed.

The order denying a refund for the 1976 property taxes is vacated. As to the 1976 taxes, the cause is remanded for a determination by the trial court as to whether the 1976 property taxes were paid involuntarily. If the taxes were paid involuntarily, plaintiff is entitled to a refund; if paid voluntarily, plaintiff is not entitled to a refund.

To the extent permitted by law, plaintiff is to recover its costs on appeal. See *Addis v. Santa Fe Cty. Valuation Protests Bd.*, 91 N.M. 165, 571 P.2d 822 (Ct.App.1977).

IT IS SO ORDERED.

WALTERS, J., concurs.

SUTIN, J., concurs in part and dissents in part.

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

I concur and dissent.

Lovelace sued defendants in two counts under § 44–6–13, N.M.S.A.1978 of the De-

claratory Judgment Act, to obtain a refund of 1976 and 1977 property taxes paid the county treasurer.

Count I sought a refund of 1976–77 taxes paid because its property had been continuously classified as exempt from property taxation from about 1968 through 1975; that it is and always has been used by Lovelace for charitable purposes, and it is, therefore, exempt from payment of the New Mexico property tax for the tax years 1976, 1977 and thereafter under Article VIII, § 3 of the New Mexico Constitution, in the absence of a substantial change in circumstances. Lovelace also sought a judgment restraining and enjoining defendants from assessing, collecting or attempting to collect any real property tax as long as its property remained in the ownership and possession of Lovelace and continued to be used for charitable and educational purposes.

Count II sought to declare the county assessor's 1976 assessment void because the county assessor arbitrarily departed from the prior exempt treatment accorded Lovelace and placed its property on the tax rolls for the calendar year 1976; that in equity and good conscience Lovelace's payment of 1976 property tax should be refunded if the court determines that the property is exempt because a retention of monies paid for 1976 would be a deprivation of Lovelace property without due process of law.

Defendants answered in denial and set forth as an affirmative defense, that, with reference to the 1976 values assessed, the complaint was not timely filed.

In its judgment, the trial court found:

1. That Plaintiff is a non-profit New Mexico Corporation which is exempt from Federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1954 as amended.

2. That Plaintiff's property, the property tax exemption of which is the subject of this action is operated as part of a hospital.

3. That the property referred to in Paragraph 2 is and has been used for charitable and educational purposes. Therefore, said property is and should be exempt from New Mexico property tax under Article VIII, Section 3 of the Constitution of the State of New Mexico.

Based upon these findings, the court entered judgment for Lovelace in the following respects:

1. Defendants were directed to refund the 1977 property tax payment.

2. Lovelace's property is and always has been used for charitable purposes and is therefore exempt from taxation for the years 1977 and 1978 and thereafter in the absence of any substantial change in the use of the property, under Article VIII, § 3 of the New Mexico Constitution.

3. Defendants are restrained and enjoined from placing the property on tax rolls in the absence of a substantial change in use of the property and defendants are specifically ordered to remove the property from the tax rolls for Bernalillo County for the year 1978.

Judgment was entered for defendants in this respect:

4. Lovelace's claim for a refund was denied for the 1976 property tax because its filing of the refund claim was untimely.

Defendant, Bernalillo County, appealed from the judgment of the district court.

Lovelace cross-appealed from paragraph 4 of the judgment.

A. *The judgment in favor of Lovelace is affirmed.*

Defendant did not request findings of fact and conclusions of law. Neither did defendant challenge the court's findings. The Supreme Court has repeatedly held that a party who does not request findings of fact and conclusions of law cannot, on appeal, obtain a review of the evidence. *McNabb v. Warren*, 83 N.M. 247, 490 P.2d 964 (1971). The judgments in favor of Lovelace should be affirmed.

B. *The county assessor's 1976 assessment was void ab initio.*

Lovelace, in its cross-appeal, argues that the statutory refund procedure set forth in

§ 7–38–40(A)(1), N.M.S.A.1978 of the Property Tax Act does not apply to exemption questions; that its property is exempt under Article VIII, § 3 of the New Mexico Constitution, inasmuch as the Constitution does not provide that the property shall be exempt from taxation if the owner satisfies statutory and regulatory requirements of the Property Tax Act. For these reasons, Lovelace sued in declaratory judgment and sought equitable relief.

Section 7–38–40(A)(1) reads in pertinent part:

> A. Claims for refund shall be filed by the property owner as a civil action in the district court for the county in which the valuation was determined * * *. Claims shall:
>
> (1) be filed * * * against the county as party defendant if the property was valued by the assessor and *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.* [Emphasis added.]

This limitation period is mandatory. Under this section, a refund for 1976 property taxes had to be filed by December 15, 1976. The Lovelace complaint was filed December 14, 1977, a year late. Under this section, the failure to timely file a claim for refund of ad valorem taxes is fatal. *Dale Bellamah Land Co. v. Bernalillo County*, 92 N.M. 368, 588 P.2d 1043 (Ct.App.1978).

However, the provisions of the Property Tax Code deals with protest and refund procedures with respect to valuation questions. It does not apply to property that is exempt from taxation by reason of the protection given property owners by the Constitution. Section 7–38–40(A)(1) does not say that "every claim" or "all claims" for refund, including claims for refund based upon property heretofore exempt from taxation, shall be filed no later than December 15 of the year the first installment is due. This section does not create an exclusive remedy for a property owner who seeks a refund based upon the exemption of its property from ad valorem taxes. Lovelace did have a remedy under the Declaratory Judgment Act.

Lovelace is not bound by the time period limitation set forth in § 7–38–40(A)(1). Its property was not subject to assessment for taxes in 1976 unless the assessor had prior thereto established that there was such a substantial change in the use of the property that it was removed from the charitable and educational purposes set forth in the Constitution. No such determination had been made. Property exempt from taxation in 1975 does not automatically change to non-exempt property in 1976. An arbitrary determination by the county assessor without a hearing would violate the Due Process Clause of the Constitution. Neither the assessor, the legislature nor the courts can efface the protection given property owners by the Constitution, as long as its property is held to be used for charitable and educational purposes.

The trial court concluded that Lovelace's property "is and always has been used by plaintiff for charitable purposes and is therefore exempt from New Mexico property tax * * *."

The County has misinterpreted the position taken by Lovelace. It claims that Lovelace filed this action pursuant to § 7–38–40(A)(1) and now claims it does not apply. The County is mistaken. It has failed to meet the challenge extended by Lovelace. Section 7–38–40(A)(1) was not applicable and Lovelace did not pursue that remedy. Lovelace had no plain, speedy and adequate remedy at law. It had to seek the injunctive process. The legislature may not deprive the district court of the power to issue writs of injunction unless it provides an adequate remedy at law as a substitute. *Lougee v. New Mexico Bureau of Revenue Commissioner*, 42 N.M. 115, 76 P.2d 6 (1937). Section 7–38–40(A)(1) did not provide such a substitute.

The assessment of Lovelace's property for taxation for the year 1976 was void ab initio.

The trial court should be affirmed on that portion of the judgment that relieved Lovelace's property from taxation for the years

1977 and 1978 and thereafter and should be reversed on that portion of the judgment that held untimely Lovelace's claim for refund of taxes paid for the year 1976.

The trial court should enter judgment that Lovelace's property is exempt from taxation for the years 1976, 1977, 1978 and thereafter in the absence of any substantial change in the use of the property which removes it from the protection of Article VIII, § 3 of the New Mexico Constitution.

606 P.2d 210

STATE of New Mexico, Plaintiff-Appellee,

v.

Orlando Robert LOPEZ, Defendant-Appellant.

No. 4440.

Court of Appeals of New Mexico.

Feb. 5, 1980.

John B. Bigelow, Chief Public Defender, Martha A. Daly, Appellate Defender, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Lawrence A. Barela, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

This case was placed on the summary calendar with reversal proposed because the docketing statement recited that the defendant waived a jury and was tried to the judge, but that this waiver was not in writing as is required by N.M.R.Crim.P. 38(a), N.M.S.A.1978. The State has filed a memorandum in opposition to summary reversal urging several bases why this case should not be summarily reversed. We are not persuaded.

First, the State contends that summary reversal would conflict with this Court's recent decision in *State v. Pendley*, 92 N.M. 658, 593 P.2d 755 (Ct.App.1979). In *Pendley*, one juror became ill during the course of the trial and the State, the defendant and his counsel consented to a trial by an eleven person jury. On appeal, this Court held that the written waiver requirement of Rule 38(a) was not intended to apply to the situation of that case. As *Pendley* stated: "[t]his 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." We do not see *Pendley* as a decision regarding the waiver of a jury, but rather the waiver of the number of persons on the jury. Any discussion in *Pendley* beyond that would be beyond the question presented for review.

The State further argues that, upon the initiating of the process of waiving his right to a jury trial, the burden of securing and filing documentation reflecting his desired waiver would logically fall upon the defendant. This contention does not aid the State. Rule 38(a) assumes the right of the defendant to waive, but it specifies that it must be in writing. The State would further urge that the defendant should be estopped from complaining that his waiver was not in writing and, hence, not effective. The State cites us to *State v. Edwards*, 54 N.M.

189, 217 P.2d 854 (1950). That case held that a procedure to which the defendant acquiesced at trial could not be later urged as error because the defendant led the trial court into the alleged error. However, we do not think the reasoning of that decision is persuasive in this instance. Rule 38(a) expressly spells out the conditions when a jury may be waived. In addition, the rule clearly states that the waiver is to be in writing. Under the present wording of Rule 38(a), it is incumbent upon the trial court to receive a waiver "in writing" before it permits a trial to proceed without a jury.

The State has cited other cases for the proposition that defendant's verbal acquiescence was an effective waiver of a trial by jury. *State v. Hernandez*, 46 N.M. 134, 123 P.2d 387 (1942); *State v. Marrujo*, 79 N.M. 363, 443 P.2d 856 (1968). However, as was discussed above, there is no quarrel with the proposition that a defendant might waive a jury. We merely hold that the clear meaning of Rule 38(a) is that the waiver of a jury must be in writing. We assume the rule means what it says. The Supreme Court is presumed not to have used any surplus words in the rule and that each word used has a meaning. *See State v. Doe*, 90 N.M. 776, 568 P.2d 612 (Ct.App. 1977). We are bound to follow Supreme Court decisions and rules. *See Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973) and its progeny.

The proposed summary reversal is made final.

IT IS SO ORDERED.

HERNANDEZ and WALTERS, JJ., concur.