[redacted]

626 P.2d 1303

Steven G. RUMPF, Plaintiff-Appellee,

v.

RAINBO BAKING COMPANY, Employer and American Motorist Insurance Company, Insurer, Defendants-Appellants.

No. 4795.

Court of Appeals of New Mexico.

March 12, 1981.

Alan M. Malott, Shaffer, Butt, Thornton, Baehr, P. C., Albuquerque, for defendants-appellants.

John Hogan Stewart, P. A., Martin J. Chavez, Albuquerque, for plaintiff-appellee.

OPINION

WALTERS, Judge.

On February 17, 1978, Steven Rumpf slipped on some ice while making a delivery

as a route salesman for Rainbo Baking Company. He injured his lower back, aggravating a preexisting condition. It is now undisputed that the February injury was compensable under the Workmen's Compensation Act.

On February 27, 1978, Mr. Rumpf's attorney prepared and sent a notice letter informing Rainbo of plaintiff's injury. In March, 1978 Mr. Rumpf underwent a spinal fusion.

Ultimately, three complaints were filed seeking workmen's compensation benefits for Rumpf. The first suit was filed on April 11, 1978; at that time Rumpf had received no compensation from Rainbo's insurer. The suit was voluntarily dismissed when defendants agreed to start paying benefits. The insurer stopped payments after a couple of weeks, and a second suit was filed on May 15, 1978. Once again, defendants agreed to pay benefits, and that complaint was also voluntarily dismissed. They continued to pay until around November 3, 1978, and on November 30, 1978, Rumpf's attorney filed the third suit, from which this appeal arises.

Plaintiff returned to work for Rainbo around the beginning of December, 1978. At that time he was still owed some compensation payments. His employers learned of claimant's third suit; they called him in and asked him to drop it. On December 4, 1978, Rumpf, by telephone call, advised his attorney to drop the suit. On December 19th, he repeated the request by letter, but he delivered this letter to his employer instead of mailing it directly to his attorney.

Shortly thereafter in early 1979, Rumpf instructed his attorney to disregard any of his letters or phone calls in which Rumpf might direct him to drop the case; the attorney was to act only on in-person attorney-client conversations. The attorney thereafter received two more letters from Rumpf, one dated April 5, 1979, and one dated March 18, 1980, asking him to drop the suit against Rainbo. Since the attorney had not had any personal communications from his client, he disregarded the letters.

Defendant filed a motion to dismiss on August 22, 1979. When it became clear to plaintiff's counsel that Mr. Rumpf was no longer cooperating with him in pursuing the suit, he agreed to dismissal of the third suit.

After a hearing on plaintiff's motion for attorney's fees and on defendants' motion to dismiss, the trial judge fixed Mr. Rumpf's attorney's fees at $1,872.00, and the case was dismissed with prejudice.

Rainbo and American appeal the award of attorney's fees. We affirm. In addition, although the dismissal with prejudice was not an issue on appeal, we hold that it was improper under the circumstances of this case.

Attorney's Fees

Rainbo's insurer paid compensation after plaintiff's attorney filed the suits and negotiated with the insurer. The trial court fixed attorney's fees at $1,872.00, finding in its Order,

> That it was reasonably necessary for the plaintiff to employ counsel to obtain benefits under the workman's compensation act, and that the plaintiff obtained benefits, including compensation, as a result of the counsel's services.

The appellants argue that without an actual award of compensation made to Rumpf by the trial court, an allowance of attorney's fees is unauthorized by the Act. A careful reading of New Mexico decisions does not support their position.

The essence of our case law on the allowance of attorney's fees in workmen's compensation cases is that the claimant must receive compensation due to the services performed by his attorney in order for the claimant to be eligible for attorney's fees. *Wuenschel v. New Mexico Broadcasting Corp.*, 84 N.M. 109, 500 P.2d 194 (Ct. App.1972); *Geeslin v. Goodno*, 75 N.M. 174, 402 P.2d 156 (1965); *Ennen v. Southwest Potash Co.*, 65 N.M. 307, 336 P.2d 1062

(1959); *Perez v. Fred Harvey, Inc.*, 54 N.M. 339, 224 P.2d 524 (1950). Appellants wholly rely on language in *Phelps Dodge Corp. v. Guerra*, 92 N.M. 47, 582 P.2d 819 (1978), to sustain their argument. In that case the New Mexico Supreme Court affirmed the trial court's dismissal of a workmen's compensation suit on the basis that the parties had previously settled the claim. The claimant had asked for attorney's fees for the appeal only, and the court denied the attorney's fees, stating that

> even if Guerra had prevailed in this Court on the other issues, that awarding of attorney's fees would have been in error since, even if Guerra had won this appeal, there would not yet have been any decision by the trial court as to his entitlement to compensation until after the case had been remanded. Until there has been an award of compensation at the trial court level, an allowance of attorney's fees is improper. [Citations omitted.]

92 N.M. at 52, 582 P.2d at 842.

It would be unduly restrictive to hold that the Supreme Court, by this language, imposed a requirement that in all cases a formal award of compensation must be made by the trial court before attorney's fees are appropriate. Moreover, the facts of the *Phelps* suit are entirely dissimilar to the instant matter. We rely, instead, upon the language of Section 52–1–54(D), N.M. S.A. 1978, which provides that

> in all cases where compensation to which any person shall be entitled under the provisions of the Workmen's Compensation Act shall be refused and the claimant shall thereafter collect compensation through court proceedings in an amount in excess of the amount offered in writing by an employer thirty days or more prior to the trial by the court of the cause, then the compensation to be paid the attorney for the claimant shall be fixed by the court trying the same * * *.

There were court proceedings in this case. As a legal term, "proceedings" embraces all the steps in a cause from its commencement to its conclusion. 50 C.J., Process, § 1, quoted in *State v. District Court of Second Jud. Dist.*, 45 N.M. 119, 112 P.2d 506 (1941). Initiation of a claim for workman's compensation benefits is a "proceeding." *State ex rel. Pacific Empl. Ins. Co. v. Arledge*, 54 N.M. 267, 221 P.2d 562 (1950). Plaintiff instituted three suits; each of them resulted in plaintiff temporarily collecting compensation.

The statute does not require that the judge make an award; it provides only that when payments are refused, "claimant * * * thereafter collect compensation through court proceedings." We are not bound to interpret "recovery" as used in *Geeslin* and *Perez, supra*, to mean a judge-awarded recovery. "Recovery" must be defined broadly enough to fit the statutory allowance of fees once the claimant "shall * * * collect compensation" after filing his claim. The trial court's findings cannot be read to mean anything but that payment of compensation would not have been forthcoming had suits not been filed. The condition of the statute was met and Rumpf is entitled to attorney's fees.

We have considered appellants' other arguments but do not find in them any justification for denying attorney's fees in this case. We express our dismay, however, at the criticism in appellants' briefs amounting to a personal attack on the attorney who handled claimant's court proceedings. Such an unwarranted display of acerbity against another attorney is inappropriate and unseemly. The trial court was the judge of the evidence offered and obviously believed claimant's attorney. Additionally, sufficient evidence of work performed was introduced to satisfy the requirements of *Johnson v. Fryar*, 93 N.M. 485, 601 P.2d 718 (1979).

Dismissal With Prejudice

The dismissal with prejudice by the lower court is contrary to the policy stated in *Glover v. Sherman Tongs*, 94 N.M. 587, 613 P.2d 729 (Ct.App.1980), recognizing

the right of a workman to reopen his claim if and when problems later develop which are related to the compensable injury. We said:

> The Workman's Compensation Act was not written with the intent that it be so penuriously interpreted that a workman be bound by a "one-shot" chance at showing his ability or inability to perform the tasks of his usual occupation or other work he is fitted by past history to do. If that were so, and each word of the Act were to be read to find a means to deny rather than to grant relief to an injured workman, the principal purpose of workman's compensation law would be thwarted.

613 P.2d at 732. Section 52–1–56 A provides for regular reconsideration of a workman's benefits during the period for which compensation could be paid. We note that claimant's doctor expressed concern early in 1979 that the spinal fusion might not be completely successful. Case law also suggests that Rumpf may bring a future action if his condition deteriorates. *Rayburn v. Boys Super Market, Inc.*, 74 N.M. 712, 397 P.2d 953 (1964); *Cordova v. City of Albuquerque*, 71 N.M. 491, 379 P.2d 781 (1962). Dismissal with prejudice would deprive claimant of a right afforded to him by law and, even though consented to by plaintiff's court-appointed lawyer, plaintiff was *not* asked if he agreed to dismissal *with prejudice*. Such a disposition is incompatible with the statute.

The judgment awarding attorney's fees is affirmed. The case is remanded for modification and deletion of that portion of the judgment which dismisses the claim with prejudice.

Plaintiff's attorney is awarded $1,500 for services on appeal.

IT IS SO ORDERED.

ANDREWS, J., concurs.

SUTIN, Judge (dissenting).

I dissent.

The time has arrived when a majority opinion has presented a collapsible house of cards built with a stacked deck and a joker. My colleagues exercised "superintending control" over the district court on matters not before this Court.

A. *This Court does not have jurisdiction over a Final Order from which no appeal is taken.*

Plaintiff's complaint was dismissed "with prejudice." No appeal was taken from this Order. Plaintiff is not a party to this appeal. The Order of Dismissal "with prejudice" is not an issue in this appeal. The Order was approved by plaintiff and his attorney. Yet, the majority opinion has deleted from the Order the words "with prejudice."

At the hearing on June 18, 1980, Fred M. Calkins, an eminent lawyer, was appointed by the court to consult with plaintiff. Mr. Calkins reported to the court as follows:

> *He [plaintiff] has no objection to the case being dismissed with prejudice and understands that* if his condition, back condition * * * should occur in the future that *he would be unable to reopen the case* for the payment of medical bills, weekly compensation or permanent disability. [Emphasis added.]
>
> * * * * * *
>
> THE COURT: Are you asking that it be dismissed? You don't want it pursued any further?
>
> MR. RUMPF: Right.

To delete the words "with prejudice" is the exercise of "superintending control" over a non-appealed Order. It allows this Court, in its discretion, to sit as a district judge. Thus, we can affirm a case, yet order the district court to modify matters of reversible error such as erroneous instructions given, admission of improper testimony, and a good pleaded affirmative defense.

It has been suggested that a judge should compromise his views and join in the opinion of his colleagues. This I cannot do.

B. *Stewart was not entitled to attorney fees.*

On the matter of attorney fees, in every case cited, except *Wuenschel v. New Mexico Broadcasting Corp.*, 84 N.M. 109, 500 P.2d 194 (Ct.App.1972), the Supreme Court has not followed § 52–5–54 (D). In *Wuenschel*, I said:

> * * * The plaintiff did not *collect* compensation and he is not entitled to attorneys' fees * * *. [84 N.M. 111.] [Emphasis added.]

Phelps-Dodge (92 N.M. 47, 52) says:

> * * * Until there has been an *award* of compensation * * * an allowance of attorney's fees is improper.

Geeslin (75 N.M. 174, 179) says:

> * * * Plaintiff's attorney is not entitled to an attorney fee unless compensation is *recovered* herein. [Emphasis added.]

Perez (54 N.M. 339, 346) says:

> The *recovery* of compensation is a prerequisite to the allowance of attorney fees. [Emphasis added.]

These and other cases have fixed a rule on an allowance of attorney fees. There must first occur an "award" or "recovery" of compensation. If the Supreme Court intended that "award" and "recovery" meant "collect compensation through court proceedings" as provided by statute, plaintiff is entitled to an award of attorney fees. Otherwise not. " 'Proceedings' are all steps or measures adopted in the prosecution or defense of an action." *Ingravallo v. Pool Shipping Co.*, 247 F.Supp. 394 (D.C.N.Y. 1965); *State v. McCafferty*, 105 P. 992 (Okl. 1909).

What the Supreme Court intended "award" or "recovery" to mean must be expressed by the Supreme Court. "*Stare Decisis*" has set in. In my opinion, all prior cases that use the words "award" and "recovery" should be overruled. The words "collect compensation through court proceedings" should be defined. Until this occurs, plaintiff's attorney is not entitled to an attorney fee.

Plaintiff's attorney filed a motion for an Order that he be awarded an attorney fee for services rendered plaintiff and for expenses occurred. Some five or six weeks *before* the Order of Dismissal with prejudice was entered, absent any trial or award of attorney fees to plaintiff, the court entered an Order on the attorney's motion "that the lawyer fee for plaintiff's attorney is fixed at $1872.00." This is erroneous. *Genuine Parts Co. v. Garcia*, 92 N.M. 57, 582 P.2d 1270 (1978) holds that attorney fees are to be awarded to plaintiff and not to his counsel.

An attorney has no authority to seek payment of an attorney fee to himself from an employer. The workman must seek this relief. An attorney fee is obtained from a workman. If a workman is not entitled to an attorney fee, the attorney has donated his time. Plaintiff's claim was dismissed with prejudice. Plaintiff was not awarded an attorney fee in the Order of Dismissal. The attorney, therefore, is denied one. It was the duty of the attorney to have plaintiff seek an attorney fee or have one awarded in the Order of Dismissal with prejudice. This is one case when an employer should not be additionally burdened. Here, the employer was not at fault. The plaintiff or his lawyer was. "As you make your bed, so you must lie on it." Everyone must bear the consequences of his own acts.

626 P.2d 1307

Frank SPINOSO and Mary Spinoso, Plaintiffs-Appellees,

v.

RIO RANCHO ESTATES, INC., and Amrep Construction Corporation, Defendants-Appellants.

No. 4719.

Court of Appeals of New Mexico.

March 12, 1981.

Certiorari Denied April 13, 1981.

Lastrapes & Merl, Albuquerque, for defendants-appellants.

Robert C. Resta, Albuquerque, for plaintiffs-appellees.

OPINION

ANDREWS, Judge.

This suit was brought to recover damages for construction defects in the building of a house. The plaintiffs, Frank and Mary Spinoso (Spinosos) entered into an agreement with Rio Rancho Estates, Inc. (Rio Rancho) to purchase a lot on which a subsidiary, Amrep Construction Corporation, was to construct a house. The agreement, drawn by Rio Rancho, included the following provision:

> Seller agrees, at its sole cost and expense, to remedy any substantial defect in workmanship or materials of the structural components of the dwelling that shall be called to its attention by notice in writing from Purchaser on or before the first anniversary of the date of closing of title.[1]

The parties closed on the purchase November 26, 1974. On the same day, after the Spinosos made their initial inspection of the house, they notified Rio Rancho of deficiencies in construction. Enumerated items included cracks in the exterior walls of the house. Further written notices of the exterior wall defects were given to Rio Rancho on March 19, 1975, September 30, 1975, January 20, 1976, and September 11, 1977. These written notices were either mailed or personally delivered to the proper Rio Rancho authorities.

During the three years following the first written notification of defects in the exterior walls, Rio Rancho made various attempts at repair. The efforts were unsuccessful, however, and the Spinosos were never satisfied with the results. After Rio Rancho sent notice that it would make no further repairs on the house, the Spinosos filed this suit asserting three causes of action; the first seeking damages for breach of contract with respect to the warranty provision, the second for negligence, and the third for punitive damages. The court entered judgment against Rio Rancho for breach of contract ($4,807.92) and negligence ($1,000.00).

In this appeal, Rio Rancho alleges that the trial court erred in deciding that the defect in the stucco[2] constituted "[a] substantial defect * * * of the structural components of the dwelling." Rio Rancho also takes exception to the trial court's finding of a duty to repair the defect and the conclusion that it had therefore been negligent.

As its first issue, Rio Rancho asserts that the defects occurring in the stucco on the exterior of the house were not defects in workmanship or materials of the "structural components" of the dwelling; and were, therefore, not covered under the purchase agreement. According to Rio Rancho, the stucco on the exterior of the house is merely ornamental, and does not involve the structural integrity of the house.

1. *Compare Sparks v. Melmar Corp.*, 93 N.M. 201, 598 P.2d 1161 (1979) where the contract provision was almost identical, but did not specify "structural" defects.

2. The stucco used was a texture coating called Tex-Cote.

Like this case, *Koenigshofer v. Shumate*, 68 Ill.App.2d 474, 216 N.E.2d 195 (1966), dealt with the definition of the word "structural." In that case which involved a dispute over a clause in a lease, the court concluded that the "classification of repairs as 'structural' depends not so much on the physical characteristics of the deficiency as on its foreseeability, from which the intentions and agreements of the parties may be inferred." 216 N.E.2d 195, 196. *Accord Baxter v. Ill. Police Federation*, 63 Ill. App.3d 819, 20 Ill.Dec. 623, 380 N.E.2d 832 (1978); *Hardy v. Montg. Ward & Co.*, 131 Ill.App.2d 1038, 267 N.E.2d 748 (1971); *440 E. 102nd St. Corp. v. Murdock*, 285 N.Y. 298, 34 N.E.2d 329 (Ct.App.1941). We find this analysis helpful in examining the question presented here. The trial court could properly consider the intent of the parties in determining whether the defects in the stucco were defects in workmanship or materials of the "structural components" of the building.

To ascertain the intent of the parties to a contract, great weight, if not controlling weight, is to be given to the construction of the contract adopted by the parties, as reflected by the available evidence. *Mobile Investors v. Spratte*, 93 N.M. 752, 605 P.2d 1151 (1980). In this case, the intentions and agreement of the parties to the contract can be ascertained from the following evidence.

An official of Rio Rancho corresponded with the Spinosos several times, and each time indicated:

> Repairs will be underway shortly and I hope you will find everything satisfactory.

These statements reflect Rio Rancho's understanding that the stucco problem was covered under the warranty and were its obligation to correct. Further, at trial, Mr. Joseph Edwards, Manager of Rio Rancho's Customer Service Department, when asked whether he believed Mr. Spinoso "was covered for a one-year period," responded as follows:

A. In the beginning, yes.

Q. And workmanship, materials and the constructional component of the dwelling?

A. Well, one year, yes. That's the way I interpret it.

Mr. Spinoso, who had been given no choice as to the use of Tex-Cote on his home, testified that there had been continuous patching and repatching of the ever-appearing cracks. Mr. Steve Scutt, plaintiffs' expert witness, testified as to the techniques and procedure by which stucco and Tex-Cote are fastened to the exterior subwalls of a building, including the methods necessary to remove Tex-Cote once it is applied (sandblasting), and the remedy if it cannot be removed (relathing and restuccoing).

Mr. Scutt testified that texture coated products will crack when applied to a porous surface like stucco which must move and breathe. Tex-Cote is rigid and does not give with the movement or "breathing" of the sub-surface. When cracks appear, as is inevitable, moisture invades the cracks. According to Mr. Scutt, because sealing causes more cracking and peeling, there is only one remedy when texture coating begins cracking—to completely relathe and restucco.

The testimony of Mr. Bill Swingle, defendant's construction superintendent, supported in large measure Mr. Scutt's testimony regarding the cause of the cracking and peeling. In addition, he confirmed that Rio Rancho never did a complete job of either removing old stucco or putting new stucco on the Spinosos' dwelling. Another of Rio Rancho's employees established that the company no longer used the product.

In interpreting a contract uncertainties must be construed most strongly against the party drafting the contract, in this case, Rio Rancho. *Mobile Investors v. Spratte, supra; Schultz and Lindsay Construction Co. v. State*, 83 N.M. 534, 494 P.2d 612 (1972). Using this test, the evidence

adduced at trial was more than adequate to support the trial court's conclusion that the "defendants are in breach of contract * * * for failure to perform the contract with respect to its warranty of completion of construction and * * * to remedy any substantial defect in workmanship or material * * * *" The evidence was sufficient for the trial court to determine that the defects which served as the basis for this suit related to the understanding the parties had as to the warrantied "structural components" of the Spinoso home.

By way of defense, Rio Rancho claims that at the time it refused to make further repairs the warranty had expired and no further work was required under the contract. We consider this argument specious. The agreement did not set a one-year limitation on repairs, but rather a one-year maximum period for the discovery and proper notification regarding defects. Since the defects were so discovered and Rio Rancho was adequately notified, the warranty was applicable. Rio Rancho's failure to repair the defects constituted a breach of contract.[3]

Defendant's second issue relating to the trial court's finding of negligence is premised upon the assumption that because the warranty did not cover the defect, there was no duty to repair. Rio Rancho is in error in its premises. As discussed above, the defect was covered under the warranty provisions of the agreement. Negligence is a matter for the trier of fact to decide—in this case the trial court judge. *Yeary v. Aztec Discounts, Inc.*, 83 N.M. 319, 491 P.2d 536 (Ct.App.1971). The evidence is sufficient to support the trial court's conclusion that Rio Rancho was negligent in repairing or attempting to repair the Spinoso home.

The decision of the trial court is affirmed.

IT IS SO ORDERED.

HERNANDEZ, C. J., concurs.

SUTIN, J., specially concurring.

SUTIN, Judge, specially concurring.

I concur in affirmance.

Defendants' interpretation of the contract that bears upon the meaning of "*any substantial defect* in workmanship or materials *of the structural components of the dwelling*" is illusory. A wall is a "structural component." Treas.Reg. 1:48–1(e)(2) of the Internal Revenue Code, *Kramertown Company, Inc. v. C. I. R.*, 488 F.2d 728 (5th Cir. 1974).

"Materials" is "[t]he substance or matter of which anything is made." Black's Law Dictionary, 1128 (Rev.Fourth Ed.1968). It is something that goes into and becomes a part of the finished structure. *D. H. Overmyer Warehouse Co. v. W. C. Caye & Co.*, 116 Ga.App. 128, 157 S.E.2d 68 (1967); *Interstate Equipment Co. v. Smith*, 31 N.C. App. 351, 229 S.E.2d 241 (1976).

"A defect is defined to be an imperfection, flaw, blemish, or fault." *Galloway v. City of Winchester*, 299 Ky. 87, 184 S.W.2d 890, 893 (1944). Black's Law Dictionary, p. 506, defines a defect as " * * * a deficiency in something essential to the proper use for the purpose for which a thing is to be used." *McMinn v. Damurjian*, 105 N.J.Super. 132, 251 A.2d 310 (1969).

Eliott S. Peterson Co. v. Parrott, 129 Me. 381, 152 A. 313, 315 (1930) says:

> * * * If "the paint on the automobile was not in good condition and was not properly applied," defective workmanship or material or both was plainly indicated, for which defendant would be entitled to damages in recoupment.

It would be difficult to conceive of defective material used in construction that would not involve defective workmanship in

3. Defendant's claim that that statute of limitation on the cause of action ran before suit was filed is also without merit. As pointed out by the trial court, the cause of action did not arise at the time the defect was first noted, but when defendant refused to cure the defect. *See Davis v. General Motors Corp.*, Ct.App. 4681, decided December 11, 1980; *Sparks v. Melmar Corp.*, 93 N.M. 201, 598 P.2d 1161 (1979).

one way or another. *Benson v. Denny*, 14 S.W.2d 456 (Mo.App.1929).

Under the real estate contract, defendants agreed to remedy any deficiency, imperfection or flaw in the Tex-Cote placed on the exterior walls of the house that defendants sold to plaintiffs. This exterior cover was defective in workmanship and materials. Tex-Cote was deficient in something essential for the purpose for which it was to be used. The Tex-Cote was peeling off in two-foot sheets. It was defective. For defendants to argue that this peeling and cracking of Tex-Cote, which was "paint with an aggregate in it," was not a "substantial defect in workmanship or materials of the structural components of the dwelling" is a poor way to seek an escape hatch from liability. "Home is where the heart is." It is the most popular and enduring of all earthly establishments. To put on exterior coating that destroys its appearance does not find any sympathy in the concepts of justice and the law in the courts.

Defendants rely on *440 East 102nd Street Corporation v. Murdock*, 285 N.Y. 298, 34 N.E.2d 329 (1941); *Hardy v. Montgomery Ward & Co.*, 131 Ill.App.2d 1038, 267 N.E.2d 748 (1971); *Baxter v. Ill. Police Federation*, 63 Ill.App.3d 819, 20 Ill.Dec. 623, 380 N.E.2d 832 (1978).

Murdock held that stuccoing of a building did not constitute a "structural alteration." Of course not. We are not involved with "structural alterations." *Hardy* and *Baxter* held that in a landlord-tenant relationship where a lessee agreed to make all repairs, and the plaster fell from the ceiling, the landlord had no duty to make non-structural repairs. Plaster attached to a ceiling is non-structural. The falling of plaster was the result of "a defect in workmanship and materials of the structural components of the building," *but the tenant agreed to repair this defect.*

In a seller-purchaser real estate contract, defendants, as sellers, stand in the shoes of the tenant. Defendants agreed to repair the defect. Defendants cannot escape liability.

626 P.2d 1312

STATE of New Mexico, Plaintiff-Appellee,

v.

Marvin BROWN and Melvin Brown, Defendants-Appellants.

Nos. 4679, 4680.

Court of Appeals of New Mexico.

March 12, 1981.

John B. Bigelow, Chief Public Defender, Martha A. Daly, Appellate Defender, Santa Fe, for defendants-appellants.

Jeff Bingaman, Atty. Gen., Michael E. Sanchez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

The Supreme Court remanded N.M.App., 623 P.2d 574 these two decisions for us to reconsider in light of its decision in *State v. Jones*, 96 N.M. 14, 627 P.2d 409, 1981. We have done so and find no reason to change our prior decision.

We read the Supreme Court's decision in *Jones* to disagree with us specifically in the analysis of corroboration of the informant's statements. Comparing the *Jones* decision to *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959), we understand our Supreme Court to say that the unique information about the *modus operandi* of the burglaries was sufficient information to establish the reliability of the informant. The unique information about the "MO" of the burglaries, at the time when such information was not public, is comparable to the information supplied in *Draper* by the "special employee" Hereford, who had always been found to be accurate and reliable by Narcotic Agent Marsh. Thus, as the United States Supreme Court held in *Draper*, after Agent Marsh had received the information from "special employee" Hereford, "it is clear that Marsh would have been derelict in his duties had he not pursued it."

The *Draper* court reasoned that because Hereford had given detailed descriptions of the suspect, even describing the way he walked, an arrest by the agents when they observed the individual fitting the description and walking as he did was proper:

> And when, in pursuing that information, he [Marsh] saw a man, having the exact physical attributes and wearing the precise clothing and carrying the tan zipper bag that Hereford had described, alight from one of the very trains from the very place stated by Hereford and start to walk at a "fast" pace toward the station exit, Marsh had personally verified every facet of the information given him by Hereford except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of Hereford's information being thus personally verified, Marsh had "reasonable grounds" to believe that the remaining unverified bit of Hereford's information—that Draper would have the heroin with him—was likewise true.

We understand the reasoning in *Jones* to be an exact parallel to this discussion in *Draper*:

> Furthermore, Jones matched the description given by the informant and drove the car and lived in the apartment named by the informant. It was therefore reasonable for the officers to believe that the other information supplied by the informant was true.

In our reconsideration of the instant cases, however, we do not find the comparable uniqueness of facts or any other indicia of reliability of the informants. The affidavit for both search warrants was identical:

> Affiants are full time salaried commisioned [sic] police officers with the Albuquerque Police Department with a total of 13 years law enforcement experience. Affiants are currently assigned to the Property Crimes Section were [sic] they maintain certain expertise in the investigation of theft related crimes and the concealing and disposing of stolen property. In this capacity Affiants investigated a Commercial Burglary which occurred at the Alb. Tennis Complex, 1903 Stadium SE, on July 26, 1979, APD Report # 79–45193, in which approximately $6,500.00 worth of various tennis equipment was stolen. On August 16, 1979, Affiants were contacted by a confidential informant, who was found to be in possession of a tennis racket that had been taken in this burglary, and the confidential informant advised that he learned that this burglary had been committed by Marvin and Melvin Brown. This confidential informant wishes to remain anonymous for reasons of personal safety, however, he is deemed reliable in that he is a member in good standing in the community[,] has no arrest record in the community, is not presently under indictment nor working off any criminal charges. On August 20, 1979, the burglary at the Albuquerque Tennis Complex was presented throughout the news media as the Crimestopper "Crime of the week". On August 21, 1979, Affiants received a crimestopper tip which informed that a cheerleading squad for a football team at the John Marshall Community Center at 1500 Walter SE, had been outfitted with white socks, which match "John Newcombe" socks which were taken in the burglary at the Albuquerque Tennis Complex. The crimestopper informant further advised that these socks were supplied to the cheerleaders by Marvin and Melvin Brown. On August 22, 1979, Affiants received information from another crimestopper informant (# 1893) who advised that Marvin and Melvin Brown have been seen selling tennis equipment and have a large quantity of tennis equipment, that was stolen in the burglary of the Albuquerque Tennis Complex, in the rear bedroom of their residence which is located at 1607 Edith SE.
>
> Based on the above facts, affiants respectfully pray that this search warrant be granted under the auspices of the District Court, State of New Mexico, County of Bernalillo.

Nothing in *Jones* suggests that our Supreme Court will tolerate anything less than some underlying circumstances from which one may conclude that the informant is credible or that the information he supplied is reliable. In these cases the officers affirmed that the tennis complex was burglarized on July 26, 1979. There was no mention that this burglary was unknown comparable to the uniqueness of the "MO" of the burglaries of the pharmacies in *Jones*. Secondly, the officers related that on August 20 the news media carried the burglary of the tennis complex as a "Crimestopper" crime of the week. They mentioned that prior to August 20, Informant No. 1 was found in possession of a tennis racket that had been taken in the burglary. They affirmed that this informant advised that he had "learned" that the burglary had been committed by the two defendants. The officers added that the confidential informant wished to remain anonymous for safety reasons, but that he was deemed reliable "in that he is a member in good standing in the community[,] has no arrest record in the community, is not presently under indictment nor working off any criminal charges."

Analyzing the information supplied by Informant No. 1, we note first that he did not speak of personal knowledge. Second, the reasons the officers gave for believing

that he was reliable do not meet the traditional test of indicia of reliability. New Mexico Rule of Criminal Procedure 17(f), N.M.S.A. 1978, requires that when hearsay is used in a search warrant that there be "a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished." Under the facts recited in the affidavit, we do not have any of the uniqueness upon which our Supreme Court relied in *Jones*. We observe further that Informant No. 1 did not tell the officers that he had received the racket from the defendants. He merely "advised that he learned that this burglary had been committed" by the defendants. As in *State v. Duran*, 90 N.M. 741, 568 P.2d 267 (Ct.App. 1977), this information might have been mere casual rumor circulating in the underworld.

There were no underlying circumstances which indicated reliability with respect to Informant No. 2, who called up on August 21 regarding the socks. Further, the affidavit recited no attempt to corroborate whether in fact the cheerleaders had received socks from anyone. Thus, we do not see that this second informant's information satisfied any of the corroboration which our Supreme Court found critical in *Jones*.

Likewise, the third informant, who called on August 22, did not meet the unique information requirement of *Jones*. Perhaps he spoke from firsthand observation regarding the selling of the tennis equipment. However, there were no underlying circumstances which suggest that his information was reliable or that he was credible. The two-prong test of *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), and *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), was not met. Those requirements were recently reaffirmed by the United States Supreme Court in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

Finally, the aggregate of bits of information from the three informants, each of which does not contain within itself any indicia of credibility of the informant or reliability of the information, does not add up to a showing of probable cause. *Spinelli* holds that an aggregate of discrete bits of information, each of which is defective, does not add up to the establishment of probable cause.

Thus, having reconsidered these decisions in light of *Jones*, we find no reason to change the decision.

Reversed.

IT IS SO ORDERED.

LOPEZ and WALTERS, JJ., concur.

627 P.2d 409

STATE of New Mexico, Petitioner,

v.

Eldridge O. JONES, Respondent.

No. 13221.

Supreme Court of New Mexico.

Jan. 26, 1981.

Jeff Bingaman, Atty. Gen., Marcia E. White, Asst. Atty. Gen., Santa Fe, for petitioner.

Martha A. Daly, Appellate Defender, Melanie S. Kenton, Asst. Appellate Defender, Santa Fe, for respondent.

OPINION

EASLEY, Chief Justice.

The district court granted Jones' motion to suppress evidence. The State petitioned for an interlocutory appeal to the Court of Appeals, 627 P.2d 413, which affirmed the

decision of the trial court. We granted certiorari and reverse.

The issues presented are: (1) whether the officers had probable cause to arrest and search Jones without a warrant and use the evidence obtained, and (2) whether the affidavit for search warrant adequately established the credibility of the informant and furnished support for the introduction of the evidence recovered in a search of Jones' apartment.

A police officer manning the phones of the Crime Stoppers Program, a voluntary citizen informant program operated by the Albuquerque Police Department, received a call from an anonymous informant. The caller stated that he had been in Jones' apartment within the last twelve hours and Jones had shown him narcotics which appeared to be controlled substances and bragged that they had been obtained by burglarizing several pharmacies in the Albuquerque area. Jones had stated that he had gained entry to two pharmacies through the roof and one pharmacy through the window.

The caller further described Jones and his car and stated that Jones had said that he transported narcotics in his car. Officers checked the Department records which revealed that three recent unsolved burglaries of Albuquerque pharmacies had been committed with a modus operandi as described by the citizen informant. The modus operandi of the burglaries had not been publicly revealed by the police.

The police undertook surveillance of the apartment named by the informant and prepared an affidavit for a search warrant containing the above information. Before the affidavit was submitted to a magistrate, Jones was observed by police officers emerging from the apartment named by the informant and getting into the car described by the informant. Jones matched the informant's description. The officers arrested him and searched his person. They found what they believed to be controlled substances. These facts were added to the affidavit for search warrant. A search warrant for Jones' apartment and car was then obtained, based upon the affidavit. Controlled substances were seized in a subsequent search of Jones' apartment.

The first issue is whether the officers had probable cause to arrest defendant and conduct a search of his person incident to the arrest based upon the information provided by the anonymous citizen informant.

No claim has been made that the search of Jones' person exceeded the scope of a lawful search incident to arrest. Thus the only question is whether the search was incident to a valid arrest. A warrantless arrest is valid where the officer has probable cause to believe that a crime has been committed by the person whom he arrests. *Rodriquez v. State*, 91 N.M. 700, 580 P.2d 126 (1978); *State v. Kaiser*, 91 N.M. 611, 577 P.2d 1257 (Ct.App.1978), *cert. denied*, 91 N.M. 491, 576 P.2d 297 (1978). Probable cause requires that the officer believe, and have good reason to believe, that the person he arrests has committed a felony. *Rodriquez, supra.*

The initial information possessed by the arresting officer that indicated that the defendant had committed a crime was an anonymous informant's tip. A warrantless arrest may be based upon information from other persons where the information is corroborated or verified to an extent sufficient to establish the informant's credibility. *See Whiteley v. Warden*, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971); *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); *State v. Rondeau*, 89 N.M. 408, 553 P.2d 688 (1976); *State v. Deltenre*, 77 N.M. 497, 424 P.2d 782 (1966), *cert. denied*, 386 U.S. 976, 87 S.Ct. 1171, 18 L.Ed.2d 136 (1967); *State v. Barton*, 92 N.M. 118, 584 P.2d 165 (Ct.App.1978), *writ quashed*, August 16, 1978.

The information supplied by the informant in this case was corroborated by the police investigators which revealed that

three recent pharmacy burglaries had been committed in exactly the manner described by the informant. The informant's credibility was thus established by his unique knowledge of the particular facts of the crime. Furthermore, Jones matched the description given by the informant and drove the car and lived in the apartment named by the informant. It was therefore reasonable for the officers to believe that the other information supplied by the informant was true.

With the officers having such detailed information that had been partially corroborated, it would be stretching the exclusionary rule to say that the officers had no probable cause to believe that Jones had committed or was committing a felony. Law is, or should be common sense. There would be no common sense to such a rule. We hold that the officers had probable cause to arrest the defendant, and were therefore entitled to conduct a reasonable search of defendant's person incident to the arrest.

■ The next issue is whether the affidavit submitted by the police officers was sufficient to provide probable cause for the issuance of a warrant for the search of defendant's apartment.

In *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), the United States Supreme Court held that an affidavit may be based on hearsay information supplied by an informant so long as the magistrate is informed of some of the underlying circumstances from which the informant reached his conclusions, and some of the underlying circumstances from which the officer concluded that the informant was reliable, or his information credible.

Jones does not dispute that the first part of this test was satisfied by the affidavit in this case. Jones contends that the affidavit does not contain sufficient information from which it can be concluded that the anonymous informant was reliable, and the information credible.

In addition to the other information given by the informant, the officers found controlled substances on Jones when he was arrested. The previous discussion of the corroboration of the information supplied by the informant applies equally here. The credibility of the informant was established by the verification of the circumstances of the crimes as related by the informant, and the accuracy of the descriptions supplied by the informant.

We reverse the Court of Appeals and hold that the trial court erred in suppressing the evidence. The case is remanded to the trial court for trial on the merits.

IT IS SO ORDERED.

PAYNE, FEDERICI and RIORDAN, JJ., concur.

SOSA, Senior Justice, respectfully dissenting.

[redacted]

[redacted]

627 P.2d 413

STATE of New Mexico,
Plaintiff-Appellant,

v.

Eldridge O. JONES, Defendant-Appellee.

No. 4457.

Court of Appeals of New Mexico.

July 3, 1980.

Jeff Bingaman, Atty. Gen., Marcia E. White, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

John B. Bigelow, Chief Public Defender, Melanie S. Kenton, Asst. Appellate Defender, Santa Fe, for defendant-appellee..

OPINION

HENDLEY, Judge.

Defendant's motion to suppress certain physical evidence (narcotics) was granted and the State appeals. We affirm.

At the hearing on the motion to suppress, the only evidence offered was the affidavit for the search warrant. Neither side offered the testimony of any witness. The following is a summary of the contents of the affidavit:

1. Affiants are Albuquerque Police Department officers with several years of experience in the investigation of "Property Crimes, narcotics violations."

2. Other officers received an anonymous Crime Stoppers call from "informant number 1" who stated that "he/she" had been in contact with defendant in the last 12 hours; that defendant had bragged to the informant about committing several drug store burglaries; and that during the burglaries, entry had been gained once through a window and twice through the roof.

3. The informant also stated that the defendant showed him/her "narcotics which looked to be controlled substances."

4. Informant was told that if the information was true, informant would receive a monetary reward.

5. The affiants checked Albuquerque Police Department records and found reports on three burglaries wherein the modus operandi for entry was similar to that stated by the informant. The affiants stated that the MO which the defendant told the informant was known only to the perpetrator and to the investigating officers.

6. A handwritten amendment to the affidavit stated that defendant was arrested and upon his arrest a search revealed narcotics on his person. The handwritten addition also states: "Informant # 1 stated that 'Red' [the defendant] is known to transport narcotics in his own vehicle by 'Reds' [sic] own admission."

The arguments of counsel before the trial court somewhat clarify the chronology of events. Apparently, the officers received the Crime Stoppers tip, prepared the typewritten part of the affidavit, then arrested the defendant with no arrest warrant. The handwritten part of the affidavit for search warrant was added after the arrest.

There is one primary issue involved: Does the affidavit state sufficient facts (both facts to support the informant's assertion that the defendant was committing a crime and corroboration of the informant's assertions) to justify issuance of a warrant? However, before a conclusion can be reached on this issue, the sub-issue as to the validity of the warrantless arrest must be considered. If the warrantless arrest was valid, it was a "fact" before the magistrate; if invalid, the affidavit must be considered with the arrest information deleted.

The State argues that the legality of the warrantless arrest was not presented to the trial court. This argument is unpersuasive for several reasons. First, the defendant's motion specifically questioned the sufficiency of the *facts* upon which the affidavit was based. A subset of those facts was composed of the evidence obtained during the defendant's arrest. Second, the court stated it was accepting the defendant's argument, a portion of which questioned the legality of the arrest.

In *Hudson v. State*, 89 N.M. 759, 557 P.2d 1108 (1976), the trial court had deleted from the search warrant affidavit the portion regarding the arrest of the defendant. The Supreme Court stated:

> The State failed to preserve as error this deletion by the trial court and failed to appeal it; thus, it is not before us. [Citations omitted.] Had this paragraph been before us, there may have been sufficient corroborative evidence to validate the infirmity of the search warrant, *Spinelli v. United States*, 393 U.S. 410, 415, 89 S.Ct. 584, [588,] 21 L.Ed.2d 637 (1969), which was, as is discussed below, the insufficient description of the underlying circumstances. However, since the record was not perfected and that paragraph is

> not before us, we cannot read that corroborating statement into the affidavit for the search warrant.

Hudson imposes upon the State the obligation to support each and every aspect it intends to rely upon when the sufficiency of the affidavit is challenged. If the State intended to rely upon the arrest evidence in the affidavit, it had the obligation to show that the warrantless arrest was based upon probable cause. *See State v. Gorsuch*, 87 N.M. 135, 529 P.2d 1256 (Ct.App. 1974).

The State presented no evidence to support the warrantless arrest in the trial court. Thus, the answer as to whether the evidence of arrest could be utilized in considering the sufficiency of the warrant is that the State failed to present evidence to justify the warrantless arrest. Therefore, if the affidavit will not stand absent the arrest evidence, the trial court must be upheld.

Did the affidavit state sufficient facts to allow a finding of probable cause in support of the search warrant?

The Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, states that warrants shall not issue except upon a showing of probable cause. Probable cause is variously defined; however, the most common statement requires reasonable grounds to believe that the suspect has committed a crime. *See, e. g., Rodriquez v. State*, 91 N.M. 700, 580 P.2d 126 (1978); *State v. James*, 91 N.M. 690, 579 P.2d 1257 (Ct.App. 1978). In determining the officers' reasonable grounds, his reliance on hearsay is not dispositive. *State v. Perea*, 85 N.M. 505, 513 P.2d 1287 (Ct.App. 1973). Rule 17(f) of the Rules of Criminal Procedure for the District Courts, N.M.S.A. 1978, states that 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 that there is a factual basis for the information furnished."

In applying what has come to be known as the *Aguilar* two-prong test, this Court held in *State v. Bowers*, 87 N.M. 74, 529 P.2d 300 (Ct.App. 1974):

> We believe that the following should be the standards for the sufficiency of search warrants: (1) only a probability of criminal conduct need be shown; (2) there need be less vigorous proof than the rules of evidence require to determine guilt of an offense; (3) common sense should control; (4) great deference should be shown by courts to a magistrate's determination of probable cause. [Citations omitted.]

See also State v. Perea, supra.

Thus, in order for hearsay to be relied upon in an affidavit for a search warrant, the affidavit must establish first the underlying circumstances from which the (hearsay) informant concluded that the crime was being committed; and, second, that the informant was reliable. The defendant does not contest the first aspect—the personal knowledge of the informant as asserted by the affiant was sufficient. *Compare State v. Duran*, 90 N.M. 741, 568 P.2d 267 (Ct.App. 1977). Rather, the claim is that there is no showing that the informant's information should be given credit because of the informant's reliability.

Generally, there are three methods for establishing the unnamed informant's reliability in an affidavit for a search warrant. First, the affiant can establish the informant's reliability by stating that, due to his prior experience with the informant, he trusts the reliability of the information supplied. *See State v. Cervantes*, 92 N.M. 643, 593 P.2d 478 (Ct.App. 1979). *See also State v. Gutierrez*, 91 N.M. 542, 577 P.2d 440 (Ct.App. 1978); *In Re One 1967 Peterbilt Tractor, etc.*, 84 N.M. 652, 506 P.2d 1199 (1973). The affidavit in this case does not claim that the affiant had prior dealings with this informant.

Second, the type of information provided can be in and of itself deemed reliable or self-corroborating; such as, where the information contains a statement against the penal interests of the informant. *See State v. Perea, supra; State v. Archuleta*, 85 N.M.

146, 509 P.2d 1341 (Ct.App. 1973). The statements of the informant in this case cannot be deemed statements against penal interest.

Third, the reliability of the informant can be established by verifying certain aspects of the information which he provided. *See State v. Turkal*, 93 N.M. 248, 599 P.2d 1045 (1979), which states:

> 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.

The State contends that the affidavit in this case should be upheld because it claims sufficient corroboration of the informant's allegation to establish the informant's reliability. The State's claim is that the informant's statement of the "modus operandi" used by the burglar was verified by the officers' check of police records. We agree that the officers' search verified that burglaries had occurred and that the entry made in those burglaries was effected in the manner which the informant asserted. However, the corroboration of the facts asserted should go not only to the fact that a crime was committed, but also to the fact that this defendant committed the crime. *See People v. Elwell*, 27 Cr.L. 2223 (N.Y.Ct. App.). In effect, the corroboration in this case was only the first prong of the *Aguilar* test—that a crime had been committed. There was no corroboration of the informant's assertion that the defendant had committed the crimes. The statement that the "MO" was "only known to the investigating officers and/or the perpetrator of the burglaries" is insufficient in this respect. *Compare State v. Luna*, 91 N.M. 560, 577 P.2d 458 (Ct.App. 1978). Not only did the investigating officers and the perpetrator know the "MO", but the informant also knew the "MO". There is no showing as to why the officers believed the informant's assertions inculpating the defendant rather than focusing their investigation upon the informant. Thus, the reliability of the informant was not established upon the face of the affidavit.

Affirmed.

IT IS SO ORDERED.

WALTERS and ANDREWS, JJ., concur.

627 P.2d 864

L. R. PROPERTY MANAGEMENT, INC., a corporation, Plaintiff-Appellee,

v.

James R. GREBE and Gregory J. Simon, d/b/a Burnt Wood, Inc., Defendants-Appellants.

No. 13112.

Supreme Court of New Mexico.

March 16, 1981.

Rehearing Denied May 5, 1981.

Moses, Dunn, Beckley, Espinosa & Tuthill, Adelia W. Kearny, Albuquerque, for defendants-appellants.

Alfred M. Carvajal, Albuquerque, for plaintiff-appellee.

OPINION

FEDERICI, Justice.

L. R. Property Management, Inc. (appellee), brought suit in the district court against James R. Grebe and Gregory J. Simon (appellants), individually, to recover damages for breach of a lease of premises in the Montgomery Plaza Shopping Center in Albuquerque. The trial court granted judgment for appellee. Appellants appealed to this Court. We reverse.

On or about June 24, 1975, appellants, doing business as Burnt Wood, Inc., entered into a written lease with Regional Properties of New Mexico, Inc., landlord of Montgomery Plaza. The premises were vacated prior to termination of the lease. Appellee, L. R. Property Management, Inc., filed suit upon the lease, alleging that it was the successor in interest to the original landlord.

The issues we discuss on appeal are: (1) whether L. R. Property Management, Inc. is a real party in interest, and (2) whether the terms of the lease provide for individual liability on the part of Grebe and Simon.

N.M.R.Civ.P. 17(a), N.M.S.A.1978 (Repl.Pamp.1980), requires every action to be prosecuted in the name of the real party in interest. A real party in interest is "determined by whether one is the owner of the right being enforced and is in a position to discharge the defendant from the liability being asserted in the suit." (Citation omitted.) *Jesko v. Stauffer Chemical Company*, 89 N.M. 786, 790, 558 P.2d 55, 59 (Ct.App.1976).

Appellee submitted a bill to appellant Simon, billing him and/or the business for "Common Area Maintenance costs" dated "9–21–77." Appellee further submitted testimony by Roy Kane that he was the general manager of Montgomery Mall. In answers to interrogatories and in a letter placed in evidence, Mr. Kane indicated that he was employed by L. R. Property Management, Inc. Finally, appellee placed in evidence an order accepting a receiver's final account and report, and discharging it as a receiver for Montgomery Plaza dated July 11, 1977. Appellee states that this evidence is sufficient to show that it is the real party in interest.

This evidence does not establish that appellee is either the owner of a right or that it is in a position to discharge appellant from the liability being asserted in the suit. *Jesko, supra.* At the most, it only establishes that Kane worked for L. R. Property Management, Inc., and that L. R. Property Management, Inc. was sending bills to appellants for use of a common area in Montgomery Plaza.

One who is not a party to a contract cannot maintain a suit upon it. *Bank of New Mexico v. Rice*, 78 N.M. 170, 429 P.2d 368 (1967). If L. R. Property Management, Inc. was a successor in interest to a party on the lease, it was incumbent upon it to prove this to the court.

In *Family Farm & North 10 Riding Academy, Inc. v. Cain*, 85 N.M. 770, 517 P.2d 905 (1974), this Court considered a situation similar to the situation here where a corporation claimed to be a party. There, the Court stated: "No evidence was presented to show that the corporation was in existence, or to show that it had any interest in the subject matter of the litigation." *Id.* at 772, 517 P.2d at 907.

The original lease here was for more than one year and any assignment of it for a term greater than a year must be in writing to satisfy the statute of frauds. *Merrill v. Klein*, 51 N.M. 498, 188 P.2d 609 (1947). No assignment, either oral or written, appears in the record.

We hold that appellee did not establish that it was a real party in interest to the lease, and thus it is not entitled to judgment. The trial court is reversed on this issue.

Since disposition of this issue may not resolve the controversy between the parties, we also address the issue of individual liability of appellants.

The trial court found that "[t]he lease indicates that all the original parties intended that Defendants Simon And Grebe be bound individually as tenants." It is apparent from this finding that the trial court did not go beyond the four corners of the lease in determining individual liability. This is proper where a lease agreement is not ambiguous. *Higgins v. Cauhape*, 33 N.M. 11, 261 P. 813 (1927).

The lease provisions here name the parties in several places. On the cover page appears the following:

REGIONAL PROPERTIES OF NEW MEXICO, INC.

Landlord

Jim Grebe & Greg Simon

d/b/a

THE BURNT WOOD, INC.

Tenant

The first paragraph of the lease contains the following recitations:

> THIS LEASE, made this 24th day of June, 1975, between REGIONAL PROPERTIES OF NEW MEXICO, INC., hereinafter designated "Landlord", and Mr. Jim Grebe and Mr. Greg Simon, d/b/a THE BURNT WOOD, INC. * * * hereinafter designated "Tenant".

The signature page of the lease shows:

> REGIONAL PROPERTIES
> OF NEW MEXICO, INC.
> By [Signature]
> LANDLORD
> ATTEST:
> [Signature]
> Secretary
> BURNT WOOD, INC.
> By [Signature]
> Jim Grebe TENANT
> By [Signature]
> Greg Simon TENANT
> WITNESS:
> [Signature]

Similar designations of the parties appear in a Rider and a Memorandum Agreement, also admitted in evidence.

If we were looking solely to the signature lines on the contract, we would have no trouble in finding that the lease creates a corporate and not a personal obligation, as a matter of law. *Barnes v. Sadler Associates, Inc.*, 95 N.M. 334, 622 P.2d 239 (1981); *Carlesimo v. Schwebel*, 87 Cal.App.2d 482, 197 P.2d 167 (1948).

However, the introductory lines of the contract name the individuals, Grebe and Simon, "d/b/a THE BURNT WOOD, INC." This recitation arguably creates an ambiguity in the contract. We must look to the agreement as a whole in interpreting the intention of the parties. *Acquisto v. Hahn Enterprises, Inc.*, 95 N.M. 193, 619 P.2d 1237 (1980).

The lease was prepared by the landlord, its agents or employees. It would have been very easy for the landlord to create individual liability on the part of Grebe and Simon by indicating they were individually liable in the lease. The landlord did not do this. If an ambiguity was created, it must be construed most strongly against the landlord who prepared the lease. *Mobile Investors v. Spratte*, 93 N.M. 752, 605 P.2d 1151 (1980).

We conclude that even if an ambiguity existed in the lease, rules of construction require the ambiguity to be resolved against the appellee-landlord. Grebe and Simon are not individually liable on the contract. The trial court is reversed on both issues presented to this Court on appeal. The district court is directed to enter judgment in favor of appellants.

IT IS SO ORDERED.

SOSA, Senior Justice, and RIORDAN, J., concur.

627 P.2d 866

Peter Lynn ADAMCHEK, Petitioner,

v.

GEMM ENTERPRISES, INC., d/b/a Bagel Nosh Restaurant and Edward Muzio, Respondents.

No. 12997.

Supreme Court of New Mexico.

April 23, 1981.

Adams & Foley, Quincy D. Adams, Albuquerque, for petitioner.

Gallagher, Casados & Martin, J. E. Casados, Albuquerque, for respondents.

OPINION

RIORDAN, Justice.

On December 30, 1980, an opinion in the above case was handed down by this Court. A motion for rehearing was filed by the respondents. The motion was granted in order to reconsider our original opinion. We are hereby withdrawing the opinion of December 30, 1980 and substituting the following opinion.

Defendants-appellees (Gemm, Inc. and Muzio) were granted summary judgment against plaintiff-appellant (Adamchek). Adamchek brought this tort action against his employer and the corporation for injury resulting from a gunshot wound. The defendant moved for summary judgment on the ground that the Workmen's Compensation Act provided the exclusive remedy for plaintiff. The trial court granted the motion. The Court of Appeals affirmed the summary judgment, and we granted certiorari. We reverse the decision of the Court of Appeals and the trial court.

Gemm, Inc., owns a restaurant and Muzio is an officer and stockholder in the Gemm Corporation. Adamchek was employed by Gemm, Inc., as a cook. When Adamchek returned to the restaurant from a personal errand, Muzio was playing with a .357 magnum pistol. Muzio accidentally discharged the gun inflicting serious injuries to Adamchek.

The critical question in the case at bar is whether the accidental shooting of Adamchek was a risk incident to the work itself thereby leaving Adamchek the exclusive remedy provided under the Workmen's Compensation Act.

In *Mountain States Tel. & Tel. Co. v. Montoya,* 91 N.M. 788, 581 P.2d 1283 (1978), the workman was injured after leaving his duties but still on the employer's premises. He was injured by a security guard striking him on the head with a night stick. This Court held that the workman's exclusive remedy in that case was under the Workmen's Compensation Act. A night stick is a device normally used by a security guard in performing his job, a tool of his trade. Although an injury to a fellow employee from the negligent use of a device or tool of the trade may be said to arise out of the employment, in the case at bar, a pistol in the hands of a corporate executive cannot be said to be a device or tool of his trade normally used in the performance of his executive duties. The negligent injury of an employee through the accidental discharge of such a pistol does not ordinarily arise out of the employment.

In *Berry v. J. C. Penney Co.*, 74 N.M. 484, 394 P.2d 996 (1964) this Court, as stated in part, held as follows:

> Our workmen's compensation statute requires as a condition to a compensable injury that it arise out of and in the course of the employment. The two parts of the phrase must be separately interpreted. Any accident arising "while at work" is one "in the course of the employment." The terms are synonymous. (Citations omitted.) However, it is well established that under the express statutory language it is not enough that an injury "arose in the course of employment." *It must "arise out of"* as well as "in the course of" the employment. (Citations omitted.) 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.* (Emphasis added.)

Id. at 485, 394 P.2d at 997.

In *Gutierrez v. Artesia Public Schools*, 92 N.M. 112, 583 P.2d 476 (Ct.App.1978), a teacher's widow sought to recover workmen's compensation benefits for the murder of her husband committed at a time when the victim-teacher was at school but was not at work.

The Court of Appeals clearly defined and delineated the meaning of "arise out of" as used in the Workmen's Compensation Act as follows:

> For an injury to "arise out of" the employment, there must be a showing that *the injury was caused by a risk to which the decedent was subjected by his employment. The employment must contribute something to the hazard, Williams v. City of Gallup*, 77 N.M. 286, 421 P.2d 804 (1966).
>
> A definition of "arise out of" adopted by almost every state in the union and referenced to in *Perez*, supra [54 N.M. 339, 224 P.2d 524], comes from an opinion written by Chief Justice Rugg, *In re McNicol*, 215 Mass. 497, 102 N.E. 697, L.R.A.1916A, 306, 4 N.C.C.A. 522 (1913). An employee was assaulted and killed by an obviously intoxicated fellow workman whose quarrelsome and dangerous disposition when intoxicated was well known to the employer. In holding for claimants, the court said:
>
> It is sufficient to say that an injury is received "in the course of" the employment when it comes while the workman is doing the duty which he is employed to perform. *It arises "out of" the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.* Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. *It need not have been foreseen or expected, but after the event if must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.* [102 N.E. at 697]. (Emphasis added.)

This incisive language should put to rest any quarrel with respect to the meaning of "arise out of." By the application of this rule to the instant case, we cannot fathom any basis for plaintiff's argument that decedent's murder arose out of decedent's employment. Decedent's death cannot be traced to his employment as a contributing proximate cause. Decedent would have been equally exposed apart from the employment.

> It could have occurred anywhere other than the Hermosa School. The danger was not peculiar to decedent's work or incidental to the school system in Artesia.

Id. at 115, 583 P.2d at 479.

Applying the rationale from the above case, we do not see any basis for a ruling that a gunshot wound could be traced to the employment as a restaurant cook being a contributing proximate cause of the gunshot wound in this case.

The decision of the Court of Appeals and the trial court are reversed. The case is remanded to the trial court with instructions to reinstate it on its docket for further proceedings not inconsistent with this opinion.

IT IS SO ORDERED.

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

627 P.2d 869

John Merl GUESS, Administrator of the Estates of Virginia Madine Guess, Cecil Wayne Guess and Janet R. Guess, Individually and as Guardian and Next Friend of Carrie Guess, a minor, Plaintiff-Appellant,

v.

GULF INSURANCE COMPANY, Defendant-Appellee.

No. 13083.

Supreme Court of New Mexico.

May 4, 1981.

Gary Jeffreys, Deming, for plaintiff-appellant.

Crouch, Valentine & Ramirez, Larry Ramirez, Las Cruces, for defendant-appellee.

OPINION

RIORDAN, Justice.

Plaintiff, as personal representative of the estates of his deceased children and as next friend of another child, filed suit against his insurance carrier seeking recovery under the uninsured motorist provision of his insurance policy for damages resulting from the death of three of his minor children and the injuries to a fourth child. The suit alleges the negligent operation by the plaintiff's wife of an uninsured automobile owned by a third party. The children were passengers in the car that was involved in the one-car accident in which plaintiff's wife also died.

The defendant filed a motion to dismiss for failure to state a cause of action, claiming that an "insured" (the plaintiff in this case) cannot maintain a direct cause of action against his insurance company and further, that since plaintiff was suing in his representative capacity the suit was barred by public policy reasons that do not allow a child to sue a parent. The trial court granted the motion to dismiss. We reverse.

The first question we address is whether an insured can bring a direct action against his own insurance company on the uninsured motorist claim. We answer in the affirmative.

■ The object of uninsured motorist insurance is to protect persons injured in automobile accidents from losses which would otherwise go uncompensated because of the tortfeasor's lack of liability coverage. *Chavez v. State Farm Mutual Automobile Ins. Co.*, 87 N.M. 327, 533 P.2d 100 (1975).

The statute creating compulsory uninsured motorist coverage states that it is:

> for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, and for injury to or destruction of property resulting therefrom . . . .

§ 66–5–301(A), N.M.S.A.1978 (Cum.Supp. 1980).

Defendant insurance company argues that before an insured can bring an action against his own insurance company, he must first bring an action and obtain a judgment against the uninsured motorist.

■ The statute itself does not prohibit an insured from bringing a direct action against the insurer nor does it require an action against the uninsured motorist to establish liability and damages. We do not think the Legislature intended to require the insured to first bring an action against the uninsured tortfeasor. The damages an insured is legally entitled to recover can be determined as easily in a direct suit against the insurance carrier as in a suit against the uninsured motorist. Furthermore, the Rules of Civil Procedure allow the insurance company to demand a joinder of the tortfeasor.

We hold that an uninsured motorist provision which is required by statute to be included in a motor vehicle insurance policy allows a cause of action on uninsured motorist claims to be raised in a direct action by the insured against the insurance company.

Our holding follows the view accepted by a majority of the courts which have examined this issue. In one of the leading cases in the area, *Winner v. Ratzlaff*, 211 Kan. 59, 505 P.2d 606 (1973), the Supreme Court of Kansas lists the cases from other jurisdictions which adopt a similar view. *See also*, Annot., 73 A.L.R.3d 632 (1976).

Not only does the statute require this result, but an interpretation of the applicable policy provisions, also supports this theory. The uninsured motorist clause of the policy in question reads:

> The company will pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured highway vehicle because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured highway vehicle. . . .

Plaintiff's children, as members of the insured's household, are insured parties under the terms of the policy and are therefore covered by the uninsured motorist provision.

The policy continues:

> [D]etermination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, may be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration in accordance with the arbitration provision of this policy, *or by judicial determination.* (Emphasis added.)

Does this policy provision purport to require that the judicial determination first be made against a third party before it can be made against the insurance company? We think not. The following provision of the policy makes the judicial determination referred to above inconclusive as to the liability of the insurance company:

> No judgment against any person or organization alleged to be legally responsible for the bodily injury shall be conclusive, as between the insured and the company, of the issues of liability of such person or organization or of the amount of damages to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company.

There would be no reason to require the insured to first sue the tortfeasor and recover a judgment since the insurance company is not bound by that judgment under the terms of the policy.

The second ground for granting the motion to dismiss was the public policy barring suits between children (or their representative) and their parents. This judicially-created intrafamily immunity is based upon the public policies of preventing collusion and maintaining family relationships. *See Fitzgerald v. Valdez*, 77 N.M. 769, 427 P.2d 655 (1967); *Nahas v. Noble*, 77 N.M. 139, 420 P.2d 127 (1966); *Streenz v. Streenz*, 106 Ariz. 86, 471 P.2d 282 (1970).

Other intrafamily immunities based on these same policies have been abolished in recent years. In *Maestas v. Overton*, 87 N.M. 213, 531 P.2d 947 (1975), interspousal immunity for non-intentional torts was abolished. Interspousal immunity for intentional torts had previously been abolished in *Flores v. Flores*, 84 N.M. 601, 506 P.2d 345 (Ct.App.1973), *cert. denied*, 84 N.M. 592, 506 P.2d 336 (1973).

There is no stronger public policy for barring intrafamily suits between parents and children than existed for barring intraspousal suits. The arguments that family relationships will be weakened or destroyed by bringing a lawsuit is not persuasive. The relationships will be affected to a much greater extent by the conduct between the parties that causes the lawsuit to be filed. We hold that a suit may be maintained between a child and his or her representative and the parents or their personal representative.

The trial court is reversed, and this case is remanded with instructions to reinstate the case on the docket and proceed in a manner consistent with this opinion.

IT IS SO ORDERED.

EASLEY, C. J., and SOSA, Senior Justice, concur.

627 P.2d 871

STATE of New Mexico,
Plaintiff-Appellee,

v.

Donald Lee STOUT,
Defendant-Appellant.

No. 13341.

Supreme Court of New Mexico.

May 5, 1981.

Martha A. Daly, Appellate Defender, Melanie S. Kenton, Asst. Appellate Defender, Santa Fe, Susan Alkema, Asst. Public Defender, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Charles F. Noble, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

RIORDAN, Justice.

The defendant was convicted of robbery with a firearm and sentenced on October

23, 1979 to a term of not less than fifteen nor more than fifty-five years. On June 19, 1980, some eight months after defendant initially began serving his sentence, the district attorney filed a supplemental information alleging that the defendant had previously been convicted of armed robbery in 1971 and therefore his punishment for the second conviction should be life imprisonment in accordance with Section 30–16–2, N.M.S.A.1978. A trial was held on the supplemental information and the jury found the defendant to be the same person previously convicted in 1971. The trial judge therefore vacated the October 23, 1979 sentence and sentenced the defendant to life imprisonment. We affirm.

The defendant raises three points on appeal: (I) the enhancement procedure violated the defendant's right to due process; (II) the resentencing of the defendant violated his constitutional protection against double jeopardy; and (III) the trial court erred in admitting penitentiary records that were not properly authenticated.

I. *THE ENHANCEMENT PROCEDURE*

The defendant was sentenced under Section 30–16–2, N.M.S.A.1978, which reads as follows:

> Robbery consists of the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence.
>
> Whoever commits robbery is guilty of a third degree felony.
>
> Whoever commits robbery while armed with a deadly weapon is, for the first offense, guilty of a second degree felony and, for second and subsequent offenses, is guilty of a first degree felony.

The statute provides no procedure for determining whether the defendant had previously been convicted of armed robbery, nor does it state how the defendant is to be informed of the possible sentence that he is facing if convicted. Since it is a procedural matter, it is within the province of the court to determine how this is to be accomplished.

We first address the issue of whether the filing of the notification of enhancement after conviction violates the defendant's rights. The defendant argues that he is entitled to notice that he may be sentenced to life imprisonment as a second offender before he is tried on the robbery offense, claiming that anything else denies him due process. This Court has previously held that a defendant is entitled to notice of the charges by some pleading being filed and an opportunity to be heard before sentence is imposed. In *State v. Rhodes*, 76 N.M. 177, 181, 413 P.2d 214, 217 (1966) we stated:

> [E]ssential fairness requires that there be some pleading filed by the state, whether it be by motion or otherwise, by which a defendant is given notice and opportunity to be heard before an increased penalty can be imposed.

The defendant in *Rhodes* appeared for sentencing and was questioned by the court as to whether he had previous convictions for narcotics violations. When the defendant admitted a prior conviction, the court immediately sentenced him as a second offender. On appeal, this Court held that there was a denial of due process in that procedure and that a pleading must be filed before enhancement could occur.

Rhodes did not address the issue as to whether filing of the pleading after conviction would violate due process. On this point, we see no difference between the procedure followed in the instant case and the filing of an habitual criminal proceeding under the habitual criminal statute. The separate enhancement proceeding has been approved by the United States Supreme Court in *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). The Court held that if the state uses two separate proceedings, due process does not require notice before trial that an enhancement proceeding will follow conviction. It is our opinion that the defendant was not denied due process by the manner in which the enhancement proceeding was prosecuted. The state is not required to give the defendant notice before trial on the substantive offense that enhancement may be

sought after conviction. By filing a pleading seeking to enhance the defendant's sentence, the state has complied with the guidelines set out in *Rhodes*, supra.

II. *DOUBLE JEOPARDY*

The defendant claims that once he has begun his sentence that he cannot be resentenced and given an increased sentence. He relies, in particular, on *State v. Allen*, 82 N.M. 373, 482 P.2d 237 (1971), in support of his position. In *Allen*, this Court held that a defendant who had been properly sentenced and had served a substantial portion of his sentence could not be resentenced to a longer term even though the judge could have validly imposed the longer sentence in the first place. In that case, the defendant had served eight years of a 3–50 year sentence. The applicable statute at that time allowed any sentence of from three years to life imprisonment. The court in its discretion had imposed the shorter sentence and only sought to impose a greater sentence after the defendant had filed several motions and habeas corpus proceedings attacking his sentence. This case differs from *Allen* in a number of respects. In this case, the defendant had only served eight months of his sentence before the enhancement of the sentence was sought. In addition, the change in sentencing here was according to the enhancement statute and not imposed by the judge as a penalty for exercising the defendant's constitutional rights. We hold that the defendant's initial sentence was the valid and appropriate sentence until it was proven that he was a prior offender under the appropriate enhancement statute. Upon a finding by a court or jury, depending on whether the defendant is entitled to a jury trial on the question of identity (which we do not address in this proceeding) the previous sentence must be vacated and the enhanced sentence imposed as provided by law.

There are many valid considerations, some evidentiary and some financial, for the district attorney to weigh before determining when an enhancement proceeding will be filed. And while we assume that in some case it could violate the defendant's rights to wait a substantial period of time before enhancement is sought, that is not the case here. The appeal on the defendant's conviction was not even affirmed until after the enhancement proceeding was filed.

As far as the claim that an increase in sentence amounts to double jeopardy, this court has held on a number of occasions that validly increasing a sentence under our habitual offender act is not double jeopardy. *State v. James*, 94 N.M. 604, 614 P.2d 16 (1980). *See also State v. Gonzales*, 84 N.M. 275, 502 P.2d 300 (Ct.App.1972), *cert. denied* 84 N.M. 271, 502 P.2d 296 (1972). While the defendant was not sentenced under our habitual criminal statute, there is no material difference. We hold that it does not amount to double jeopardy.

III. *THE PENITENTIARY RECORDS*

The third point that the defendant raises is that the records of the penitentiary that were used to prove his identity as previously convicted were improperly admitted. During the trial on the issue of identity, the judge admitted records from the penitentiary that were authenticated by the penitentiary's records manager. The records were also under seal of the acting warden. The name typed on the form was that of "Robert E. Montoya", however they were signed by "Felix Rodriguez, Acting Warden." Since there was no foundation for the documents other than the documents themselves, they must be self-authenticating under Rule 902 of the Rules of Evidence, N.M.S.A.1978, in order to qualify as exceptions to the hearsay rule under Rule 803(8) of the Rules of Evidence, N.M.S.A.1978 (Cum.Supp.1980) which applies to public records. We hold that the exhibit was properly admitted. It was a document bearing the seal of a state agency, and it bears a *signature* of attestation. The typed name is irrelevant. The admission of evidence is within the discretion of the trial judge and will not be disturbed absent a clear abuse of discretion. *State v. Valdez*, 83 N.M. 632, 495 P.2d 1079 (Ct.App.1972),

aff'd, 83 N.M. 720, 497 P.2d 231 (1972), *cert. denied* 409 U.S. 1077, 93 S.Ct. 694, 34 L.Ed.2d 666 (1977). Here we find no abuse of discretion. The imposition of the sentence of life imprisonment is affirmed.

PAYNE and FEDERICI, JJ., concur.

627 P.2d 875

Mike SIMS, Berry F. Davis and The Four Seasons Apartments Co., a New Mexico limited partnership, Plaintiffs-Appellees,

v.

Eddy L. CRAIG, Defendant-Appellant.

No. 13261.

Supreme Court of New Mexico.

May 5, 1981.

Cox, Imke & Proctor, Charles W. Imke, Max Proctor, Hobbs, for defendant-appellant.

James E. Womack, Albuquerque, for plaintiffs-appellees.

OPINION

SOSA, Senior Justice.

This is an appeal from the district court's ruling that plaintiffs-appellees Sims, et al. (Sims) were entitled to damages arising from an option agreement to purchase certain community property from defendant-appellant Craig. The issues are as follows:

(1) Whether the option agreement entered into between appellees and Mr. Craig is void and of no effect because it is a contract to convey community property and Mrs. Craig failed to sign it.

(2) Whether the trial court erred in finding that appellees were damaged by reliance on the representations made by Craig concerning the option agreement since plaintiffs knew or should have known that the subject property was community property.

(3) Whether appellees are entitled to damages based on their reasonable reliance on appellant's misrepresentations.

(4) Whether the agreement negotiated between Sims and the Craigs for a higher purchase price amounted to a waiver, settlement or novation of the terms of the option agreement.

Sims entered into an option agreement with Mr. Craig to purchase real estate owned by Mr. and Mrs. Craig for $55,000.00. Sims gave Mr. Craig a non-refundable option check for $5,000.00 to be applied toward the purchase. At the time of the execution of the option agreement, Mrs. Craig was in Europe and never signed the contract. The real estate in question is the community property of the Craigs. Mrs. Craig learned of the option agreement when she returned from Europe. She informed appellees that she would not sell the land for $55,000.00 but would accept $65,000.00 instead. Sims and the Craigs renegotiated the sale of the property on November 7, 1977, raising the purchase price to $65,000.00. On September 14, 1979, appellees sued Mr. Craig for breach of the option agreement, seeking compensatory damages of $10,450.00. The district court ruled in favor of Sims finding that at the time the option agreement was executed, Mr. Craig knew that the real estate was community property and that Sims relied on the option agreement to their detriment, expending large sums of money in commitment and architectural fees. Mr. Craig appeals this decision. We affirm.

Both parties agree that the option agreement is a contract to convey community property and is, therefore, void because it does not bear Mrs. Craig's signature. Section 40–3–13(A), N.M.S.A. 1978, requires joinder of both spouses for contracts to convey or transfer community property. Accordingly, Sims could not obtain specific performance of the contract to force conveyance of the real estate. *Hannah v. Tennant*, 92 N.M. 444, 589 P.2d 1035 (1979). Nor could he obtain damages for breach of contract since the contract is void.

Having decided that Sims cannot sue on the contract because it is void, the next question becomes whether he can recover damages on any other theory of law. The evidence in this case supports an action for negligent misrepresentation. While we

recognize that actions for damages based on issues of tort should be appealed to the Court of Appeals, § 34–5–8, N.M.S.A. 1978, we have decided to hear this case because the parties brought it before us on a theory of breach of contract which we now decide cannot lie. An action for misrepresentation differs from the tort of deceit wherein plaintiff must prove intent on the part of the defendant to mislead or defraud. The theory of liability for this tort is one of negligence rather than of intent to mislead. W. Prosser, *Handbook of the Law of Torts* § 107 (4th Ed. 1971). Negligent misrepresentation is available to a plaintiff who is "so circumstanced that he cannot or does not wish to rescind, and cannot meet the proof required for the tort of fraud or deceit [as a] . . . remedy for damages caused by a misrepresentation short of fraud." *Maxey v. Quintana*, 84 N.M. 38, 41, 499 P.2d 356, 359 (Ct.App.1972), *cert. denied*, 84 N.M. 37, 499 P.2d 355 (1972). Such a remedy is available in situations such as this one involving the sale of real estate.

> The rule is well established that a charge of fraud may be based on the vendor's false statements and misrepresentations in the sale of land, where it appears that such statements and representations were statements or representations of material facts and not mere statements of opinion, and were such that the purchaser not only was entitled to rely upon them, but in point of fact did rely upon them, to his injury. (Footnotes omitted.)

37 Am.Jur.2d, *Fraud and Deceit* § 239 at 319 (1968).

The trial court concluded that Sims relied to his detriment on the oral and written representations made by Craig as to the sale of the real estate for $55,000.00. The court also concluded that Sims had a right to rely on the statements made by Craig. There is substantial evidence in the record to support the court's conclusions in that Sims had expended large sums of money in commitment and architectural fees, the parties (including Mrs. Craig) had been engaged in several negotiations concerning the sale of the realty over several preceding months, and Mrs. Craig testified that she had signed an option agreement for the sale of the land for $55,000.00 prior to the execution of the contract found to be void in this action. Because of the conduct of the Craigs in prior negotiations, Sims had reason to believe that Mrs. Craig would sign the deed conveying the land for $55,000.00. The trial court found that Sims reasonably relied on Mrs. Craig's representations, and we will not disturb those findings where substantial evidence exists for their support.

> It is well settled in New Mexico that the appellate court will not substitute its judgment for that of the trial court in weighing the evidence. If the trial court's findings are supported by substantial evidence, they must be affirmed. *Cave v. Cave*, 81 N.M. 797, 474 P.2d 480 (1970).

Tome Land & Improvement Co. v. Silva, 83 N.M. 549, 552, 494 P.2d 962, 965 (1972). *See Schaab v. Schaab*, 87 N.M. 220, 531 P.2d 954 (1974).

Appellant argues that the trial court erred by failing to conclude that the contract entered into between Sims and the Craigs to convey the property for $65,000.00 constituted a novation or compromise and settlement of the original option agreement. In order for this contract to constitute a novation, there must be (1) an existing and valid contract, (2) an agreement to the new contract by all parties, (3) a new valid contract, and (4) an extinguishment of the old contract by the new one. 58 Am. Jur.2d, *Novation* § 10 (1971). We have already held that the original option agreement was void and unenforceable. Therefore, the first element of novation is lacking. In addition, Craig failed to show that Sims intended a novation of the old contract when the new contract was negotiated. "In order to effect a novation there must be a clear and definite intention on the part of all concerned that such is the purpose of the agreement, for it is a well-settled principle that novation is never to be presumed." (Footnote omitted.) 58 Am. Jur.2d, *Novation* § 20 at 534 (1971). Finally, a contract of novation is no different

from any other contract in that it must be supported by good and sufficient consideration. It has been held that a contract to perform, at a higher price, that which one is already obligated to perform will fail for lack of consideration. *Williston on Contracts* § 130 (1957). The evidence in this case shows that Sims, having expended large sums of money in commitment and architectural fees, felt economically compelled to execute the new contract. It was more feasible economically for appellees to pay the additional $10,000.00 purchase price than it was for them to forego the purchase of the realty and sue to recover the $84,000.00 already expended. The trial court properly refused to find novation or compromise and settlement.

For the foregoing reasons, we affirm the trial court's decision that appellees reasonably relied to their detriment on appellant's misrepresentations.

IT IS SO ORDERED.

PAYNE and FEDERICI, JJ., concur.

627 P.2d 878

David HILLELSON, Plaintiff-Appellee,

v.

REPUBLIC INSURANCE COMPANY, Defendant-Appellant.

No. 13274.

Supreme Court of New Mexico.

May 6, 1981.

Menig, Sager, Curran & Sturges, Edward T. Curran, Albuquerque, for defendant-appellant.

Elvin Kanter, Albuquerque, for plaintiff-appellee.

OPINION

FEDERICI, Justice.

Hillelson filed a claim on a homeowner's policy issued by Republic Insurance Company (Republic) for a loss of certain property stolen from the home. When Republic failed to pay the claim, Hillelson filed suit in the district court. The district court awarded judgment in the amount of $10,515.20 plus interest at 10% per annum. We affirm in part and reverse in part.

The insurance policy provides that in event of loss, the insured must give the company written notice, furnishing complete inventory "showing in detail quantity, costs, actual cash value and amount of loss claimed; AND * * * A PROOF OF LOSS signed and sworn to by the insured."

Hillelson delivered a proof of loss in the amount of $8,039, including $4,715 for stereo equipment. In support of his claim on the stereo equipment, Hillelson delivered a Channel Industries invoice. Evidence in the record tends to show that the invoice was not related to the stolen stereo equipment.

The issues on appeal are: (1) Whether there is substantial evidence to find that Hillelson did not falsely swear to his claim; (2) Whether the trial court correctly determined the amount of loss; and (3) Whether the trial court provided for the proper rate of interest on the judgment.

We recently set forth the standard of review of substantial evidence questions in *Toltec Intern. v. Village of Ruidoso*, 95 N.M. 82, 619 P.2d 186 (1980).

We note that there is evidence in the record showing that Hillelson had the stereo equipment and there is no evidence to the contrary. We also note that "false swearing has been defined as knowingly and intentionally stating upon oath what is not true." 60 Am.Jur.2d *Perjury* § 2 (1972). Even if we take the falsity of the invoice as correct, there is substantial evidence in the record to the effect that Hillelson did not know or have any reason to know it was false. The trial court is affirmed on this issue.

Concerning the amount of judgment, Republic does not dispute that if Hillelson was entitled to recover under the policy, he was entitled to $8,872. Since Section 56–8–3, N.M.S.A.1978, the statute in effect when this became a pending case, provided for interest of six percent per annum on money due by contract, the trial court could, in its discretion, award six percent interest to the amount Republic owed Hillelson. *See O'Meara v. Commercial Insurance Company*, 71 N.M. 145, 376 P.2d 486 (1962). This interest should have accrued from the date Republic denied liability. Since that date is unclear, it should be a reasonable time.

There is some ambiguity as to what the trial court did to determine the amount of judgment and accrual of interest. This question is remanded to the trial court for consideration of the proper judgment amount to be awarded following the guidelines set forth above.

Prior to judgment in this case, Section 56–8–3, *supra*, was amended by the Legislature. Section 56–8–3, N.M.S.A.1978 (Cum.Supp.1980). The new statute provides for ten percent interest on judgments and decrees for the payment of money.

The New Mexico Constitution, Article IV, Section 34, provides: "No act of the legislature shall affect the right or remedy of

either party, or change the rules of evidence or procedure, in any pending case." We are called upon to decide whether interest must be set under the old statute or the new statute. Section 34 of Article IV of our Constitution requires interest to be set under the old statute if the statutory change affects the right or remedy of either party.

In *Bradbury & Stamm Const. Co. v. Bureau of Revenue*, 70 N.M. 226, 372 P.2d 808 (1962), this Court was concerned with a similar change in statutes concerning interest the State must pay a taxpayer on illegally collected taxes. Because the requirement that the State pay interest did not create a right, but only a privilege for the taxpayer, the statute in effect at the time of judgment rather than the time of filing controlled. However, that case applied where the State was involved, and is distinguishable from this situation which involves claims between private parties. There can be little doubt that a change in interest affects either the rights or the remedies of the parties, even if these rights or remedies are purely statutory. *See Morley v. Lake Shore Railway Co.*, 146 U.S. 162, 13 S.Ct. 54, 36 L.Ed. 965 (1892) and *Funkhouser v. Preston Co.*, 290 U.S. 163, 54 S.Ct. 134, 78 L.Ed. 243 (1933). While interest could not be claimed as a matter of right in the absence of an express agreement at *early* common law, according to the modern viewpoint, there are many circumstances where interest can be so claimed. 45 Am.Jur.2d *Interest and Usury* § 34 (1969). We think this is an appropriate situation within the latter rule. Since our Constitution forbids an act of the Legislature from affecting a right or remedy such as the one involved here, it follows that the statute in effect when this became a pending case is applicable. The trial court is reversed on this issue and directed to enter judgment with interest at the rate of six percent per annum.

Finally, Hillelson requests attorney fees for the appeal in this matter. This issue was not raised in the trial court and the court did not find that the insurer acted unreasonably in failing to pay the claim, as required by Section 39–2–1, N.M.S.A.1978. Attorney fees are denied. Costs shall be apportioned equally between the parties.

IT IS SO ORDERED.

EASLEY, C. J., and PAYNE, J., concur.

627 P.2d 880

FIRST NATIONAL BANK OF LEA COUNTY, a national banking corporation, Plaintiff-Appellee,

v.

(Troy JULIAN et al.) John Pike, d/b/a Pike's Plumbing and Heating, Defendant-Appellant.

FIRST NATIONAL BANK OF LEA COUNTY, a national banking corporation, Plaintiff-Appellee,

v.

GARRETT BUILDING CENTERS, INC., Defendant-Appellant,

Troy Julian et al., Defendants.

Nos. 12741, 12761.

Supreme Court of New Mexico.

May 7, 1981.

Maddox & Maddox, Don Maddox, John M. Renfrow, Hobbs, for Garrett Bldg.

Williams, Johnson, Reagan & Porter, Hobbs, for plaintiff-appellee.

OPINION

PAYNE, Justice.

First National Bank of Lea County brought suit to foreclose a mortgage and have all other liens on the mortgaged property declared inferior to its mortgage. The property was sold at a foreclosure sale following the default of the mortgagor, and the monies derived from the sale were paid into the district court pending determination of the priorities of the competing liens.

Troy Julian, a contractor, in order to finance construction of a house, borrowed $40,000 from the bank secured by a mortgage on the building lot. Both before and after the recording of the bank's mortgage, several contractors and suppliers, including Garrett Building Centers, Inc. and John Pike, d/b/a Pike's Plumbing and Heating, delivered materials to the work site. Pike and Garrett were not completely paid for these materials and filed materialmen's liens on the property.

The trial court held that the bank's mortgage prevailed over the liens of both Garrett and Pike. It found that Garrett's lien was defective because of an insufficient corporate acknowledgment. The court ruled that Pike did not have a cause of action because of his failure to properly serve process on Julian with his cross-claim and counterclaim. We affirm the trial court's ruling as it pertains to Garrett's lien and reverse as it relates to Pike's.

Templeman & Crutchfield, C. Barry Crutchfield, Lovington, for Pike.

I.

The requirements of corporate acknowledgments in materialmen's liens was

thoroughly discussed in our recent opinion of *New Mexico Properties v. Lennox Indus.*, 95 N.M. 64, 618 P.2d 1228 (1980). We adopt the reasoning and analysis of that opinion. The slight differences in language between the liens in the *Lennox* case and the present case do not warrant a different disposition. The corporate acknowledgment on the Garrett lien is insufficient. The lien cannot be treated as a recorded instrument. Therefore, as between the bank and Garrett, the bank has priority. Garrett's claim that the trial court erred in making findings concerning the validity of the lien when the issue was not argued before it is without merit.

II.

The bank stipulated to the amount, validity and priority of Pike's lien. The only question is whether the failure of Pike to obtain personal jurisdiction over Julian or in rem jurisdiction over the property barred recovery under his lien prior to satisfaction of the bank's claim. Under the facts existing in this case we hold it did not.

The bank filed its complaint against Julian on October 5, 1978, seeking a determination of priorities and a foreclosure of its mortgage. This complaint was personally served on Julian. On December 4, 1978, the bank amended its complaint to specifically include Pike as a defendant. The amended complaint prayed that a receiver be appointed to take possession of the res, consummate the sale of the property and disburse the proceeds to "those parties and in such proportions as the court shall deem equitable." The complaint also listed Pike as a party claiming an interest in the property through a lien, although it did assert that the lien was inferior to the mortgage on which Julian defaulted. Julian's failure to answer the bank's complaint had the effect of admitting the truth of the allegations against him and allowing, as prayed, that the proceeds be disbursed to "those parties and in such proportions as the court shall deem equitable." Pike answered January 10, 1979, asserting the priority of his mechanic's lien, by counterclaiming against the bank and cross-claiming against Julian. Julian defaulted on the bank's complaint and left the jurisdiction without being served with Pike's cross-complaint. Pike also failed to obtain in rem jurisdiction by publication.

The bank argues that Pike cannot participate in the proceeds from the foreclosure sale because his lien has not been properly foreclosed against Julian in accordance with New Mexico law. The bank contends that Pike's lien cannot be foreclosed because he failed to establish jurisdiction by either personal service upon Julian or in rem by publication. We disagree based upon the unique facts of this case. We do not hold that service as provided by N.M.R. Civ.P. 5, N.M.S.A. 1978 (Repl.Pamp.1980) and other rules can be discarded as an essential step in the normal lien foreclosure process. We hold only that based on the complaint to which Julian defaulted in this case there was sufficient basis to allow disbursal of funds to satisfy Pike's lien as being senior to the bank's, before satisfying the mortgage lien.

The foreclosure of Pike's lien without service on Julian did not violate due process. The bank urged us to rule in accordance with *Robertson et al. v. Supply Co.*, 15 N.M. 606, 110 P. 1037 (1910), which held that the foreclosure of a materialmen's lien without service upon the owners of the property violated due process. However, this case is distinguishable. The required elements for due process, as outlined in *Robertson*, are notice and an opportunity to be heard. In *Robertson*, the landowners were "not served with process of any kind." In the present case, Julian, the landowner, was served with both the complaint and the amended

complaint of the bank. The amended complaint contained the following language:

> Plaintiff is informed and believes GARRETT BUILDING CENTERS, INC.; JOHN PIKE, d/b/a PIKE'S PLUMBING AND HEATING . . . may claim an interest in the property which is the subject of this suit, but these claims are inferior to plaintiff's mortgage lien and should be declared inferior by the Court.

This was sufficient to put Julian on notice of the claim of Pike. Julian, being both the landowner and the contractor, also had actual knowledge of Pike's claim and knew that Pike had delivered materials to the work site for which Pike had not been paid. Julian had the opportunity to be heard. He needed only to file his answer to the complaint. He chose instead to default and flee the jurisdiction. Since Julian had both notice and the opportunity to be heard, Pike's lien is not barred.

The only issue that would have been resolved in a Pike-Julian suit would have been the validity and amount of the lien. Since both the amount and validity of the lien were stipulated to by the bank, the bank was not prejudiced by Pike's failure to accomplish service of process upon Julian.

The bank's position that Pike cannot share in the proceeds of the sale is inconsistent with the historical character of mechanic's and materialmen's liens. These liens are creatures of statute, remedial in nature and have their basis in equity. *Beck v. Hanson*, 589 P.2d 141 (Mont.1979). *See also Genest v. Las Vegas Masonic B'ld'g Ass'n.*, 11 N.M. 251, 67 P. 743 (1902). It would be contrary to the legislative policy of favoring materialmen's and mechanic's liens to allow them to be defeated by junior lienors simply foreclosing their liens first. Also, it would be inequitable for the court to award the bank foreclosure to the detriment of Pike when the bank has stipulated that Pike's lien was valid and senior to its own. Pike had no duty to do anything as against the bank except to prove the superiority of its lien. Julian is not prejudiced because he, by reason of his default, could not come in and complain if the proceeds are disbursed to the bank. By the same measure he should not be able to complain if some of the proceeds are disbursed to lienholders who have priority to the bank in order to allow the bank to recover on its complaint.

For these reasons we hold that the requirements of due process have been met. Neither the bank nor Julian has been prejudiced. Because of the equitable nature of materialmen's liens, the trial court had the power to allow Pike's lien to be paid. Therefore, we reverse the trial court as to Pike and remand with instructions that the trial court disburse the proceeds from the foreclosure sale to the various lienors according to their priorities.

IT IS SO ORDERED.

FEDERICI and RIORDAN, JJ., concur.

DAN SOSA, Jr., Senior Justice, and JAMES MICHAEL FRANCKE, District Judge, dissent.

627 P.2d 1241

John A. SHINDLEDECKER, Plaintiff-Appellant,

v.

Bob SAVAGE, aka Bobbie O. Savage, and Barbara Savage, husband and wife, Donald E. Jacquez and Verita L. Jacquez, husband and wife, and Federal National Mortgage Association, Defendants-Appellees.

No. 12840.

Supreme Court of New Mexico.

May 11, 1981.

John R. Westerman, Farmington, for plaintiff-appellant.

Faurot & Birdsall, Jay L. Faurot, Beavers & Dean, Farmington, for defendants-appellees.

OPINION

PAYNE, Justice.

The plaintiff, Jon Shindledecker, brought suit against the defendants Savage for debts due him. He also sought to have a mortgage given him by the Savages declared superior to the claims of the other defendants and to have it foreclosed. The trial court awarded Shindledecker judgment against the Savages for the debts owed but denied all other claims. Shindledecker appeals only the trial court's refusal to recognize and foreclose his mortgage. We affirm.

The property in question was sold in 1975 by Taylor under a real estate contract to the Savages who paid $1,500 down and agreed to make monthly payments on the unpaid balance. Later, Shindledecker received from the Savages what was called a second mortgage on the property as security for several loans made to the Savages. At that time, the Savages were current in their monthly payments and all other obligations under the real estate contract. Some time after giving the "second mortgage", the Savages decided to move from the state. Although there is no evidence that they were in default on the contract, the Savages executed a document which instructed the escrow agent to release to Taylor a special warranty deed held in escrow. That deed conveyed the Savages' interest back to Taylor. Taylor, instead of creating a new escrow account with Shindledecker (the holder of the second mortgage) as buyer in place of the Savages, sold the property to the Villasenors who later conveyed the property to defendants Jacquez. From the time Taylor received the title until he sold it to the Villasenors, no payments were made on the real estate contract by Shindledecker.

Shindledecker argues that the Savages and Taylor agreed that Shindledecker could assume the real estate contract in satisfaction of the outstanding debt secured by the "second mortgage". Taylor is not a party to this lawsuit, however, and we cannot grant any relief that might be due to Shindledecker from Taylor as a result of Taylor's agreements with the Savages. We consider only the relative rights of the parties to this action.

The two issues raised on appeal are: (1) whether Shindledecker had an interest in the subject real estate which was enforceable against the Savages' equitable interest in the real estate, and (2) whether the Savages terminated or relinquished any interest they may have had in the real estate thus extinguishing any claim Shindledecker would have as against subsequent purchasers of the property.

The first issue can be alternatively stated as whether the vendee under an executory land sales contract has a mortgageable interest. The majority of courts have held that both the legal and equitable owner have mortgageable interests in the realty. *Gavin v. Johnson*, 131 Conn. 489, 41 A.2d 113 (1945); *Sigman v. Stevens-Norton, Inc.*, 70 Wash.2d 915, 425 P.2d 891 (1967); *see generally* 55 Am.Jur.2d *Mortgages* § 111 (1971); Annot., 85 A.L.R. 927 (1933). Because the vendee cannot create an interest in the realty greater than his own, *Campos v. Warner*, 90 N.M. 63, 559 P.2d 1190 (1977), the interest acquired by the mortgagee is necessarily limited by that of the vendee. *See Gavin v. Johnson, supra; Kendrick v. Davis*, 75 Wash.2d 456, 452 P.2d 222 (1969). Since the mortgage is subject to the prior interest of the vendor under the sales contract, it is enforceable only if the contract is kept in force by continued performance of its terms. *Sheehan v. McKinstry*, 105 Or. 473, 210 P. 167 (1922).

When Shindledecker entered into the mortgage agreement with the Savages, he acquired an enforceable lien on the property subject to the prior interest of Taylor, the vendor. This interest was also limited by the amount of equity held by the Savages and was subject to continued performance under the contract. Though called a "second mortgage", the interest acquired by Shindledecker was not clothed with all the same legal rights as are generally found with second mortgages. Generally a second mortgage refers to a subsequent mortgage on a fee interest. Here the mortgage was not on a fee interest but only on the vendee's equitable interest. We follow the analysis adopted by the Washington courts in *Sigman v. Stevens-Norton, Inc., supra*:

> [A]ppellant [asserts] there is no substantial difference in a mortgage on purchaser's interest in a land contract and a second mortgage. There is, however, a considerable difference in that there is no lien on the fee under a mortgage on buyer's interest and forfeiture of a land contract gives the junior encumbrancer no right of redemption. * * * The term

> "second mortgage" means a lien right second only to a superior lien of a first mortgage on a buyer's interest in a land contract. 425 P.2d at 894.

We hold that the Savages' interest under the real estate contract was a mortgageable interest, and that Shindledecker had a valid lien on that interest.

Having held that Shindledecker did have a lien on the Savages' equitable interest in the property, we turn to the issue of whether the Savages relinquished their interest in the property and what effect it would have on the title acquired by the Jacquez. Generally, the vendor under a property sales contract can, upon default by the vendee, retake the property and retain all sums paid under the contract. *Bishop v. Beecher*, 67 N.M. 339, 355 P.2d 277 (1960). This right of re-entry and repossession is somewhat limited in the case, as here, where the vendee has mortgaged his equitable interest. In such a case the mortgagee cannot have his lien eclipsed by the agreement of the parties to the real estate contract to rescind it. By virtue of his mortgage, the mortgagee obtains the original purchaser's right to purchase the property for the consideration stated in the purchase contract. In other words, the mortgagee assumes the rights of the vendee under the real estate contract. As explained in *First Mortgage Corporation of Stuart v. deGive*, 177 So.2d 741, 746 (Fla.Dist.Ct.App.1965):

> The mortgage by a purchaser of his interest in a contract for the sale of real property merely gives the mortgagee the right to complete the purchase if the mortgagor refuses to do so, and the mortgagee takes no greater rights than the purchaser had. In other words, the mortgagee acquires a right to purchase the property for the consideration stipulated in the contract of purchase, and the enforceability of the mortgage depends upon the condition that the contract be kept in force by the subsequent performance of its terms. *Young v. Clay* [139 Or. 427, 10 P.2d 602 (1932)]; *Sheehan v. McKinstry* [105 Or. 473, 210 P. 167 (1922)]; *Nelson v. Bailey*, 1959, 54 Wash.2d 161, 338 P.2d 757, 73 A.L.R.2d 1400; 59 C.J.S. Mortgages § 184.

We recognize the right in the mortgagee to assume the position of the vendee and keep the contract, and thereby his mortgage, in effect. However, even though Shindledecker had the right to assume the Savages' position under the contract, and even though there was no evidence of default by the Savages, we hold that the rights of Shindledecker must yield to the rights of the subsequent purchasers of the property.

The mortgagee of an equitable interest must protect his lien by giving notice to the vendor of his equitable interest so that he can arrange an assumption of the contract in case the vendee defaults or otherwise rescinds the contract. Recording the mortgage does not give the vendor constructive notice such as to require the vendor to notify the mortgagee of his intent to retake the property. *Kendrick v. Davis, supra.* Instead, the mortgagee must use one of several available contractual devices to insure that he receives both notice of a breach by the vendee and the opportunity to protect his interests.

Finally, Shindledecker argues that the powers of equity should be exercised by this Court to allow his mortgage to be enforced against the Jacquez. We do not see how the equities favor Shindledecker. The equities in this case favor the Jacquez, the innocent purchasers. Shindledecker had the opportunity to take the necessary steps to put Taylor on notice and protect against a default in the real estate contract. The Jacquez, on the other hand, had no knowledge of any agreements between the Savages, Shindledecker, and Taylor, and a title search would have revealed nothing to indicate possible defects in their title.

For the foregoing reasons the trial court's judgment is affirmed.

IT IS SO ORDERED.

Easley, C. J., and RIORDAN, J., concur.

627 P.2d 1244

Margaret C. EIS, Plaintiff-Appellant,

v.

William CHESNUT, M. D., Defendant-Appellee.

No. 4840.

Court of Appeals of New Mexico.

March 19, 1981.
Certiorari Denied May 6, 1981.

Gallagher, Casados & Martin, J. E. Casados and Robert A. Martin, Albuquerque, for plaintiff-appellant.

Rodey, Dickason, Sloan, Akin & Robb, P. A., W. Robert Lasater, Jr., Albuquerque, for defendant-appellee.

OPINION

LOPEZ, Judge.

Plaintiff, Mrs. Eis, appeals the summary judgment granted to the defendant, Dr. Chesnut, in this personal injury suit. Plaintiff's theories of recovery were medical malpractice and battery. At oral argument, plaintiff's counsel narrowed the malpractice claim to negligence in failing to diagnose the cause of Mrs. Eis's knee pain following the second operation the doctor performed on her leg. Her claim of battery rests on the failure of Dr. Chesnut to obtain her consent before performing the second operation, although her daughter consented to it.

The issue is the propriety of the summary judgment. We reverse on both counts.

Dr. Chesnut operated twice on Mrs. Eis's hip and leg. During the first operation, on June 27, 1976, he fractured her femur when trying to insert a pin into it. A longer pin was needed, but none was available. The longer pin was inserted July 2, 1976, at a second operation. An x-ray taken that day showed that the new pin protruded from the lower end of the femur, and a radiology report one week later indicated that the pin protruded into the soft tissues adjacent to the supracondylar area. Mrs. Eis complained of intense knee pain in her visits to Dr. Chesnut during the five months after her second operation and before she left Albuquerque for Florida. He responded with medications for her pain. In Florida, in January of 1977, she saw Dr. Jahn, who took x-rays and discovered that the prosthesis inserted by Dr. Chesnut was protruding out from the femur and impaling the patella or kneecap. He corrected this condition by surgery on February 17, 1977, in which he sawed off the protruding portion of the prosthesis. This surgery effectively relieved Mrs. Eis's complaints.

Mrs. Eis herself never signed a written consent to the second operation performed by Dr. Chesnut. Her daughter signed the form the day before the surgery, because, as the form states, Mrs. Eis was confused at that time.

Malpractice. It is Mrs. Eis's position that Dr. Chesnut should have diagnosed the cause of her knee pain. This claim is buttressed by the reports of the hospital radiologist indicating that x-rays taken after surgery showed the pin already protruding from the femur. There is some evidence that a migration downward of the pin would not be unusual in the circumstances surrounding Mrs. Eis's surgery. Mrs. Eis's claim is also supported by part of Dr. Jahn's deposition which states that the inflammation of her knee was caused by the protruding pin.

■ Summary judgment is proper if there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. N.M.R.Civ.P. 56(c), N.M.S.A.1978. The burden is on the moving party to show the absence of a genuine issue of fact. *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972), and the party opposing the motion is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists. *Pharmaseal Laboratories, Inc. v. Goffe*, 90 N.M. 753, 568 P.2d 589 (1977).

■ Dr. Chesnut failed to meet his burden of showing the absence of a genuine issue of disputed fact. The affidavit of the orthopedic surgeon relied on by defendant, and the deposition of Dr. Jahn, are insufficient to meet the prima facie case of negligence presented by the undisputed facts. It is not enough for medical experts to offer an opinion that the treating physician was not negligent in his treatment; the evidence of the experts must overcome the reasonable inferences of negligence raised by the facts of no pain before or after the first operation; projection of the longer pin beyond the femur seen by x-ray on the day of the second surgery and eight days later; continuing complaints of knee pain for five months after the surgery and during treatment by the defendant; diagnosis through x-ray, by the second surgeon and immediate

relief of the pain when the extended portion of the pin was sawed off.

Mrs. Eis's painful knee condition immediately following the second knee operation and its continued painfulness for five months thereafter until the impalement was corrected, raises the inference that impalement existed from the time of the second surgery. Indeed, portions of Dr. Jahn's deposition may be read to so state. The refusal of both medical experts, however, who did not see Mrs. Eis during her treatment by defendant, to give an opinion when the impalement occurred does nothing to destroy the logical inferences prevailing in plaintiff's favor. Whether Dr. Chesnut should have correctly diagnosed her condition earlier is a factual issue that could not be resolved at a summary judgment hearing.

Dr. Chesnut, citing *Cervantes v. Forbis*, 73 N.M. 445, 389 P.2d 210 (1964), asserts that Mrs. Eis needed to present expert testimony to defeat his motion for summary judgment. While *Cervantes* was also a malpractice case involving orthopedic surgery on the femur, the doctor was charged with negligence in performing the surgery, which is not true in the case before us. We do not dispute that, absent some glaring error such as inadvertently leaving a surgical instrument inside a patient, a plaintiff must offer expert testimony to defeat a defendant's motion for summary judgment when the defendant has presented expert testimony that he was not negligent and the issue is the propriety of a certain surgical procedure. Mrs. Eis's claim is not, however, negligent performance of surgery, but negligence in failure to diagnose. In *Pharmaseal* the Supreme Court recognized an exception to the requirement that the plaintiff must present expert testimony to avoid summary judgment against him. When the alleged negligence is of the kind which could be determined by the common knowledge of the average person, expert testimony is not needed to raise a genuine factual issue as to whether the act was negligent.

From the x-rays taken in July after the second operation, and from the evidence that Mrs. Eis's intense knee pain developed subsequent to that operation and continued until the end of the pin was removed by Dr. Jahn, we believe that an average person could reasonably infer from common knowledge that Dr. Chesnut should have known that the protruding pin was the cause of Mrs. Eis's pain. *Cf. Mascarenas v. Gonzales*, 83 N.M. 749, 497 P.2d 751 (Ct.App. 1972) (from the evidence that the patient's ribs were intact prior to treatment by a chiropractor, that the treatment consisted of pressure which resulted in a crack followed by immediate pain, and that after the treatment, the patient had fractured ribs, the jury could properly infer that the chiropractor caused the fracture). We do not hold that this evidence is conclusive or sufficient to prove Dr. Chesnut's negligence, but only that it is sufficient to raise a genuine factual issue concerning negligence. As we have already said, Dr. Chesnut's evidence in support of his motion for summary judgment did not dispose of this issue. The summary judgment against plaintiff on her malpractice claim was improper.

Battery. A physician who operates without the patient's consent commits a battery. *See*, Prosser, Law of Torts § 18 (4th ed. 1971). As Justice Cordozo said:

> Every human being of adult years and sound mind had a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits [a tort], for which he is liable in damages.

Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 129–30, 105 N.E. 92, 93 (1914). In a suit against a surgeon for battery, there is no need that the patient be physically damaged by the surgery. Consequently, there is no need for expert medical testimony to show either causation or standard of care. The only question to be determined is whether the patient consented to the specific operation performed. *Gerety v. Demers*, 92 N.M. 396, 589 P.2d 180 (1978). Two exceptions to the consent requirement

are given in *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972), a case quoted with approval in *Gerety*. The court in *Canterbury* found that the patient's consent need not be obtained in an emergency, or when the disclosure of the risk will be harmful to the patient. As the court wrote:

> Two exceptions to the general rule of disclosure have been noted * * * * The first comes into play when the patient is unconscious or otherwise incapable of consenting, and harm from a failure to treat is imminent and outweighs any harm threatened by the proposed treatment. When a genuine emergency of that sort arises, it is settled that the impracticality of conferring with the patient dispenses with the need for it * *
>
> The second exception obtains when risk-disclosure poses such a threat of detriment to the patient as to become unfeasible or contraindicated from a medical point of view. It is recognized that patients occasionally become so ill or so emotionally distraught on disclosure as to foreclose a rational decision, or complicate or hinder the treatment, or perhaps even pose psychological damage to the patient * * * * The critical inquiry is whether the physician responded to a sound medical judgment that communication of the risk information would present a threat to the patient's well-being.

Id. at 788–89. In such situations, a relative's consent should be obtained, if possible. *Canterbury.*

Dr. Chesnut submitted evidence that Mrs. Eis's daughter signed the consent form for the second operation. This evidence is not controverted. The consent form, signed at 4:30 p. m., carries a notation that the patient could not request or authorize treatment because she was confused, thus explaining the daughter's signature. There is no evidence, however, that the operation was performed in an emergency, or that Mrs. Eis was confused for such a long period of time as to preclude obtaining her consent to the operation. The hospital notes of that day indicate that, on the contrary, Mrs. Eis was disoriented only temporarily on the day before surgery when the daughter's consent was obtained. A genuine issue of fact exists as to whether Mrs. Eis's consent could have been obtained, making summary judgment improper. A fact finder must determine whether the situation falls within either of the two exceptions explained in *Canterbury* under which the patient himself need not consent to the surgery performed.

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

IT IS SO ORDERED.

WOOD and WALTERS, JJ., concur.

627 P.2d 1247

Geraldine MARTINEZ, Plaintiff-Appellee,

v.

Thomas TEAGUE, Defendant-Appellant.

No. 4750.

Court of Appeals of New Mexico.

April 2, 1981.

Certiorari Denied June 30, 1981.

John B. Pound, Montgomery & Andrews, P. A., Joseph A. Sommer, Sommer, Lawler & Scheuer, P. A., Santa Fe, for defendant-appellant.

Robert R. Rothstein, Jan Unna, Rothstein, Bailey & Unna, Santa Fe, for plaintiff-appellee.

OPINION

LOPEZ, Judge.

On May 16, 1978, when driving her automobile on State Highway 84 shortly after midnight near Medenales, Mrs. Martinez collided with a horse owned by Mr. Teague and suffered injuries. The defendant, Mr. Teague, has horses on his land along this highway. A jury found the defendant's negligence caused Mrs. Martinez' injuries and awarded her $250,000.00 in damages. Mr. Teague appeals on five grounds: 1. that the court should have declared a mistrial when the plaintiff informed the jury that the defendant had insurance; 2. that the jury should not have been instructed on *res ipsa loquitur*; 3. that the jury should not have been instructed that violation of certain statutes was negligence *per se*; 4. that the jury award was excessive; and 5. that the cumulative errors committed deprived the defendant of a fair trial. Finding no error, we affirm the judgment of the trial court.

Mention of insurance. A blanket rule against the inclusion of evidence that a party is insured does not exist in New Mexico. Evidence that a person is insured is not admissible to show that he acted negligently or wrongfully. N.M.R. Evid. 411, N.M.S.A. 1978. In certain other circumstances, however, it is admissible, as when used to show proof of agency, ownership, or control. *Id.* In extreme circumstances, the exclusion of evidence of insurance is reversible error. *See, Mac Tyres, Inc. v. Vigil*, 92 N.M. 446, 589 P.2d 1037 (1979). The propriety of admitting the evidence depends on the reason it was proffered. In *Grammer v. Kohlhaas Tank & Equipment Co.*, 93 N.M. 685, 692, 604 P.2d 823, 830 (Ct.App. 1979), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980), this court set out the following rules for determining the admissibility of evidence of insurance coverage:

(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 evidence that Mr. Teague was protected by insurance was mentioned by plaintiff's counsel when he read a portion of Dr. Wood's report to Dr. Egelman. The portion read contained Dr. Wood's observation that Mrs. Martinez did not trust her attorney because she thought he was siding with the insurance company. The portion was read aloud, not to show that the insured, Mr. Teague, acted wrongfully, but to show why Mrs. Martinez was increasing her demands for compensation. The explanation of why Mrs. Martinez was increasing her demands was relevant to discredit Dr. Egelman's earlier opinion that Mrs. Martinez was trying to solve her financial problems through lawsuits. This evidence is not barred by Rule 411, the first rule in *Grammer*, and is admissible under the second rule enumerated in that case. Evidence of insurance, not used to show the wrongful acts of the insured, is admissible to rebut the discrediting effect and correct any wrong impression of earlier testimony by the witness. *See, Wood v. Dwyer*, 85 N.M. 687, 515 P.2d 1291 (Ct.App.1973). This was the legitimate purpose for which the testimony was elicited and admitted in the case before us. The evidence was also admissible under the third rule in *Grammer*. It was introduced in the context of workmen's compensation, and, although Dr. Egelman subsequently clarified the testimony slightly by explaining that Mrs. Martinez was involved in two cases simultaneously—one for workmen's compensation benefits and the

present negligence suit—the court could have found the prejudicial effect very minimal. The jury could have missed the reference altogether, or it could have thought the insurance was workmen's compensation insurance. There is no abuse of discretion under the third rule in *Grammer*, and no reversible error under the fourth rule.

Res ipsa loquitur. Mere proof of an accident is insufficient to invoke the doctrine of *res ipsa loquitur. Tapia v. McKenzie*, 85 N.M. 567, 514 P.2d 618 (Ct. App.1973). In order for the doctrine to be applicable, the following must be true:

> (1) [T]he accident [must] be of the kind which ordinarily does not occur in the absence of someone's negligence.
>
> (2) [The accident] must be caused by an agency or instrumentality within the exclusive control and management of the defendant.

Renfro v. J. D. Coggins Co., 71 N.M. 310, 316, 378 P.2d 130, 134 (1963).

The defendant does not dispute that the second test was met. The horse, which was the cause of the accident, was within the defendant's exclusive control and management. He does challenge the applicability of the first test, claiming that *Akin v. Berkshire*, 85 N.M. 425, 512 P.2d 1261 (Ct. App.1973) controls in the circumstances of this case. In *Akin*, a cow on the road caused an automobile accident. In suing the owner of the cow, the plaintiff relied on *res ipsa loquitur.* This court said that *res ipsa* did not apply because the plaintiff failed to prove that the accident was of the kind which ordinarily does not occur in the absence of someone's negligence; *see also, Tapia*, a similar case. *Akin* and *Tapia* do not stand for the proposition that in cases involving a collision with livestock on the road, *res ipsa* is never applicable. In *Mitchell v. Ridgway*, 77 N.M. 249, 421 P.2d 778 (1966), the Supreme Court, finding that a count of the complaint invoking *res ipsa* stated a cause of action in a negligence suit arising out of a collision with a horse on the road, reversed the trial court's dismissal. *Akin, Tapia* and *Mitchell* read together indicate that each case must be decided by considering its own unique facts.

For *res ipsa* to apply, there must be facts which lead to a reasonable and logical inference that the defendant was negligent. *Strong v. Shaw*, 20 N.M.St.B.Bull. 70 (1980). The State Policeman who investigated the accident testified that the road where the accident occurred is lined by fences put up by the highway department. The gate to the defendant's property was open, and there was no cattle guard at the gate. Defendant said he always left the gate open for easy access. Other witnesses testified that defendant's corral, from which the horses somehow escaped, was about three and a half feet high. The defendant stated that he knew a horse could jump a three and a half foot fence. When the corral was examined after the accident, it was found to be closed and locked. There was no evidence that anyone had let the horses out; no one had been heard near the house, nor were there any tracks to indicate the presence of strangers.

This case is distinguishable form both *Akin* and *Tapia.* In those cases, there was no evidence of negligence in the construction or maintenance of the gates and fences. In *Akin*, there was also no evidence of how the cow escaped onto the road. In *Tapia*, there was some evidence that the cow walked across a cattle guard. Thus it was unfair to infer the defendant's negligence from the lack of evidence in *Akin*; and in *Tapia*, a reasonable inference was that the defendant was *not* negligent. The logical inference in the instant case, on the contrary, is that the horse escaped through the owner's negligence. Since the facts indicate that Mr. Teague was negligent in the construction of his corral and in his use of the gate, and that this negligence was the cause of the accident, the trial court did not err in instructing the jury on the doctrine of *res ipsa loquitur.*

Negligence per se. We do not reach this issue, because Mr. Teague failed to preserve it for appeal. The specific vice in a challenged instruction must be pointed out to the trial court in order to preserve

the error for review. *Gonzales v. Allison & Haney, Inc.*, 71 N.M. 478, 379 P.2d 772 (1963); *McBee v. Atchison, T. & S. F. Ry.*, 80 N.M. 468, 457 P.2d 987 (Ct.App.1969). Unless the objection raised at trial to an instruction is the same as that raised in the brief on appeal, this court will not consider the objection. *Harrell v. City of Belen*, 93 N.M. 612, 603 P.2d 722 (Ct.App.), *rev'd on other grounds*, 93 N.M. 601, 603 P.2d 711 (1979). The defendant argued to the trial judge that the instruction on negligence *per se* was repetitious, and that there was no evidence to support part of the instruction. That part was then deleted. No argument was made at that time that the statutes cited do not give a standard for determining negligence and so cannot be used in an instruction on negligence *per se*. We will not now consider this argument.

Defendant contends that, as the error was fundamental error, we should review it even if he failed to make the proper objection below. In support of this, he cites *Vaughn v. Philadelphia Transportation Co.*, 417 Pa. 464, 209 A.2d 279 (1965). While *Vaughn* indicates that fundamental error may be found in the instructions given in a civil negligence case, this rule has not been adopted in New Mexico, and we decline to adopt it in this case.

Excessive award. The defendant gives a three pronged argument as to why the award of damages was excessive. First he argues that the full range of consequences was extraordinary and should not be attributable to the defendant. Secondly he argues that Mrs. Martinez' psychological disorder pre-dated the accident and that she failed to prove the extent of the aggravation for which he is liable. His third argument is that the evidence does not support an award of $250,000.00.

Defendant's first argument is based on § 435(2) of the Restatement (Second) of Torts (1965) which reads:

> The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extra-ordinary that it should have brought about the harm.

This argument fails for two reasons. Section 435 does not limit liability, once it is determined to exist, but is used to determine whether there is any liability at all. Introductory note and Comments to § 435. Even if this section did apply, there is nothing "highly extraordinary" in incurring psychological problems as the result of an accident. Negligent conduct is that which a reasonably prudent person should recognize as involving an unreasonable risk of harm to another, regardless of whether the exact nature and extent of that harm is foreseeable. *See, Lujan v. Reed*, 78 N.M. 556, 434 P.2d 378 (1967); *see generally, Reif v. Morrison*, 44 N.M. 201, 100 P.2d 229 (1940).

> There is almost universal agreement upon liability . . . for quit unforseeable consequences, when they follow an impact upon the person of the plaintiff. . . . The defendant is held liable when his negligence operates upon a concealed physical condition, such as pregnancy, or a latent disease, or susceptibility to disease, to produce consequences which he could not reasonably anticipate. He is held liable for unusual results of personal injuries which are regarded as unforeseeable, such as tuberculosis, paralysis, pneumonia, heart or kidney disease, blood poisoning, cancer, or the loss of hair from fright.

Prosser, Law of Torts 260–261 (4th ed. 1971). We note that in order for an act to be the proximate cause of an injury, it need not be the sole cause, but merely a concurring cause. *Galvan v. City of Albuquerque*, 85 N.M. 42, 508 P.2d 1339 (Ct.App.1973). There is substantial evidence that Mr. Teague's negligence was the proximate cause of Mrs. Martinez' psychological problems.

Hebenstreit v. Atchison, T. & S. F. Ry., 65 N.M. 301, 366 P.2d 1057 (1959), which holds that when a person's negligence aggravates a pre-existing condition, his liability is limited by the extent of the aggravation, supports defendant's second argu-

ment. For the rule to become effective, however, it is necessary that there be a pre-existing condition which was aggravated by the injury. In reviewing the evidence, this court will indulge in all reasonable inferences in support of the verdict, and will disregard all inferences or evidence to the contrary. *Anaconda Co. v. Property Tax Dept.*, 94 N.M. 202, 608 P.2d 514 (Ct. App.1979), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980).

Dr. Trost testified that Mrs. Martinez' present psychological problems are attributable directly to her accident with Mr. Teague's horse. Dr. Hochmán's testimony, viewed in the light most favorable to upholding the verdict, indicated that Mrs. Martinez had a pre-disposition for psychological disorders. He did not say that her present psychological condition with its attendant physical complaints existed before the collision with the horse. This testimony indicated a susceptibility to psychological disorders, but did not indicate that she was suffering from such disorders at the time of the accident. There is substantial evidence that the accident with Mr. Teague's horse was the proximate cause of Mrs. Martinez' current condition, rather than the cause which aggravated a pre-existing mental state.

The standard for determining whether an award is excessive was set out in *Sweitzer v. Sanchez*, 80 N.M. 408, 409, 456 P.2d 882, 883 (Ct.App.1969), which gives the rules as:

> (1) whether the evidence, viewed in the light most favorable to plaintiff, substantially supports the award and (2) whether there is an indication of passion, prejudice, partiality, sympathy, undue influence or a mistaken measure of damages on the part of the fact finder.

Damage awards are found to be excessive only in extreme cases. *Lujan.* Defendant invites us to compare *Gonzales v. General Motors Corp.*, 89 N.M. 474, 553 P.2d 1281 (Ct.App.1976), where we ordered remittitur, with the present case. We are warned by *Sweitzer*, however, that the comparison of awards is improper because the question of prejudice must be determined from the evidence in each case. In *Gonzales*, we found evidence of prejudice and sympathy by the jury; here there is no such evidence. Nor is there evidence that the jury used the wrong measure of damages. Mrs. Martinez proved $80,000.00 in medical expenses, lost wages, and property damages. Beyond this, the jury was instructed to award damages for psychiatric injuries and for pain and suffering. If a plaintiff in a personal injury case is entitled to recover at all, he is entitled to damages for his injuries, for pain and suffering, and for mental injury arising from the accident. *Jones v. Pollock*, 72 N.M. 315, 383 P.2d 271 (1963). There was substantial evidence to support the jury award of $250,000.00.

Cumulative error. Not having discovered any errors at the trial, we find no cumulative error.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

SUTIN, J., specially concurring.

HERNANDEZ, C. J. concurs.

627 P.2d 1253

STATE of New Mexico, Plaintiff-Appellee,

v.

Ricky GALLEGOS, Defendant-Appellant.

No. 4936.

Court of Appeals of New Mexico.

April 14, 1981.

John B. Bigelow, Chief Public Defender, Lynne Corr, Asst. Appellate Defender, Santa Fe, Calvin R. Neumann, Trial Counsel, Clovis, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Santa Fe, Carol Vigil, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

Defendant appeals his conviction of second degree murder. There are three

issues: (1) informing the prospective jurors, immediately prior to voir dire, that the death penalty was not involved; (2) sufficiency of the evidence; and (3) the trial court's nondisclosure of information obtained by the trial court *in camera* during a proceeding under Evidence Rule 510.

Informing Prospective Jurors that the Death Penalty was not Involved

The indictment charged defendant with first degree murder, a capital felony. Section 30–2–1, N.M.S.A.1978 (Cum.Supp.1980). However, the aggravating circumstances set forth in § 31–20A–5, N.M.S.A.1978 (Cum.Supp.1980), were not involved. If convicted of first degree murder, defendant would not have been exposed to a sentence of death, § 31–20A–2, N.M.S.A.1978 (Cum. Supp.1980).

Immediately prior to the voir dire of prospective jurors, the trial court stated:

> Before the State will inquire on voir dire examination, the Court will make this announcement to people in the jury box and all the jurors here. This is a first degree murder case. However, ladies and gentlemen, I would advise you that the death penalty is not involved in this case.

U.J.I.Crim. 50.06 states: "You must not concern yourself with the consequences of your verdict." The Use Note to this instruction states that it "is a proper instruction to be given in every case." The instruction was given in this case. Defendant claims that the trial court's announcement that the death penalty was not involved was improper because it was contrary to U.J.I.Crim. 50.06. Defendant also claims an inconsistency between the announcement and U.J.I.Crim. 50.06.

We agree with defendant to this extent; the announcement concerning no death penalty and the giving of U.J.I.Crim. 50.06 were inconsistent. Inasmuch as the jury was not to fix the penalty in this case, compare U.J.I.Crim. 39.10 to 39.24, N.M.S.A.1978 (Cum.Supp.1980) and *State v. Sanchez*, 58 N.M. 77, 265 P.2d 684 (1954), the trial court's announcement was erroneous, being contrary to the approved instruction.

We recognize that noncompliance with U.J.I.Crim. is reversible error if there is the slightest evidence of prejudice. *State v. Sanders*, 93 N.M. 450, 601 P.2d 83 (Ct. App.1979); compare *Poore v. State*, 94 N.M. 172, 608 P.2d 148 (1980).

Defendant asserts he was "arguably prejudiced" by the trial court's announcement "because such remarks permitted the jury to infer that a conviction in this case would be less serious in that it would not subject appellant to the death penalty." We disagree.

In *Bumper v. State of North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968), a jury, improperly qualified to impose a death penalty, returned a verdict of life imprisonment. The improper qualification of the jury in connection with the death penalty did not show either that the jury was necessarily biased or necessarily prosecution prone; the claim that defendant had been denied trial by an impartial jury was, in the absence of evidence, held to be insubstantial.

The jury did not react to the death penalty remark by convicting of "any" offense less serious than an offense for which the penalty was death. The jury did not return a verdict of first degree murder; defendant was convicted of second degree murder. Under the instruction, see U.J.I.Crim. 2.40, the jury was not to consider second degree murder unless and until the jury disagreed as to guilt of first degree murder. The jury followed this instruction. See *State v. King*, 90 N.M. 377, 563 P.2d 1170 (Ct.App. 1977). In this circumstance, defendant's claim, as the claim in *Bumper*, supra, has no factual basis. Compare *State v. Armstrong*, 61 N.M. 258, 298 P.2d 941 (1956).

There being nothing showing the slightest prejudice to defendant by the trial court's announcement, defendant's contention is without merit.

Sufficiency of the Evidence

Contrary to defendant's contention, there was sufficient evidence for the jury to convict defendant either as a principal or as an accessory.

There was evidence that defendant, the victim, and Rudy Cardenas first partied at a park, then went to the house of Jerry Ortiz where the party continued. There were several fights at Ortiz's house; one of the fights involved Cardenas, defendant and the victim. During this fight, defendant had a steak knife. The victim was told to leave, and did so. Cardenas and defendant followed the victim down the stairs.

The victim was stabbed to death with a knife. The victim's body was found lying in the median of a street. Given a tip to look for Ortiz and "Rudy", officers went to a residence and found defendant lying on a bed. When getting out of the bed, defendant stepped on a knife and shuffled around with his foot as if he was trying to conceal the knife. Defendant attempted to escape. The knife was a steak knife. The knife had blood on it; human blood, Type B. The victim's blood was Type B. Ortiz's residence was checked for blood; the blood found there was Type A, not Type B. Defendant's own statements place him at the scene of the killing, and defendant admitted leaving the scene with the knife with Type B blood on it.

From the foregoing, the jury could determine that defendant was the killer.

Defendant's statements were to the effect that Rudy Cardenas did the killing and that defendant removed the knife from the scene of the crime because of panic. Even if this should be true, defendant was with Cardenas before and after the killing, he participated in Cardenas' fight with the victim and, with Cardenas, followed the victim when the victim was told to leave. Defendant had in his possession a knife with blood of the victim's type, and defendant had the same type of knife prior to the killing. From the evidence, the jury could determine that defendant was an accessory to a killing by Cardenas. U.J.I.Crim. 28.39.

The evidence for conviction was substantial and sufficient for a rational juror to find the essential elements of the crime beyond a reasonable doubt. *State v. Carter*, 93 N.M. 500, 601 P.2d 733 (Ct.App.1979).

Trial Court's Nondisclosure of Information Obtained at an In Camera Hearing

We have previously pointed out that a tip directed officers to the residence where defendant was located. The police report listed the informer as unknown. Testimony at trial developed that the identity of the informer was known to the officer who was testifying, however, the officer preferred not to disclose the informer's name.

Defendant asked that the informer's name be disclosed. The trial court proceeded under Evidence Rule 510(c)(2). It first reviewed an affidavit from the informer, then took testimony from the informer. The trial court ruled that the informer's identity would not be disclosed. Defendant claims this ruling was an abuse of discretion.

We have reviewed the affidavit and a transcription of the informer's testimony. The contents of these documents show nothing that would be relevant or helpful to the defense of the accused, and nothing necessary to a fair determination of guilt or innocence. The trial court did not abuse its discretion in refusing to require that the informer's identity be disclosed. *State v. Robinson*, 89 N.M. 199, 549 P.2d 277 (1976).

Although the informer's identity is not to be disclosed, the matter does not end at that point in this case. The affidavit and the transcription of testimony were sealed and submitted, sealed, to this Court in accordance with Evidence Rule 510(c)(2). Counsel, not knowing the contents of the sealed documents, could not raise the issue which we now discuss.

The informer's testimony revealed to the trial court that the informer's information was hearsay, and that the hearsay information came from a person who was a possible eyewitness. The trial court did not disclose the name of the possible eyewitness; the question is what the trial court should do in this situation.

Although this situation is not covered by a precise rule, the combination of Evidence Rule 510 and Rules of Crim.Proc. 27 and 30 provides the answer.

The possible eyewitness, who supplied information to the informer, is also an informer; the policy involved in Evidence Rule 510, *State v. Robinson*, supra, applies in determining whether the identity of this possible eyewitness should be disclosed.

Rule of Crim.Proc. 27 provides for disclosure to the defendant, and disclosures provided for by that rule should be made because the purpose of discovery is to ascertain the truth. *State v. Manus*, 93 N.M. 95, 597 P.2d 280 (1979). Under R.Crim. Proc. 27(a)(6), the State is required to disclose material evidence favorable to the defendant.

Rule of Crim.Proc. 30 places a continuing duty of disclosure on the parties.

When the trial court, rather than the parties, obtains information which raises the question of whether the information should be disclosed, the disclosure requirements should also apply to the trial court's information.

We hold that the trial court should conduct an *in camera* hearing and determine whether the possible eyewitness would "be able to give testimony that is relevant and helpful to the defense of an accused, or is necessary to a fair determination of" defendant's guilt or innocence. Evidence Rule 510(c)(2). The trial court should also determine whether disclosure would subject the possible eyewitness to a substantial risk under R.Crim.Proc. 27(e)(2) which outweighs any usefulness of the disclosure to defense counsel. These two rulings are subject to review for abuse of discretion. *State v. Robinson*, supra.

We affirm the judgment and sentence on the issues raised. However, we remand the matter to the trial court for a hearing and rulings as discussed in this opinion. Those rulings are subject to further appeal.

IT IS SO ORDERED.

HERNANDEZ, C. J., and WALTERS, J., concur.

627 P.2d 1257

Rene HIRTH, Plaintiff-Appellant,

v.

Rex HALL, Defendant-Appellee.

No. 4746.

Court of Appeals of New Mexico.

April 16, 1981.

B. James Reeves, Campbell, Reeves, Burn & Burn, Las Cruces, for plaintiff-appellant.

Kent Cooper, Gary Jeffreys, P. C., Deming, for defendant-appellee.

OPINION

HERNANDEZ, Chief Judge.

Plaintiff appeals from the summary judgments which dismissed her three causes of action. We affirm in part and reverse in part.

Defendant, an attorney, was employed by plaintiff to form a corporation and to negotiate a contract for the corporation. Defendant and his wife somehow came to hold shares of stock in the corporation. Several disagreements arose between the parties and plaintiff ended the attorney-client relationship. She sent defendant a check on December 30, 1977, to pay his attorney's fees; delivery of the check was to be conditioned upon defendant's return of the stock. On the same day, December 30, defendant took the check to his bank and asked the bank to verify whether the check was good. He was told that there were insufficient funds in plaintiff's account to cover the check. Plaintiff made a night deposit to cover the amount of the check, which was posted on January 3, 1978; on that same day she stopped payment on the check because the stock had not been returned. The check was returned to defendant on January 5, marked "stop payment."

After defendant talked to the Assistant District Attorney and the District Attorney, a criminal complaint was issued under the Worthless Check Act, for which the penalty would be "imprisonment in the penitentiary for not less than one year nor more than three years or the payment of a fine of not more than one thousand dollars ($1,000) or both such imprisonment and fine." § 30–36–5, N.M.S.A.1978. The magistrate dismissed the complaint against plaintiff for lack of probable cause. Plaintiff then filed her civil complaint, seeking damages for invasion of privacy, abuse of process, and malicious prosecution.

The elements of a cause of action for malicious prosecution are stated by the Restatement (Second) of Torts, § 653 (1977):

> A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if
>
> (a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and
>
> (b) the proceedings have been terminated in favor of the accused.

It is true, as defendant argues, that "[a] public prosecutor acting in his official capacity is absolutely privileged to initiate, institute, or continue criminal proceedings." Restatement (Second) of Torts, § 656 (1977); *Hughes v. Van Bruggen*, 44 N.M. 534, 105 P.2d 494 (1940). It is not enough, however, to show that the criminal proceeding was initiated by the prosecutor without "direction, request or pressure" from the person supplying the information. That person must also show that the information was not known by the giver to be false.

> If, however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible, and a prosecution based upon it is procured by the person giving false information. In order to charge a private person with responsibility for the initiation of proceedings by a public official, it must therefore appear that his desire to have the proceedings initiated, expressed by direction, request or pressure of any kind, was the determining

> factor in the official's decision to commence the prosecution, *or that the information furnished by him upon which the official acted was known to be false.*

Restatement (Second) of Torts, § 653, Comment (g) (1977) (Emphasis added.); *Hughes v. Van Bruggen, supra.* This being a summary judgment proceeding, it was defendant's obligation to make a showing that he was entitled to summary judgment. Defendant has not made such a showing; there are conflicting inferences from the facts in the affidavits and depositions as to whether defendant furnished false information by not disclosing to the District Attorney several relevant aspects of the dispute between the parties. Summary judgment was improper. *See Yucca Ford, Inc. v. Scarsella,* 85 N.M. 89, 509 P.2d 564 (Ct.App. 1973).

The facts show that defendant was informed there were insufficient funds in plaintiff's checking account on the date when defendant inquired. When the check was returned, however, it was marked "stop payment" and not "insufficient funds." Defendant, knowing this and the disagreement over the stock, did not investigate further into the reason the check was not honored. Defendant, as an attorney, had the means and knowledge to research the Worthless Check Act to determine whether it applied to plaintiff's action, when the services had been fully rendered before the check was given.

> Circumstances known or believed by the accuser may be incriminating to the accused and yet may not so clearly indicate guilt that a reasonable man would initiate criminal proceedings without investigation. . . .
>
> In summary, it may be said that the defendant has probable cause only when a reasonable man in his position would believe, and the defendant does in fact believe, that he has sufficient information as to both the facts and the applicable law to justify him in initiating the criminal proceeding without further investigation or verification.

Restatement (Second) of Torts, § 662, Comment (j) (1977). This is particularly true of an attorney dealing with a matter such as the one here; he should be careful to make full investigation and to fully disclose the relevant facts. We hold that the circumstances under which defendant, as an attorney, acted in initiating the criminal proceeding are sufficient to raise fact issues as to defendant's lack of probable cause and an improper purpose. *Yucca Ford, Inc. v. Scarsella, supra.* The district court's summary judgment on Count III of plaintiff's complaint is therefore improper.

We affirm the summary judgments which were granted on plaintiff's causes of action for invasion of privacy and abuse of process. There is no showing of either a physical intrusion or publicity placing plaintiff in a false light to support an invasion of privacy cause of action under *Montgomery Ward v. Larragoite,* 81 N.M. 383, 467 P.2d 399 (1970). Neither is there any evidence that defendant committed "an act in the use of the process other than such as would be proper in the regular prosecution of the charge" to support a cause of action for abuse of process. *Farmers Gin Co. v. Ward,* 73 N.M. 405, 389 P.2d 9 (1964); *Hertz Corp. v. Paloni,* 95 N.M. 212, 619 P.2d 1256 (Ct.App.1980). The fact that defendant sent a regular monthly billing to plaintiff after process issued is not such an improper use of process. The district court's summary judgments as to Counts I and II of plaintiff's complaint are therefore affirmed.

The case is remanded with instructions to vacate the judgment heretofore entered insofar as it applies to plaintiff's cause of action for malicious prosecution and reinstate this case on its trial calendar.

IT IS SO ORDERED.

WOOD and SUTIN, JJ., concur.

628 P.2d 306

STATE of New Mexico, Plaintiff-Appellee,

v.

Velma VENEGAS, Defendant-Appellant.

No. 12890.

Supreme Court of New Mexico.

May 5, 1981.

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

Jeff Bingaman, Atty. Gen., John G. McKenzie, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

RIORDAN, Justice.

On rehearing we withdraw our earlier opinion and substitute the following opinion.

Defendant-appellant appeals her convictions for murder, armed robbery and larceny over $2,500 arising out of the same incident, for which she was sentenced to life imprisonment. We affirm.

Defendant asserts error: (1) by the trial court's refusal of her tendered jury instruction, N.M.U.J.I. Crim. 41.15, N.M.S.A. 1978 on mistake of fact; and (2) in allowing the prosecutor's erroneous assertion that defendant had changed her testimony to remain uncorrected.

Defendant went to the car lot of Voight Auto Sales in Carlsbad with Henry Martinez who was her paramour and the father of her child. The defendant was nineteen years old and had lived with Martinez for three years.

On the date of the incidents for which she was convicted, defendant and Martinez went to the car lot to see Lillard (Bill) Johnson, the deceased. On arrival, Martinez went inside the office and told defendant to wait outside. Shortly after Martinez entered the office, defendant heard a gunshot. She hurried inside and saw the deceased pointing a shotgun at Martinez whose hand had been shot. Defendant testified that Martinez shouted that Johnson was going to kill him. Defendant grabbed a coke bottle and began striking Johnson with it. The evidence indicates that defendant hit Johnson several times on the back and the side of the head with the coke bottle. Defendant then removed a .22 pistol from her purse and gave it to Martinez. She heard some shots but did not see Martinez shoot Johnson. Although one bullet was recovered from inside the chest cavity of the deceased, the cause of death was "severe trauma to the head and face producing fractures of the skull and subdural hematoma."

The first point the defendant raises in her appeal is that the refusal of an instruction on mistake of fact was error. If, in fact, Venegas entertained an honest belief that the deceased was about to kill or shoot Martinez and acted accordingly, she was mistaken. The only gun then in the hands of the deceased was a single-shot shotgun, which had already been discharged.

The only evidence we find to support the defendant's request for a mistake of fact instruction is her alleged mistaken belief that the deceased was about to shoot Martinez when in fact he lacked the ability to do so. The tendered instruction N.M.U.J.I. Crim. 41.15, N.M.S.A. 1978 reads as follows:

> Evidence has been presented that the defendant believed that Henry Martinez was in danger of being killed by Lillard Johnson. If the defendant acted under an honest and reasonable belief in the existence of those facts, you must find her not guilty. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act under such belief.

The theory of the defense to the homicide in the case at bar is justifiable homicide or defense of another embraced within N.M.U.J.I Crim. 41.42, N.M.S.A. 1978, which instruction was given. It is essential to that defense for there to be substantial evidence that the defendant's actions were based upon a reasonable belief that such action was necessary to save the life or prevent great bodily harm to another. Such belief may rest upon *apparent* danger and need not be supported by actual danger. Thus, the instruction allows and is consistent with mistaken belief. Since an honest and reasonable mistaken belief fits within the justifiable homicide instruction, the tendered instruction on mistake of fact, N.M.U.J.I. Crim. 41.15, duplicates that which was already within N.M.U.J.I. Crim. 41.42 and which was given.

Moreover, adding N.M.U.J.I. Crim. 41.15 could confuse a jury into believing that the elements of apparent danger, resulting in fear, and the test of reasonableness are all unnecessary where the State is unable to prove beyond a reasonable doubt that the defendant did not act under a mistaken belief that the gun was loaded. Admittedly, a defendant in a criminal case is entitled to have the jury instructed upon his theories of the case supported by the evidence. *Poore v. State*, 94 N.M. 172, 608 P.2d 148 (1980); *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). Nevertheless, an instruction already implicitly included in a given instruction should not be used or given when by its literal interpretation, standing alone, there would be eliminated some of the essential elements of justifiable homicide as required by the given instruction. The defendant was not prejudiced by the court's refusal of

N.M.U.J.I. Crim. 41.15 and no error may be predicated thereon. Ordinarily, a defendant is not entitled to a specific instruction where the jury has already been adequately instructed upon the matter by other instructions. *State v. Beal*, 86 N.M. 335, 524 P.2d 198 (Ct.App.1974).

The second point raised in the appeal is that the trial court allowed the prosecutor's alleged erroneous assertion that appellant had changed her testimony at trial to remain uncorrected. During his closing argument, the prosecutor stated, *inter alia*:

> The truth is the foremost aim of this entire process. And, the other [instruction] says you, and you alone, are the judges of the credibility of the witnesses. And, ladies and gentlemen, you have seen some of the worst, most unbelievable lying that you can ever see. Gloria Venegas changed her testimony while on the stand, as Velma Venegas did, and admitted to cold perjury at Preliminary Hearing.

After the prosecutor made this statement, defense counsel objected on the ground that Velma Venegas had not changed her testimony on the stand. The judge overruled the objection and stated:

> He [the prosecutor] may argue as to the inconsistencies of her testimony, and the inconsistencies of all the testimony of all of the people who were related to her and involved in this. It's perfectly good argument before the jury.

After reading the entire transcript of the argument, we believe that the statement taken in context was only a characterization of Gloria Venegas, the defendant's sister, as having changed her testimony and as having committed perjury at the preliminary hearing.

The jury heard Gloria Venegas admit under oath that she had lied at the preliminary hearing. The jury also heard Velma Venegas' testimony during the trial and could assess for themselves whether she changed her testimony while on the stand as the prosecutor claimed in his closing argument. Further, the court had previously instructed the jury that what is said in the arguments by the lawyers is not evidence. The prosecutor, as well as the defense, is allowed wide latitude in closing argument and the trial court has wide discretion in dealing with and controlling closing argument. *State v. Ruffino*, 94 N.M. 500, 612 P.2d 1311 (1980); *State v. Anaya*, 79 N.M. 43, 439 P.2d 561 (Ct.App.1968). The statement by the prosecutor is fair comment on the evidence. The judgment and sentence are affirmed.

IT IS SO ORDERED.

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

DAN SOSA, Jr., Senior Justice, not participating.

628 P.2d 308

Earl LEWIS and LeAnn Lewis, Petitioners,

v.

Linda BLOOM, as Personal Representative of the Estate of Louise Dils, Deceased, and Walter Dils and Barbara Dils, Respondents.

No. 13446.

Supreme Court of New Mexico.

May 13, 1981.

Lowell McKim, Gallup, for petitioners.

Eugene E. Klecan, Albuquerque, for respondents.

OPINION

PAYNE, Justice.

A head-on collision occurred between vehicles driven by Louise Dils and LeAnn Lewis in which three people in the Dils vehicle, including Louise Dils, were killed. It is undisputed that the Lewis vehicle was on the wrong side of the road. Lewis contended that, although she was on the wrong side of the road, she had been forced there in an attempt to avoid Dils who had initially been on the wrong side of the road. Bloom, the personal representative of the estate of Louise Dils, contended that Lewis had been in the process of passing another vehicle at the time of the impact.

The issue on certiorari is whether the district court erred in submitting to the jury a non-uniform jury instruction proposed by Lewis. The Court of Appeals reversed, holding that the instruction was insufficient. We uphold the decision of the trial court and reverse the Court of Appeals on this issue.

The questioned instruction states:

> Drivers of vehicles proceeding in opposite directions shall pass each other to the right, and upon roadways having width for not more than one (1) line of traffic in each direction each driver shall give to the other at least one-half of the main-traveled portion of the roadway as nearly as possible.
>
> If you find from the evidence that LeANN LEWIS conducted herself in violation of this statute, you are instructed that such conduct constituted negligence as a matter of law, unless you further find that such violation was excusable or justifiable.

To legally justify or excuse a violation, the violator must sustain the burden of showing that she did that which might reasonably be expected of a person of

ordinary prudence acting under similar circumstances who desired to comply with the law.

Under this instruction the jury was required to find Lewis guilty of negligence as a matter of law *unless* she sustained the burden of explaining why she was on the wrong side of the road and that she did "that which might reasonably be expected of a person of ordinary prudence acting under similar circumstances who desired to comply with the law." The burden imposed by the instruction did not require her to disprove the facts which, if not excused, would establish negligence as a matter of law. Once the facts were established which gave rise to negligence as a matter of law, she had the burden of showing excuse or justification by showing that she acted as an ordinary prudent person desiring to comply with the law. The jury believed that Lewis sustained her burden and accordingly found in her favor. We cannot substitute our judgment of the facts for that of the trial court since only the trier of facts may weigh the evidence, determine the credibility of witnesses, reconcile inconsistent or contradictory statements of witnesses, and decide where the truth lies. *Worthey v. Sedillo Title Guaranty, Inc.*, 85 N.M. 339, 512 P.2d 667 (1973); *Durrett v. Petritsis*, 82 N.M. 1, 474 P.2d 487 (1970).

The Court of Appeals relied on the failure of the trial court to use the precise words as set out by N.M.U.J.I.Civ. 3.1, N.M.S.A.1978 (subsequently recodified and changed in the 1980 replacement pamphlet): "The defendant has the burden of proving the affirmative defenses." Although the trial court's instruction departed from the specific words of N.M.U.J.I.Civ. 3.1, we hold that it substantially complied with the statutory requirements by placing on Lewis the burden of proving her affirmative defense of contributory negligence on the part of Dils. *See Jewell v. Seidenberg*, 82 N.M. 120, 477 P.2d 296 (1970); *McCrary v. Bill McCarty Const. Co., Inc.*, 92 N.M. 552, 591 P.2d 683 (Ct.App.1979).

We reverse the Court of Appeals on the issue discussed herein. The only other issue raised on certiorari pertains to the destruction by counsel of a tape recording of a witnesses' recollections of the accident. We affirm the trial court and Court of Appeals on this issue. The tape recording was the attorney's work product which may be discovered only upon a showing of good cause. In this case the evidence was not sufficient to meet the burden of showing that the tape contained any discoverable information.

We do not pass on any other issues discussed by the Court of Appeals as they are not before us on certiorari. The case is remanded to the trial court for entry of judgment consistent with this opinion.

IT IS SO ORDERED.

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

RIORDAN, J., not participating.

628 P.2d 310

UNITED SALT CORPORATION, Petitioner,

and

Gary W. Grice and Richard G. Patton, Defendants,

v.

Frankie L. McKEE, Individually and as Personal Representative of the Estate of Mona V. McKee, Deceased, Respondent.

No. 13447.

Supreme Court of New Mexico.

May 15, 1981.

Rodey, Dickason, Sloan, Akin & Robb, Travis R. Collier, James C. Ritchie, Albuquerque, for petitioner.

Thomas Fitch, Socorro, for respondent.

OPINION

SOSA, Senior Justice.

The issue before this Court on certiorari is whether a non-defaulting defendant is materially prejudiced by a default judg-

ment as to liability and as to compensatory and punitive damages against its co-defendants in a wrongful death suit. The proper procedure to be followed in cases involving multiple defendants is an issue of substantial public interest. The district court granted a final default judgment under N.M.R. Civ. P. 54(b)(2), N.M.S.A. 1978 (Repl. Pamp. 1980), which provides as follows:

> (2) *Judgment involving multiple parties.* When multiple parties are involved, judgment may be entered adjudicating all issues as to one or more, but fewer than all parties. Such judgment shall be a final one unless the court, in its discretion, expressly provides otherwise and a provision to that effect is contained in the judgment. If such provision is made, then the judgment shall not terminate the action as to such party or parties and shall be subject to revision at any time before the entry of judgment adjudicating all claims and the rights and liabilities of all the parties.

Upon interlocutory appeal, the Court of Appeals affirmed the district court's denial of appellant's motion to set aside the default judgments of defendants Grice and Patton. The court held (1) that although the district court was technically incorrect in ordering the default judgment, appellant had no standing to challenge the validity of the judgment since it was not prejudiced or injured by the error and (2) that even if appellant had standing, the judgment was "harmless error" and the trial court did not abuse its discretion by acting arbitrarily or unreasonably under the particular circumstances. We affirm in part and reverse in part.

Mona McKee was killed on February 25, 1979, when a truck owned by appellant, United Salt Corporation, and operated by Gary W. Grice, collided with the vehicle which she was driving. Richard G. Patton was a passenger in the truck. A third vehicle was also involved. Frankie L. McKee, personal representative of the estate of Mona McKee, brought suit for damages for wrongful death against United Salt Corporation, Grice and Patton. He alleged that Grice and Patton were employees of United Salt and that they were negligent in the operation of the truck. He further alleged that United Salt was vicariously liable for the negligence of the individual defendants and that it had negligently entrusted the truck to them. He also alleged that all defendants were jointly and severally liable. Grice and Patton failed to answer. The district court entered default judgment against them in the amount of $359,899.00 (including $100,000.00 punitive damages) which is $50.00 more than the amount prayed for in the complaint. Default judgment was granted while United Salt's motion to dismiss the complaint, or in the alternative, to stay was pending. The district court denied appellant's motion to dismiss the default judgment. The Court of Appeals affirmed (Sutin, J., dissenting).

Appellant relies on *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552, 21 L.Ed. 60 (1872), which involved a charge of jointly conspiring to defraud plaintiff out of certain lands in Texas. Plaintiff's complaint was eventually dismissed as to all the other defendants. The Supreme Court held that a final decree on the merits could not be made separately against one defendant where a joint charge was still pending against the others.

> The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree *pro confesso* against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court.

Id. at 554.

It has been held that "it is most unlikely that *Frow* retains any force subsequent to the adoption of Rule 54(b). In any event, at most, *Frow* controls in situations where the liability of one defendant necessarily depends upon the liability of the others." (Citation omitted.) *International Controls Corp. v. Vesco*, 535 F.2d 742, 746–47 n. 4 (2d Cir. 1976). This is a joint claim

against the defendant since the liability of United Salt as to the claim of vicarious liability necessarily depends on the negligence of the individual defendants. Therefore, a final default judgment as to the amount of damages should not have been ordered. Appellee asserts, however, that United Salt has no standing to challenge the validity of the judgment. The general rule of law is that a court of review will not entertain assignments of error made by the appellant which may be prejudicial or injurious to others but not as to him. 5 C.J.S. *Appeal and Error* § 1497 (1958).

I

The first question to be resolved is whether United Salt is prejudiced by the judgment. United Salt is not prejudiced by the default judgment establishing the liability of Grice and Patton individually since United Salt's negligence is not thereby decided. However, it may be prejudiced by the money judgment. United Salt is entitled to try the issues of negligence, respondeat superior and the amount of damages. As long as these issues were raised by United Salt's pleadings, it should not be foreclosed from litigating them merely because Grice and Patton defaulted. Grice and Patton should not be locked into an amount of damages without proof of the amount by plaintiff; neither should United Salt if it is found liable under a respondeat superior theory. As stated in *Gallegos v. Franklin*, 89 N.M. 118, 123, 547 P.2d 1160, 1165 (Ct. App. 1976), *cert. denied*, 89 N.M. 206, 549 P.2d 284 (1976): "The entry of a default judgment against a defendant is not considered an admission by defendant of the amount of unliquidated damages claimed by plaintiff. 6 Moore's Federal Practice § 55.-07 (1972 Ed.)." (Citation omitted.) This rule should inure to the benefit of United Salt. Even if United Salt is not locked into the amount of damages, there are likely to be inconsistent money judgments. United Salt is prejudiced by the default judgment and therefore has standing to challenge its validity.

II

The next question to be resolved is whether the effect of the default judgment on United Salt was harmless error. Setting aside a judgment under N.M.R. Civ. P. 60(b), N.M.S.A. 1978 (Repl.Pamp. 1980), is discretionary with the trial court, and appellate courts will not interfere with the action of the trial court except upon a showing of abuse of discretion. *Phelps Dodge Corp. v. Guerra*, 92 N.M. 47, 582 P.2d 819 (1978). Such an abuse may be found only where the judge has acted arbitrarily or unreasonably under the particular circumstances. *Richins v. Mayfield*, 85 N.M. 578, 514 P.2d 854 (1973).

We find that there was an abuse of discretion by the district court for the following reasons: (1) The district court granted damages of $50.00 more than is prayed for in the complaint. A judgment may not grant relief which is not requested. *Federal National Mortgage Ass'n v. Rose Realty, Inc.*, 79 N.M. 281, 442 P.2d 593 (1968); (2) As we discussed above, United Salt may, in effect, be locked into an amount of damages for which no proof has been presented. Claims for large sums of money should not be determined by default judgments if they can reasonably be avoided. *Springer Corporation v. Herrera*, 85 N.M. 201, 510 P.2d 1072 (1973); (3) United Salt may be found not liable at trial based upon a defense which could inure to the benefit of its defaulting co-defendants. This would lead to inconsistent verdicts. We implicitly recognized this doctrine in *City of Albuquerque v. Huddleston*, 55 N.M. 240, 230 P.2d 972 (1951); (4) The district court granted the default judgment although defendants Grice and Patton did not receive notice of the hearing on an application of plaintiff for such judgment and no hearing was held. We agree that a default judgment, absent notice and hearing or an opportunity to be heard, is not an adjudication of all issues as intended by Rule 54(b)(2).

If vicarious liability is found, United Salt will be prejudiced by the default judgment unless it is allowed to litigate the

issues of negligence, employer-employee relationship, scope of employment and measure of damages. The trial court's denial of United Salt's motion to set aside the default judgment was an abuse of discretion which does not constitute harmless error. For the foregoing reasons we hold that, although the Court of Appeals was correct in refusing to set aside the default judgment as to the liability of defendants Grice and Patton, it was incorrect in refusing to set aside the default judgment as to the amount of damages. The default judgment, to the extent it awarded money damages, is reversed and otherwise it is affirmed.

IT IS SO ORDERED.

PAYNE, FEDERICI and RIORDAN, JJ., concur.

EASLEY, C. J., dissenting.

628 P.2d 314

Donna J. COWAN, Petitioner-Appellant,

v.

Hon. Thomas DAVIS, Respondent-Appellee.

No. 13263.

Supreme Court of New Mexico.

May 19, 1981.

Martha A. Daly, Appellate Defender, Melanie S. Kenton, Asst. Appellate Defender, Sante Fe, Teel & Walker, John J. Walker, Albuquerque, for petitioner-appellant.

Jose L. Martinez, Albuquerque, for respondent-appellee.

OPINION

RIORDAN, Justice.

Defendant Donna J. Cowan was tried in magistrate court on a charge of prostitution. After the jury was unable to reach a verdict, the magistrate judge declared a mistrial and directed that a new trial date be obtained from the docketing clerk. Counsel for the State and for the defendant immediately obtained a new trial setting. The final order entered after the mistrial did not expressly reserve the right to retry the defendant. On that basis, the defendant filed a motion to dismiss the charge. The motion was denied. Thereafter, the magistrate judge amended the final order stating that the case was set for retrial before a jury.

The defendant filed a petition for a writ of prohibition in the district court seeking to prohibit the magistrate court from retrying her. The district court denied the petition and the defendant appeals.

The issue on appeal is whether the failure of the magistrate court to expressly reserve the right to retry the defendant in its final order bars a retrial on the basis that such action would constitute double jeopardy. We hold that it does not.

Defendant relies on Rule 44(h) of the Rules of Criminal Procedure for District Courts, and *State v. Spillmon*, 89 N.M. 406, 553 P.2d 686 (1976), in arguing that a retrial in this case would constitute double jeopardy.

The defendants in *Spillmon* were charged with felony murder, aggravated burglary and attempted robbery. The jury returned a verdict of guilty as to attempted robbery and not guilty as to burglary. The jury was deadlocked on the felony murder charge. The trial court did not declare a mistrial but merely dismissed the jury and set the case for retrial on the murder charge. The defendants then moved to dismiss the murder charges on grounds of double jeopardy. The trial court denied the motion.

On appeal, this Court reversed the trial court and held that because the trial court concluded the proceedings without reserving jurisdiction by properly declaring a mistrial, double jeopardy barred retrial of the defendants on the murder charges. We stated that:

> If a mistrial had been properly declared, jeopardy would not have attached and the State would be free to assert its claims before another jury.

89 N.M. at 407, 553 P.2d at 687.

A defendant is not placed in double jeopardy by being brought to trial for the same offense the second time, after the jury in the first trial has been unable to reach a verdict as to guilt or innocence and a mistrial has been properly declared. *O'Kelly v. State*, 94 N.M. 74, 607 P.2d 612 (1980). When the jury in this case was unable to reach a verdict, Magistrate Judge Davis orally declared a mistrial, dismissed the jury and then entered an order in which he stated:

> Mistrial declared. Jury unable to reach a verdict.

It is clear that the judge in the instant case properly declared a mistrial. Therefore, there is no double jeopardy. It is irrelevant that he did not expressly reserve the right to retry the defendant in his final order. By properly declaring a mistrial, the court automatically reserves the power to retry the defendant.

Defendant also relies on Rule 44(h) of the New Mexico Rules of Criminal Procedure for the District Courts. Rule 44(h) requires that an order declaring a mistrial based on jury disagreement be in writing and expressly reserve the right to retry the defendant. The magistrate court is required to follow the Rules of Criminal Procedure for the Magistrate Courts. N.M. Magis.R.Crim.P. 1, N.M.S.A.1978. There is no requirement in the Rules of Procedure for Magistrate Courts or in the Supreme Court approved forms for that court which requires it to expressly reserve jurisdiction. We therefore hold that the court can retry the defendant without expressly reserving that right.

The decision of the district court denying defendant's petition for a writ of prohibition is therefore affirmed.

EASLEY, C. J., and PAYNE, J., concur.

628 P.2d 316

K. Claudette WITHERS and Garner E. Withers, Plaintiffs-Appellants,

v.

The BOARD OF COUNTY COMMISSIONERS OF the COUNTY OF SAN JUAN, and Harley Douglass and E. Revay Douglass, Defendants-Appellees.

No. 4740.

Court of Appeals of New Mexico.

Feb. 26, 1981.

Leslie E. Nunn, Farmington, for plaintiffs-appellants.

Reed Frost, Palmer & Frost, Farmington, Paul L. Butt, Shaffer, Butt, Thornton & Baehr, Albuquerque, Ken McDaniel, Asst. Dist. Atty., Farmington, for defendants-appellees.

OPINION

ANDREWS, Judge.

San Juan County (County) published an invitation for bids on a tract of land adjacent to property Harley and E. Revay Douglass (Douglasses) held under a real estate contract. Pursuant to the conditions of the invitation allowing adjoining landowners to meet successful bids on the property, the Douglasses were awarded the property when they met the bid submitted by Garner and Claudette Withers (Withers). The Withers filed suit seeking injunctive relief and damages for the County's refusal to award them the property. Summary judgment was entered in favor of the County and the Douglasses. The Withers appeal.

In 1968, the Douglasses entered into a real estate contract for the purchase of land adjoining that which is the subject of this appeal. Sometime later, the Douglasses conveyed title to the property by warranty deed pursuant to a revocable trust agreement entered into with the Seventh Day Adventist Association of Colorado (Trustee). The Trustee's powers over the property were not to commence until the death of the Settlors who had the right to withdraw the property from the trust estate at any time.

On May 6, 1979, the County published a bid invitation with a May 14, 1979, deadline, which provided that "[i]f the successful bid on any parcel to be sold is made by a bidder other than the owner or owners of land adjacent to and adjoining such parcel and such owner or owners have also submitted a bid on the parcel, the Board of County Commissioners reserve the rights to allow such adjacent and adjoining landowner or owners to meet the successful bid . . . ." On May 14, 1979, the Trustee executed a quitclaim deed reconveying the property to the Douglasses who then submitted the matching bid under which the County awarded the property. Thus, on May 14, the Douglasses were record owners of the property subject to the real estate contract.

Plaintiffs assert that the invitation to bid requires record ownership of the adjoining land, and that a purchaser under a real estate contract is not an "owner" of the property. Thus, the Douglasses were not "adjoining landowners" entitled to submit a matching bid pursuant to the bid invitation.

In this case, the records of the County Clerk reflect only the deed from the Douglasses to the Seventh Day Adventist Association of Colorado with no mention of the trust. According to the Withers, the Trust Agreement "affected title to real estate" and therefore § 14–9–1, N.M.S.A. 1978, requires that it be recorded. Relying on § 14–9–3, N.M.S.A. 1978, they argue that the failure to record renders the Trust Agreement ineffective as to "the title of the plaintiffs on or to the land in question."

In asserting that they are entitled to the protection of the recording statute, plaintiffs ignore the clear and consistent reasoning of New Mexico case law, which holds that the object of the recording statute is to protect those who invest money in property or mortgage loans and those who have acquired judgment liens without knowledge of infirmities in title. *Arias v. Springer*, 42 N.M. 350, 78 P.2d 153 (1938). *See Romero v. Sanchez*, 83 N.M. 358, 492 P.2d 140 (1971); *Grammer v. New Mexico Credit Corp.*, 62 N.M. 243, 308 P.2d 573 (1957); *Wells v. Dice, et al.*, 33 N.M. 647, 275 P. 90 (1929).

In order to avail themselves of the protection of § 14–9–3, plaintiffs would have to be purchasers, mortgagees in good faith, or judgment lien creditors of the land which is the subject of the trust agreement. Plaintiffs clearly do not qualify as a "purchaser" which under *Arias v. Springer, supra*, has

> . . . two well-defined meanings. The common and popular meaning is that he is one who obtains title to real estate in consideration of the payment of money or its equivalent; the other is a technical meaning and includes all persons who acquire real estate otherwise than by descent . . . .

42 N.M. at 359, 78 P.2d 153, nor are plaintiffs good faith mortgagees or judgment lien creditors.

As to a purchaser under a real estate contract, in New Mexico the rule ". . . is that the vendee, under an executory contract for the sale of realty, acquires an equitable interest in 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." *Marks v. City of Tucumcari*, 93 N.M. 4, 6, 595 P.2d 1199, 1200 (1979). This result is consistent with the definition of "owner" found in other decisions concerned with the ownership of land. *See Mesich v. Board of Commissioners of McKinley County*, 46 N.M. 412, 129 P.2d 974 (1942), an eminent domain proceeding where the term "owner . . . includes all persons who have an interest or estate in the property taken or injured; and *Scudder v. Hart*, 45 N.M. 76, 110 P.2d 536 (1941), a tax title case where the word "owner" is held to refer to one who has a substantial interest in the premises, including mortgagees, judgment creditors and holders of contingent interests in the land.

In reviewing a summary judgment, we must determine that the movant had met his burden by demonstrating "an absence of a genuine issue of fact," as to any material issue. *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972). Thus, unless there is "evidence sufficient to create a reasonable doubt as to the existence of genuine issue," summary judgment is proper. *Pharmaseal Laboratories, Inc. v. Goffe*, 90 N.M. 753, 568 P.2d 589 (1977).

The protection afforded by the New Mexico recording acts is inapplicable to this case since the revocable trust does not affect the title to the original property held by the Douglasses and since the Withers were not good faith purchasers for value. Where the Douglasses were record owners of the property as of the deadline for submission of bids, all of the auction requirements imposed by the County were met and title was properly vested in the Douglasses. There being no genuine issue as to the facts which go to the dispositive issue—the issue of ownership—the decision of the trial court granting the summary judgment in favor of defendants, and dismissing plaintiffs' action is affirmed.

WALTERS, J., concurs.

SUTIN, J., concurring in result.

SUTIN, Judge (concurring in the result).

I concur in the result.

INTRODUCTION

Plaintiffs, the Withers, did not set forth any "points relied upon in the argument," Rule 9(h), Rules of Civil Appellate Procedure, nor set forth any genuine issues of material fact in order to reverse the summary judgment. This case cannot be heard on the merits. Withers claim that defendants were not entitled to summary judgment but the Withers were entitled to summary judgment.

San Juan County claims it was immune to liability for damages under the New Mexico Tort Claims Act, § 41–4–1, et seq., N.M.S.A. 1978, and Withers did not reply. San Juan County would be entitled to summary judgment under this Act, but the County did not raise the issue in the trial court. The Douglass defendants stated one sentence in a Memorandum Brief:

> Further, the County has immunity under the provisions of § 42–11–1 NMSA, 1979 Supp.

This statute grants immunity to the State and its political subdivisions "from and may not be named a defendant in any suit, action, case or legal proceeding involving a claim of title to or interest in real property except as specifically authorized by law." Laws 1979, ch. 110, § 1. This issue was abandoned in the appeal.

These issues would be interesting to resolve but they shall have to await another lawsuit of this nature. The briefs filed in this Court are similar to those filed in the trial court. An independent view of this case is necessary.

CHRONOLOGY OF EVENTS

The chronology of events were as follows:

1. On April 18, 1968, by Escrow Agreement, Douglass purchased from Wilkes, the real estate that adjoins the land owned by San Juan County.

2. On July 12, 1977, Douglass entered into a Revocable Trust Agreement with the Seventh Day Adventist Association of Colorado. During Douglass' lifetime, the Trust Agreement provided that the Trustee shall exercise no rights or duties with respect to the trust estate, and the Trustee shall hold title only to the real estate, but Douglass shall have all rights of possession. This Revocable Trust Agreement was not filed of record in San Juan County. *Neither do I find any conveyance from Douglass to the Trustee.* An endorsement to the trust agreement states:

> Trustee hereby acknowledges that on the 22nd day of May, 1977, it received the following assets which were made a part of the corpus of said Trust Agreement: Real estate property in the County of San Juan, New Mexico, described as to wit: [Description followed.]

Although the Douglass' affidavit states "that thereafter, the Affiant and her husband conveyed certain property in the attached Escrow Agreement and in the attached deed," the attached deed was one from the Trustee to Douglass dated May 14, 1979, but recorded October 18, 1979. As far as the record shows, Douglass' interest in the Escrow Agreement was never conveyed to the Trustee. It remained in Douglass.

3. Taxes for the year 1977 were assessed in names of Wilkes, Seventh Day Adventist, Attn. Douglass and paid November 29, 1978 and May 7, 1979.

4. On Sunday, May 6, 1979, San Juan County published a Notice in the Farmington Daily Times, Farmington, New Mexico, in which it asked for sealed bids for its property to be publicly opened on May 11, 1979. The Notice stated:

* * * * * *

> 6. The Board of County Commissioners of San Juan County reserves the right to reject any and/or all bids without incurring legal liability.

* * * * * *

> 8. If the successful bid on any parcel to be sold is made by a bidder other than *the owner or owners of land adjacent to such parcel and such owner or owners have also submitted a bid on the parcel, the Board of County Commissioners reserves the right to allow such adjacent and adjoining land owner or owners to meet the successful bid and to purchase the parcel if the successful bid is so met,* if said adjoining land owner meets said bid before noon May 14, 1979, subject to all the requirements of the original bid. It is the responsibility of the adjoining land owner to determine whether he was the prevailing bidder and, if not, to meet the high bid before noon May 14, 1979. [Emphasis added.]

5. At the bid opening held in the County Commissioners' room on Friday, May 11, 1979, the bids were opened and read aloud. Withers made the highest bid of 2.9 cents per square foot which amounted to $1,263.24. The only one who made any attempt to match their bid was Douglass. *There was no evidence that Douglass met the bid made by Withers.* An administrative assistant of the county manager in charge of this administrative bidding and bid award stated by affidavit to those present:

> After reading the bids, and in regard to Mr. Douglas's [sic] bid, I commented that I did not think the County would make the deed out in another person's name as was requested on the bid sheet, that it would be the Douglas's [sic] business to make any assignments or transfers after it was deeded to them by the County, *if they chose to meet the high bid of Mr. Withers.*
>
> I do not recall that Mr. Withers made any comment at the bid opening. However he came back to my office and checked the maps for parcel # 55 and then went to the clerk's office to check the title. *Mr. Withers then protested the bid of Mr. Douglas's* [sic]. [Emphasis added.]

6. At the meeting of the County Commissioners on June 5, 1979, Mr. Reed Frost, attorney for Douglass said "the property could be returned to Mr. and Mrs. Douglass."

7. On June 7, 1979, a quit claim deed was executed by San Juan County to Douglass and filed of record.

8. In Withers' Brief-In-Chief, Withers states:

> *Plaintiffs submitted the highest bid. Before the deadline, Defendants Douglass submitted a matching bid* .... The County nevertheless awarded the parcel to the Defendants Douglass. [Emphasis added.]

Withers admitted that Douglass submitted a matching bid. This admission was sufficient to supply the missing link in the bidding award made. At the time it was entered, Douglass was not entitled to summary judgment. Inadvertently, Douglass omitted producing evidence of compliance with the San Juan County Notice to Bidders. Inasmuch as the error was cured on appeal, a reversal on this issue would be purposeless.

A. *San Juan County was entitled to summary judgment as a matter of law.*

In its notice, San Juan County reserved the right to reject Withers' bid without incurring legal liability. Withers had read this Notice. The Notice alerted him to the bidding and the award. The Commissioners wanted to avoid any liability growing out of this public event. In the absence of any statutory or constitutional violations, they have the right to protect themselves against liability for damages. Summary judgment was properly granted San Juan County.

B. *Douglass was entitled to summary judgment as a matter of law.*

Withers' Brief-In-Chief states:

> *Defendants Douglass had been the owners of the adjacent [land] to the parcel sold,* but on October 21, 1977, *they deeded that property to the Seventh-Day Adventist Association of Colorado* (hereinafter referred to as the Church). (*Withers' Affidavit attached to Plaintiffs' Motion for Summary Judgment and deed attached hereto*.... [Emphasis added.]

Withers' affidavit did not have any deed attached to it. Its motion for summary judgment did have attached to it a Memorandum Brief. *Attached to the Brief was a deed from Seventh Day Adventist to Douglass.*

Inasmuch as Withers admits that Douglass was the owner of the adjacent land, any discussion of the meaning of "owner" is superfluous.

Douglass was entitled to summary judgment as a matter of law. Withers was not.

Costs of appeal should be assessed against Withers.

628 P.2d 320

STATE of New Mexico,
Plaintiff-Appellee,

v.

William E. SHEETS,
Defendant-Appellant.

No. 4867.

Court of Appeals of New Mexico.

March 24, 1981.

Certiorari in Supreme Court
Granted April 29, 1981.
Writ Quashed May 18, 1981.
Quashed May 18, 1981.

Michael E. Vigil, Romero & Vigil, P. A., Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Clare E. Mancini, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

McGee sought to hire Ortiz, an undercover police detective, to murder defendant's wife and to murder William Valentine. McGee and defendant were jointly indicted for conspiracy and attempt in the matter involving defendant's wife. In addition, McGee was charged with attempted murder in the matter involving Valentine. McGee's convictions on these charges were affirmed in *State v. McGee*, N.M., 621 P.2d 1129 (Ct.App.1980). Defendant was convicted of the two charges against him. The dispositive issue in defendant's appeal involves the sufficiency of the evidence. None of the other issues raised by defendant are identified because they do not amount to reversible error. We discuss: (1) admissibility of Ortiz's testimony under the co-conspirator rule, and (2) sufficiency of the evidence to support a finding of guilt beyond a reasonable doubt under *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We reverse the convictions under both of the issues discussed.

The evidentiary problems arise because there is no direct evidence that defendant was in any way involved in McGee's scheme to have defendant's wife killed. There is evidence that defendant's wife had an accidental death insurance policy, that defendant was the beneficiary of the policy, and that defendant knew of the existence of the policy. There is evidence that defendant had not worked for about a year, and an inference that defendant needed money. There is evidence that McGee and defendant were friends, that McGee owed defendant $5,000, and that McGee was a visitor at defendant's home. None of this evidence connects defendant with McGee's scheme and, without more, was not relevant because the evidence recited in this paragraph did not tend to make defendant's participation in McGee's scheme more probable or less probable. Evidence Rule 401. Compare *People v. Leach*, 15 Cal.3d 419, 124 Cal.Rptr. 752, 541 P.2d 296 (1975). The State contends that the evidence recited in this paragraph, when considered with certain additional evidence, was sufficient under both issues. This additional evidence is set out in the two issues discussed.

Co-Conspirator Rule

Ortiz was permitted to testify as to four items involving McGee. Those items are:

1. McGee told Ortiz the killing of defendant's wife must be "accidental" and told Ortiz of the wife's route of travel and time of travel to and from work and evening classes.

2. McGee furnished Ortiz photographs of defendant's wife and her car.

3. Inasmuch as Ortiz was to be paid for the killings out of the insurance proceeds, Ortiz asked McGee for proof that there was insurance. According to Ortiz, McGee stated he would have the proof of the insurance on defendant's wife's the next day, used the telephone to dial a number unknown to Ortiz, and said into the telephone: " 'William I'm going to need that book on the insurance since this a kinda screwy deal' ", and after a pause, " 'O.K. Bill, 8 o'clock, see ya.' "

4. The following day, McGee gave Ortiz a copy of a payroll stub for defendant's wife showing a deduction for accidental death insurance.

The foregoing testimony by Ortiz, ordinarily, would be inadmissible hearsay as to defendant. The State's contention is that this testimony was not hearsay under the co-conspirator rule. That rule, Evidence Rule 801(d)(2)(E) is:

> (d) * * * A statement is not hearsay if:
>
> * * * * * *
>
> (2) * * * The statement is offered against a party and is * * * (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The question of whether the above four items were admissible has two parts: (a) whether the four items were statements, and (b) if so, whether there was evidence of a conspiracy apart from the statements.

Items 1 and 3 of Ortiz's testimony went to out-of-court remarks by McGee; items 2 and 4 were acts of McGee. In *State v. Armijo*, 90 N.M. 12, 558 P.2d 1151 (Ct.App. 1976), we cited New Mexico decisions that included both acts and statements in the co-conspirator rule. In *State v. Jacobs*, 91 N.M. 445, 575 P.2d 954 (Ct.App.1978), we pointed out that the United States Supreme Court had distinguished between acts and statements, and had held that the co-conspirator rule did not apply to acts. Defendant suggests this distinction is not applicable under our Rules of Evidence; we agree.

Rule of Evidence 801(a) provides: "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." Items 2 and 4—furnishing the photographs and the payroll stub—were non-verbal conduct intended to show the identity of defendant's wife and the existence of insurance and, thus, intended as assertions. These acts came within the definition of "statement" and were subject to the co-conspirator rule.

Each of the four items being "statements", these items were not admissible unless there was prima facie proof of conspiracy independent of these four items. *State v. Jacobs, supra; State v. Armijo, supra.*

Prima facie proof of the conspiracy independent of McGee's "statements" is lacking. Once the "statements" are eliminated, there is nothing that permits an inference of a conspiracy between McGee and defendant. See *United States v. Stroupe*, 538 F.2d 1063 (4th Cir. 1976); *United States v. Oliva*, 497 F.2d 130 (5th Cir. 1974). Lacking this proof, McGee's "statements" were not admissible; the trial court erred in admitting McGee's "statements".

Sufficiency of the Evidence Under Jackson v. Virginia

Defendant would be entitled to a new trial because McGee's statements were improperly admitted. However, even if McGee's statements were properly admitted, there is an issue as to the sufficiency of the evidence under R.Crim.Proc. 40. See *State v. Herrera*, 90 N.M. 306, 563 P.2d 100 (Ct.App.1977). The issue is whether there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. *State v. Carter*, 93 N.M. 500, 601 P.2d 733 (Ct.App.1979).

Jackson v. Virginia, supra, explains:

> [T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Woodby v. INS*, 385 U.S. [276] at 282 [87 S.Ct. 483 at 486, 17 L.Ed.2d 362] (emphasis added). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson v. Louisiana,* 406 U.S., [356] at 362 [92 S.Ct. 1620, at 1624, 32 L.Ed.2d 152]. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law. (Emphasis in original.)

Before considering "all of the evidence" as required by *Jackson v. Virginia, supra,* we point out that defendant's conviction for attempted first degree murder is, at most, a derivative liability which depends on the conviction for conspiracy to commit first degree murder. *State v. Armijo,* 90 N.M. 10, 558 P.2d 1149 (Ct.App.1976). If there is insufficient evidence to sustain the conspiracy conviction, the evidence is insufficient to sustain the attempt conviction.

The conspiracy conviction rests entirely upon circumstantial evidence; the question is whether the circumstances, shown by all of the evidence, are sufficient for a rational trier of fact to convict. See *State v. Dressel,* 85 N.M. 450, 513 P.2d 187 (Ct.App.1973).

State v. Thoreen, 91 N.M. 624, 578 P.2d 325 (Ct.App.1978) states:

> A conspiracy is a common design or agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means. One cannot be a party to a conspiracy unless one knows of the conspiracy.

State v. Dressel states:

> Conspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties. * * * A formal agreement need not be proved; a mutually implied understanding is sufficient to establish the conspiracy.

Ortiz admitted that McGee, at no time, referred to or implicated the defendant. The portion of McGee's statement, in evidence, exculpates the defendant. What then is left that inculpates defendant? Are the statements previously identified in discussing the co-conspirator rule sufficient to prove a mutually implied understanding between McGee and defendant, and to prove that defendant had knowledge of McGee's scheme? No.

The strongest item to show a conspiracy would be an inference that defendant furnished the photographs and the copy of the payroll stub to McGee. However, inferences from other evidence—independent of the testimony of both McGee and defendant, and independent of the conflicting statements of defendant's wife—were that the photographs and the original of the payroll stub were on a table in defendant's home, as both McGee and defendant claimed. It is undisputed that McGee was a visitor to defendant's home, and items on the table were available to McGee during those visits. McGee would know that the insurance policy covered an accident from the contents of the payroll stub.

The information that McGee furnished Ortiz, as to the wife's route of travel, was inaccurate.

The use of "William" and "Bill" in the so-called telephone conversation testified to by Ortiz is as consistent with William Valentine (another McGee "victim") as it is with defendant. McGee said the telephone call was a fake, that he called "Time and Temperature". Defendant denied receiving a telephone call from McGee during the time when the telephone call could have been made; Valentine also denied receiving such a call. There is no evidence that McGee saw the defendant at 8:00 o'clock or any other time during the evening of the day the purported telephone call was made.

The evidence of McGee's statements, if properly admitted, raised a suspicion that defendant was somehow involved with McGee, but that evidence falls short of permitting a rational juror to be satisfied of guilt beyond a reasonable doubt when all of the evidence is considered. U.J.I.Crim. 40.-60 defines reasonable doubt as a "doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life." The evidence in this case, even if properly admitted, was insufficient to sustain the conspiracy conviction and, thus, both convictions are reversed for insufficient evidence. Compare *State v. Campos*, 79 N.M. 611, 447 P.2d 20 (1968); *State v. Seal*, 75 N.M. 608, 409 P.2d 128 (1965); *State v. Dressel, supra; Morris v. Dodge Country, Inc.*, 85 N.M. 491, 513 P.2d 1273 (Ct.App.1973). Compare the evidence unworthy of the degree of belief necessary for a voluntary waiver in *State v. Bramlett*, 94 N.M. 263, 609 P.2d 345 (Ct.App.1980). See *United States v. Moss*, 591 F.2d 428 (8th Cir. 1979); *United States v. Brown*, 584 F.2d 252 (8th Cir. 1978).

The judgment and sentences are reversed. The cause is remanded with instructions to discharge defendant.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

628 P.2d 324

Buford A. SMITH, Plaintiff-Appellee, and Cross-Appellant,

v.

TRAILWAYS BUS SYSTEM, Employer, and Transport Insurance Company, Insurer, Defendant-Appellant, and Cross-Appellee.

No. 4809.

Court of Appeals of New Mexico.

March 31, 1981.

Alan Konrad, Miller, Stratvert, Torgerson & Brandt, P. A., Albuquerque, for plaintiff-appellee, and cross-appellant.

Richard J. Crollett, Roybal & Crollett, Albuquerque, for defendant-appellant, and cross-appellee.

OPINION

WALTERS, Judge.

Plaintiff, a bus driver for defendant Trailways Bus System since April, 1965, sustained a work-connected injury to his lower back in January of 1974. A spinal fusion was performed in July of 1976, and a workmen's compensation claim related to the injury was settled in January of 1977. The settlement judgment provided for plaintiff to be paid "$4,000 for permanent partial disability . . . prorated over 478 weeks at approximately $8.37 per week," and $3,000 for future medical, transportation, and rehabilitation expenses, in addition to an allowance for attorneys' fees.

Plaintiff returned to his work as a bus driver in December 1976.

On December 6, 1978, plaintiff's bus was bumped from behind and he sustained an injury to his neck. He filed a compensation claim in August, 1979, alleging permanent disability as a result of the accident and complaining that he had been receiving incorrect payments of $172.46 per week in compensation benefits for the eleven weeks he had been off the job.

After a trial on the merits, the trial court awarded 100% total temporary disability for the periods from December 6, 1978 to June 15, 1979, and from December 13, 1979 to January 3, 1980; 35% partial permanent disability for 25 weeks for the period from June 15, 1979 to December 12, 1979; 25% partial permanent disability from January 3, 1980 to continue for 561 weeks. Defendants were given credit for benefits paid by them during 1979 of $172.46 for fourteen weeks ($2,414.44), and for $3,163.86 still to be paid to plaintiff under the 1977 judgment. The court also awarded unpaid past and future medical expenses and $5,500 in attorneys' fees. It is from this judgment that defendants have appealed, contending error in the trial court's determination of permanent partial, temporary partial, and temporary total disability for varying periods; in its application of § 52–1–47 D, N.M.S.A.1978, in reducing benefits; in the inclusion of some costs incurred as necessary medical expenses, and in the amount of attorneys' fees awarded. Plaintiff cross-appeals the trial court's denial of certain expenses he contends were necessary to his medical treatment.

1. *The finding of permanent partial disability as a result of the 1978 accident.*

Appellants insist that no expert medical testimony established the December 6, 1978 bus accident, rather than the 1976 spinal fusion operation, as the cause of any permanent disability to the workman. They argue that conditions of § 52–1–28 B, N.M.S.A.1978, were not met. That statute provides:

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

See Renfro v. San Juan Hospital, Inc., 75 N.M. 235, 238, 403 P.2d 681 (1965). If the necessary medical evidence is produced, the degree of disability is a question of fact for the fact-finder; and if there is substantial evidence in the record to support a disability finding, it is binding on this court. *Adams v. Loffland Brothers Drilling Co.*, 82 N.M. 72, 74, 475 P.2d 466 (Ct.App. 1970).

Defendants' contention that the record does not reflect a causal connection as a medical probability by expert medical testimony is incorrect. The medical testimony was conflicting; nevertheless, Dr. Maron, plaintiff's orthopedic surgeon, gave evidence to support the finding that plaintiff's disability was a natural and direct result of the December 6, 1978 accident. The conflicts were resolved in plaintiff's favor. The trial court's finding on this issue will be upheld. *See Alvillar v. Hatfield*, 82 N.M. 565, 484 P.2d 1275 (Ct.App.1971).

2. *The finding of 35% partial temporary disability from June 15, 1979 to December 12, 1979, resulting from the 1978 bus accident.*

Plaintiff was released by Dr. Maron to return to work on June 15, 1979. At that time, plaintiff's driving route was changed from Albuquerque-El Paso to Albuquerque-Tucumcari, and he received an increase in pay. Appellants contend that, under *Anaya v. New Mexico Steel Erectors, Inc.*, 94 N.M. 370, 610 P.2d 1199 (1980), an increase in wage-earning capacity demonstrates the error in a finding of a 35% partial disability. It was noted in *Chavira v. Gaylord Broadcasting Co.*, N.M., 620 P.2d 1292 (Ct.App. 1980), cert. denied, N.M., 621 P.2d 516 (1980), that *Anaya*

inadvertently relied on case law interpreting the earlier disability statute, and overlooked *Quintana v. Trotz Const. Co.*, 79 N.M. 109, 440 P.2d 301 (1968), which pointed out that the 1963 amendment to Sections 59–10–12.18 and 59–10–12.19, N.M.S.A.1953 (now Sections 52–1–24 and 52–1–25, N.M.S.A.1978), "changed the primary test of disability from wage-earning ability to capacity to perform work as delineated in the statute."

The evidence reflects that plaintiff suffered an incapacity to perform some of his work. He experienced constant headaches, neck and backaches after returning to work in June. He encountered problems in bending and stooping to handle baggage, and he had to have assistance to do those tasks. He sought and obtained the Tucumcari route because it was shorter, and he could stand more often because there were more stops along the way. This constitutes substantial evidence to support the finding, and it will not be disturbed on appeal. *Adams, supra.*

Appellants next argue that because plaintiff returned to his job on June 15, 1979, and performed his usual duties while receiving his normal salary, he is not entitled to disability benefits for the period in question. However, as stated in *Quintana v. Trotz Const. Co.*, 79 N.M. 109, 111, 440 P.2d 301 (1968), and reiterated in *Chavira, supra*, the primary test of disability has been changed from wage-earning ability to capacity to perform work. Based on the evidence discussed above, the finding that plaintiff suffered a disability in his capacity to perform his work from June 15 to December 12, 1979 is not erroneous.

3. *The finding of temporary total disability from December 12, 1979 to January 3, 1980, as a result of the 1978 bus accident.*

There is also substantial evidence to support this finding. Dr. Maron referred plaintiff to Dr. Mladinich on December 12, 1979 for an examination of his neck area. Dr. Mladinich diagnosed cervical and thoracic sprain. He recommended that plaintiff take time off work, and he started plaintiff on a daily physical therapy treatment program which continued through January 3, 1980. Plaintiff was then medically released to return to work. According to Dr. Mladinich, the sprain was of a temporary nature and he did not expect plaintiff to suffer any permanent physical impairment.

As was said in *Lane v. Levi Strauss & Co.*, 92 N.M. 504, 506, 590 P.2d 652 (Ct.App. 1979):

> "[T]emporary disability" is that which lasts for a limited time only while the workman is undergoing treatment. This classification anticipates that eventually there will be either complete recovery or an impaired bodily condition which is static.

The facts presented in this case satisfy the "temporary disability" definition of *Lane, supra*; and the medical evidence supports the totality of the disability during that three-week period.

4. *The manner of applying § 52–1–47 D, N.M.S.A.1978.*

This subsection of the statute limiting compensation benefits provides:

> D. the compensation benefits payable by reason of disability caused by accidental injury shall be reduced by the compensation benefits paid or payable on account of any prior injury suffered by the workman if compensation benefits in both instances are for injury to the same member or function or different parts of the same member or function, or for disfigurement, and if the compensation benefits payable on account of the subsequent injury would, in whole or in part, duplicate the benefits paid or payable on account of such prior injury.

Plaintiffs' settlement judgment of 1977, prorating $4,000 for permanent partial disability over 478 weeks at $8.37 per week, contemplated coverage through March of 1986. After the December 1978 injury, defendants voluntarily paid him fourteen weeks of compensation for temporary total disability, He was awarded in this suit 35%

partial permanent disability payments for twenty-five weeks from June 15, 1979 to December 12, 1979, and 25% partial permanent disability from January 3, 1980 to continue for the remaining 561 weeks of the statutory entitlement period. Defendants argue this a duplication of benefits in violation of § 52–1–47 D, *supra*, because plaintiff will receive payments pursuant to the 1977 judgment for a 20–25% impairment, while at the same time the present judgment grants him benefits for the same impairment. They assert there is no finding that the December 6, 1978 accident resulted in any additional permanent impairment or disability.

We do not agree with defendants' formulation of this issue because among the trial court's findings are the following:

> 23. From June 15, 1979, to December 12 1979, because of injuries sustained in the accident of December 6, 1978, Plaintiff was partially disabled to the extent of 35% of the body as a whole to perform the duties required of a bus driver on a sustaining basis or any other employment for which he was qualified by education and experience.
>
> 24. From January 3, 1980, to date of trial and at time of trial, because of injuries to the low back or aggravation to prior injury to the low back sustained in the accident of December 6, 1978, Plaintiff was partially disabled to the extent of 25% of the body as a whole to perform the duties required of a bus driver on a sustaining basis or any other employment for which he was qualified by education and experience.

The quoted findings establish that plaintiff suffered new or aggravated injuries, together with additional disabilities, as a result of the December 6, 1978 accident.

To comply with the requirements of § 52–1–47 D, the trial court provided in its judgment that

> the Defendants shall be given credit for compensation benefits in the amount of $3,163.86 previously paid to the Plaintiff as workmen's compensation benefits in a prior lawsuit styled, "Bernalillo County Cause No. 8–76–03531"; * * * *

Finding No. 25 explained that the $3,163.86 figure was computed by multiplying 378 weeks of compensation paid after December 6, 1978 and still to be paid under the 1977 judgment, by $8.37 per week. That amount was then deducted from the total amount awarded in the instant suit. We said in *Gurule v. Albuquerque-Bernalillo County Econ. Opp. Bd.*, 84 N.M. 196, 203, 500 P.2d 1319 (Ct.App.1972), cert. denied, 84 N.M. 180, 500 P.2d 1303 (1972):

> Section 59–10–18.8(D) [sic], supra, [now § 52–1–47 D] does not state that a workman may not receive compensation benefits for successive injuries. It does state that when there are successive injuries to the same member or function, benefits for the subsequent injury may not duplicate benefits paid or payable for the prior injury. It is the overlap in benefits to which the reduction applies.

By reducing the 1980 award by an amount equal to value of the 1977 judgment remaining after December 6, 1978, the court eliminated the overlap. Its manner of applying the statute was completely proper.

5. *The expenses of California doctors and hospitalization.*

Section 52–1–49, N.M.S.A.1978, requires the employer to furnish all reasonable and necessary medical expenses incurred by the workman for a job-related injury. The trial court found the expenses incurred by plaintiff in California were reasonable and necessary, and resulted from the December 6, 1978 accident. We sustain this finding on appeal; it is supported by substantial evidence from Dr. Maron that he referred plaintiff to Dr. Wiltse, who hospitalized plaintiff for evaluation and treatment and, in turn, referred plaintiff to Dr. Severance. Thereafter, Dr. Maron relied on Dr. Wiltse's findings for further diagnosis and treatment of plaintiff. There was no error in assessing those costs in plaintiffs' favor.

6. *The award of $5,500 in attorneys' fees.*

All parties agree that, in awarding attorney's fees, there was no compliance with *Fryar v. Johnsen*, 93 N.M. 485, 601 P.2d 718

(1979), *Johnsen v. Fryar*, 19 N.M.S.B.B. 1024, No. 4477, (Ct.App., Nov. 6, 1980), and *Fitch v. Tanksley Trucking Co.*, N.M., 623 P.2d 991 (Ct.App.1980). This issue therefore must be remanded to the trial court for entry of findings and conclusions on the reasonable amount of attorneys' fees to be awarded.

7. *The cross-appeal.*

Plaintiff's treating orthopedist referred plaintiff to a leading orthopedic surgeon in California because he felt plaintiff "had exhausted whatever was available here in Albuquerque." The trial court denied reimbursement for one or two nights' lodging, two meals, and air transportation to California and return.

Plaintiff's entitlement to reimbursement for expenses incident to medical treatment under the New Mexico statute, § 52–1–49 N.M.S.A.1978, is a question raised but not answered in *Hales v. Van Cleave*, 78 N.M. 181, 429 P.2d 379 (Ct.App.1967). We do not believe, however, that it is an issue necessary to decide in this case, either. Plaintiff attended a two-day union meeting when he arrived in California, and he stayed at a motel near the union meeting place the first night. The expense of two meals were incurred at that time. During the rest of his stay in California, while not hospitalized, he stayed with his brother. The evidence shows further that plaintiff could have travelled to California by bus, without charge, if he had wished. Under these circumstances, plaintiff failed to prove that the expenses disallowed by the Court were reasonable and necessarily incurred as a part of his medical treatment, and the trial court's ruling on that matter was not erroneous.

We affirm the judgment on all issues except the award of attorney fees, and that matter is remanded to the trial court for proceedings thereon. Plaintiff is awarded $2,750.00 for services of his attorney in this appeal.

IT IS SO ORDERED.

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

628 P.2d 329

Raymond CASILLAS, Plaintiff-Appellant,

v.

S.W.I.G. and Argonaut Insurance Company, Defendants-Appellees.

No. 4825.

Court of Appeals of New Mexico.

April 9, 1981.

Writ of Certiorari Denied May 21, 1981.

Charles W. Cresswell, Martin, Martin, Lutz & Cresswell, P.A., Las Cruces, for plaintiff-appellant.

J. Douglas Compton, Bivins, Weinbrenner, Richards & Paulowsky, P.A., Las Cruces, for defendants-appellees.

OPINION

WOOD, Judge.

Plaintiff suffered a compensable injury and is being paid compensation benefits. His suit made two claims: (1) that our compensation statute violated due process to the extent the disability benefits were inadequate in amount; and (2) that he was entitled to a ten percent increase in disability benefits under our safety device statute, § 52–1–10, N.M.S.A. 1978. The trial court ruled against each claim; plaintiff appeals.

Due Process—Amount of Disability Benefits

Plaintiff recognizes that he comes within § 52–1–9, N.M.S.A. 1978, which provides that his right to compensation is his exclusive remedy against his employer. He recognizes that he is being paid the maximum benefits authorized for a total disability under § 52–1–41, N.M.S.A. 1978, and that the dollar amount of those benefits is limited to the amount payable at the time disability began, see § 52–1–48, N.M.S.A. 1978.

Plaintiff does not claim that a compulsory worker's compensation system is unconstitutional. *Tipton v. Atchison, T. & S. F. R. Co.*, 298 U.S. 141, 56 S.Ct. 715, 80 L.Ed. 1091 (1936); *New York Central R. R. Co. v. White*, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667 (1917); compare *Howell v. Burk*, 90 N.M. 688, 568 P.2d 214 (Ct.App.1977).

Plaintiff's claim is that New Mexico's compensation statute deprives him of due process because it does not provide sufficient compensation and "relegates disabled workers to a subsistence standard of living." Plaintiff argues that a compensation system which, he claims, is a substitute for the worker's right to recover common-law damages, deprives the worker of due process unless the disability benefits adequately compensate the injured worker. In support of this argument plaintiff points out that the disability benefits being paid to him ($81.32 per week) are two-thirds of his average weekly wage, and that under minimum wage laws in effect at the time of his injury, his minimum wage, at $2.90 per hour for a 40-hour week, would have been $116.00 per week. The inference is that disability benefits which are less than a statutory minimum wage scale establish inadequate compensation and are a violation of due process. The argument is specious because it is based on the view that benefits paid to a disabled worker may not be less than the minimum wage paid to someone working 40 hours a week.

Plaintiff states that he has found no decision which supports his claim; he does, however, refer us to *New York Central R. R. Co. v. White*, supra, which in upholding compulsory compensation, stated:

> This, of course, is not to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises.

Plaintiff challenges the amount of disability benefits being paid to him, claiming that with the number of children he supports, the amount is unreasonable.

Plaintiff's claim involves substantive due process. We do not attempt to outline the present boundaries of the concept. See *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905); *West Coast Hotel Company v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937); *Lincoln Fed. L. U. v. Northwestern I. & M. Co.*, 335 U.S. 525, 69 S.Ct. 251, 93 L.Ed.2d 212 (1949); L. Tribe, *American Constitutional Law* Ch. 8 (1978); Perry, *Substantive Due Process Revisited: Reflections on (And Beyond) Recent Cases*, 71 Nw.U.L.Rev. 417 (1976–77); Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A.L.Rev. 689 (1976); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221 (1973–74). Rather, we assume, but do not decide, that plaintiff's claim is one on which relief could be afforded, and decide the merits of the claim.

Pedrazza v. Sid Fleming Con., Inc., 94 N.M. 59, 607 P.2d 597 (1980), comments: "A state violates the due process clause when it interferes with a fundamental right or a vested property interest." *Pedrazza* holds that workmen's compensation is not a fundamental right. Assuming that plaintiff has a vested property interest in disability benefits provided by our statute, plaintiff is being paid those benefits. Plaintiff is asserting a due process right to benefits which have not been authorized by the Legislature, specifically, the right to a larger amount for disability. *Pedrazza* states: "This Court will not * * * say that the plaintiffs have a due process property right which the Legislature has not seen fit to confer * * * *." Under *Pedrazza*, plaintiff's due process claim to larger disability benefits is without merit.

Rocky Mountain Whole. Co. v. Ponca Whole. Mercan. Co., 68 N.M. 228, 360 P.2d 643 (1961), remarks:

> [A] state is free to adopt an economic policy that may reasonably be deemed to promote the public welfare and may enforce that policy by appropriate legislation without violation of the due process clause so long as such legislation has a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory.

The purpose of our workmen's compensation statute is to provide an humanitarian and economical system of compensation to the injured workman. *Graham v. Wheeler*, 77 N.M. 455, 423 P.2d 980 (1967). That our statute has a proper legislative purpose is not questioned. See *Gonzales v. Chino Copper Co.*, 29 N.M. 228, 222 P. 903 (1924). The statute is neither arbitrary nor discriminatory; its provisions apply to all workers subject to the statute. See *State v. Spears*, 57 N.M. 400, 259 P.2d 356, 39 A.L.R.2d 595 (1953). The issue is whether the amount of the disability benefits provided by the act has a reasonable relation to the economic purpose involved.

The economic purpose is to keep an injured workman and his family at least minimally secure financially, *Aranda v. Mississippi Chemical Corp.*, 93 N.M. 412, 600 P.2d 1202 (Ct.App.1979); "to secure the injured employee against want, and to avoid his becoming a public charge", *Hughey v. Ware*, et al., 34 N.M. 29, 276 P. 27 (1929). "A large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection

of such interests." *State v. Spears*, 57 N.M. at 410, 259 P.2d 356.

We cannot hold that disability benefits based on two-thirds of plaintiff's average weekly wage have no reasonable relation to the economic purpose of the compensation statute. Plaintiff argues this issue solely on the basis of the dollar amount of the disability benefits; this argument fails to consider other benefits of economic nature conferred by the statute. Some of these benefits are: A uniform scale of compensation which substitutes for the "varying and widely divergent estimates of juries," *Gonzales v. Chino Copper Co.*, supra; a right to compensation which eliminates legal defenses favorable to the employer, § 52–1–8, N.M.S.A. 1978; *Gonzales v. Chino Copper Co.*; medical and related benefits, § 52–1–49, N.M.S.A. 1978, which at the time of the district court hearing amounted to $7,828.64; and rehabilitation services, § 52–1–50, N.M.S.A. 1978. Viewing all of these economic benefits, the amount paid for disability does have a reasonable relation to the economic purpose of our statute; the amount of the disability benefit did not violate due process, either on the face of the statute or as applied to plaintiff.

Safety Device

Plaintiff sought a ten percent increase in his disability benefits on the basis that the employer had failed "to provide safety devices required by law * * * *" Section 52–1–10(B), supra. His theory was that certain safety devices were required by regulations adopted under New Mexico's Occupational Health and Safety Act, §§ 50–9–2 and 50–9–7, N.M.S.A. 1978, and that safety devices required by these regulations had not been provided by the employer. The trial court ruled that these regulations were not admissible. There being nothing else showing a failure to provide safety devices required "by law", the safety device issue was dismissed with prejudice.

The trial court ruled correctly that the safety devices required by the regulations were not required "by law" because of § 50–9–21(A), N.M.S.A. 1978. This statute reads:

> A. Nothing in the Occupational Health and Safety Act [50–9–1 to 50–9–25 NMSA 1978] shall be construed or held to supersede or in any manner affect the Workmen's Compensation Act [52–1–1 to 52–1–69 NMSA 1978], the New Mexico Occupational Disease Disablement Law [52–3–1 to 52–3–54 NMSA 1978], or to enlarge or diminish or affect in any other manner the common-law or statutory rights, duties or liabilities of employers and employees under the laws of this state with respect to injuries, occupational or other diseases or death of employees arising out of or in the course of employment.

Section 50–9–21(A) provides that *nothing* in New Mexico's Occupational Health and Safety Act affects our Compensation Act, or the liabilities of employers under the laws of this state with respect to injuries arising out of or in the course of employment. Inasmuch as New Mexico's Occupational Health and Safety Act does not affect the employer's liability under our Compensation Act, regulations adopted under the authority of New Mexico's Occupational Health and Safety Act also do not affect that liability, and safety devices required by the Occupational Health and Safety Act regulations are not required "by law" for the purposes of § 52–1–10(B), supra. Compare *Arvas v. Feather's Jewelers*, 92 N.M. 89, 582 P.2d 1302 (Ct.App.1978). We disagree with *Childers v. International Harvester Co.*, 569 S.W.2d 675 (Ky.App.1977), which reached a contrary conclusion without considering the express language contained in the Kentucky statute which is similar to § 50–9–21(A), supra.

The trial court's order rejecting the due process claim, and its order dismissing the safety device claim, are affirmed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

SUTIN, J., dissenting.

SUTIN, Judge (dissenting).

I dissent.

Plaintiff, 28 years of age, suffered an accidental injury on May 15, 1979, in which accident his arms were crushed. As a result, he suffered total disability. Defendants pay plaintiff $81.30 per week, about $4,212.00 annually for maximum compensation payments. The rate of compensation payable is 100% of the average weekly wage in the State as determined by the Employment Security Commission. Section 52–1–41, N.M.S.A. 1978.

Plaintiff claims that § 52–1–41 is unconstitutional in that it deprives plaintiff of his right to property, and his right to due process of law, inasmuch as the amount of money paid is below any reasonable subsistence level. I agree.

The trial court granted defendants a partial summary judgment. Due to the fact that defendants pay plaintiff maximum compensation benefits the court reasoned "That the benefits payable under the Workmen's Compensation Act do not deprive plaintiff of or violate any of his constitutional rights." Plaintiff appeals from this portion of the Order and Partial Summary Judgment.

Plaintiff is married. His family consists of a wife, a stepson and five children, whose ages were 10, 7, 6, 5, 2 and 1 years. The family receives $250.00 per month for food stamps and an additional $114.00 per month for his stepson. He owns a 1968 station wagon.

Plaintiff rents a house which consists of two bedrooms, a kitchen, a living area and a bathroom. His rent and utilities are $160.00 per month. He has no health or life insurance, no savings or checking accounts, nor any property other than his car and household effects. He is heavily indebted. He cannot read or write. His education was had in special education classes that terminated at junior high school level.

Since the accident, there is absolutely no money whatever for anything but the bare necessities of life made possible by government food stamps. Plaintiff cannot provide his family with better health care, clothing, or educational opportunities. He would like to provide life insurance on himself for the benefit of the family. Tension has increased in the family due to lack of resources. To keep his family together, he feels that he should be paid in compensation at least as much as he was paid for his work. These facts have not been controverted.

The purpose of the Workmen's Compensation Act has been stated in many ways: (1) to substitute a more humanitarian and economical system of compensation, *Gonzales v. Chino Copper Co.*, 29 N.M. 228, 222 P. 903 (1924); (2) to provide enough compensation to avoid reducing a claimant to destitution, *Baca v. Gutierrez*, 77 N.M. 428, 423 P.2d 617 (1967); (3) to prevent claimant from becoming a public charge, *Lane v. Levi Strauss & Co.*, 92 N.M. 504, 590 P.2d 652 (Ct.App.1979); (4) to prevent claimant from being on welfare rolls, *Codling v. Aztec Well Servicing Co.*, 89 N.M. 213, 549 P.2d 628 (Ct.App.1976); (5) to keep an injured workman and his family at least minimally secure financially, *Aranda v. Mississippi Chemical Corp.*, 93 N.M. 412, 600 P.2d 1202 (Ct.App.1979); (6) to insure that the claimant may subsist during his period of disability, *Mullins v. National Food Stores of Louisiana, Inc.*, 175 So.2d 19 (La.App. 1965); (7) to relieve against hardships, *Kellams v. Carolina Metal Products*, 248 N.C. 199, 102 S.E.2d 841 (1958); *Baker v. Industrial Commission*, 17 Utah 2d 141, 405 P.2d 613 (1965); (8) to furnish financial protection, *Colclasure v. Industrial Commission*, 14 Ill.2d 455, 153 N.E.2d 33 (1958); (9) to give adequate economic assistance, *Davis v. Cranston Print Works Company*, 86 R.I. 196, 133 A.2d 784 (1957); (10) to provide adequate compensatory payments, *Crilly v. Ballou*, 353 Mich. 303, 91 N.W.2d 493 (1958); (11) to relieve society of burden of supporting helpless children in orphanages and public alms houses, *Franklin v. Jackson*, 231 Miss. 497, 95 So.2d 794 (1958); (12) to protect employees and their dependents unable to support themselves, *Kelly v. Sugerman*, 12 N.Y.2d 298, 239 N.Y.S.2d 114, 189 N.E.2d 613 (1963); (13) to shoulder on industry the

expense incident to the hazards of industry; to lift from the public the burden to support those incapacitated by industry and to ultimately pass on such expense to the consumers of the products of industry, *Renshaw v. U.S. Pipe & Foundry Co.*, 30 N.J. 458, 153 A.2d 673 (1959).

The totality of these purposes evince the philosophy of the Workmen's Compensation Act. It ventures to do economic justice to a totally disabled workman.

Article II, Section 18 of our Constitution says:

> *No person* shall be deprived of life, liberty or property without due process of law * * * * [Emphasis added.]

The term "due process of law" cannot be defined. It is so broad in meaning that limitations cannot be placed upon it. This concept requires only that the legislature shall not offend the traditional notions of "fair play," "substantial justice" or the "general welfare." *In re D. M. D.*, 54 Wis.2d 313, 195 N.W.2d 594 (1972) says that "due process" is the exact synonym for "fundamental fairness." A guaranty of "due process of law" constitutes a legal right assertable in courts. When we adopted our Constitution in 1910, "We could have no purpose except to check the Legislature, as representing the majority *for the time being*, from encroachment upon this reserved right of the minority or of the individual." [Emphasis added.] *State v. Henry*, 37 N.M. 536, 543, 25 P.2d 204 (1933).

Pedrazza v. Sid Fleming Con., Inc., 94 N.M. 59, 607 P.2d 597 (1980) held that property rights in workmen's compensation claims, protected by due process, never vests in nonresident alien dependents; that nonresident alien dependents do not have a "fundamental right" to pursue compensation benefits in New Mexico courts, nor do they have a "vested property interest" in compensation claims if a family workman is fatally injured in New Mexico.

The words "no person" in the Constitution, *supra*, includes a nonresident alien dependent, one who is protected by the "due process clause." Section 52–1–52, N.M.S.A. 1978 specifically denies dependents, who are nonresidents of the United States at the time of a workman's injury, the right to pursue a claim for compensation. This section interferes with the "fundamental right" of nonresident alien dependents to use our courts to recover workmen's compensation benefits. It does constitute a denial of due process.

Pedrazza says:

> * * * A state violates the due process clause when it interferes with a fundamental right or a vested property interest. [Citation omitted] No law has been cited, nor can we find any, stating that workmen's compensation is or ought to be ranked as a fundamental right within the framework of the Constitution.
>
> * * * * * *
>
> The worker's * * * right to compensation benefits arise and may be received only as specified by statute * * * * [Id. 599.]

Under *Pedrazza, resident* alien dependents would be protected by the "due process clause." In fact, any dependent resident of a workman has a "fundamental right" to pursue a workman's compensation claim as well as a "vested property interest" in compensation claims. A resident dependent may look to the Workmen's Compensation Act to determine whether any portion of it interferes with such right and vested interest. If § 52–1–41 does interfere with a workman's "vested property interest" in his compensation claim, he has the protection of the "due process clause." He has a "fundamental right" to challenge the constitutionality of that portion of the Act.

In this sense, workmen's compensation does rank as a "fundamental right" if the Act denies a totally disabled workman adequate compensation to meet the reasonably normal needs of a family in the environment in which the family exists. Such compensation must reasonably approach the earnings of a workman prior to the tragic experience that resulted in total disability. Otherwise, the purpose and spirit of the Act fades. The primary purpose of the Act is to lift a totally disabled workman and his fam-

ily out of the depths of economic despair into a realm above the subsistence level. We must avoid eclectic language of judicial opinions to skirt around the seamy side of a poor, uneducated workman and his family. If the Act offends traditional notions of "fundamental fairness," "fair play," "substantial justice" or the "general welfare," it violates the "due process clause."

The "right to make a living" is not a "fundamental right" for purposes of due process. *Frazier v. Liberty Mut. Ins. Co.*, 150 N.J.Super. 123, 374 A.2d 1259 (1977). But inability to earn a living by reason of total disability grants a workman a "fundamental right." A workman who receives so little an amount in compensation payments that it cripples the "life, liberty or property" of the workman and his family, has the right to test "due process of law." To determine whether the effect of the compensation payment offends traditional notions, we look through a wide-angled lens and not one with a restricted focus.

From the time the Workmen's Compensation Act was adopted in 1917, totally disabled workmen received a pittance in compensation payments. In 1917, a workman totally disabled received an amount not to exceed maximum compensation of $10.00 per week, L.1917, ch. 83, § 17(a). This was raised to $15.00 per week, 1929 Compilation, ch. 156, § 156–117(a), then from $15.00 to $18.00 per week in 1937, L.1937, ch. 92, § 9. Over the next four decades, compensation for total disability was gradually but slowly increased.

Effective July 1, 1978, a workman was to receive an amount not to exceed a maximum compensation of one hundred percent of the average weekly wage. Section 52–1–41. If this portion of the statute interferes with a "vested property interest" of plaintiff, the State violates the due process clause.

The gradual increase in compensation payments were legislative attempts to meet the economic purposes of the Workmen's Compensation Act as stated above. To do so, the Legislature must note economic conditions that today exist for some 600 weeks, the period that encompasses total permanent disability. It must also note the effect that compensation payments have upon the subsistence level of family life. A totally disabled workman has a fundamental right to question the Legislature about his "vested property interest," i. e., his compensation payments. These payments must be sufficient to provide the workman and his family with food, clothing, physical and medical care and the incidents that make life pleasant. Scientific, industrial and agricultural developments in this century, unavailable in 1917, should not be denied a family that now suffers the severe burdens imposed upon it by a totally disabled master of the household. We must make it clear that, in New Mexico, a workman who is totally disabled and cannot earn a living for himself and his family, is entitled to have his family live above the subsistence level, not as it existed yesterday, but as it exists today and tomorrow. Compensation payments must reach that level.

The Legislature recognized this problem with reference to the cost of medical care. Prior to 1977, the cost of medical services was limited to $40,000.00. The 1977 amendment deleted "not to exceed the sum of forty thousand ($40,000)" as shown in § 52–1–49. No violation of due process can arise.

The "due process clause" has been a vague, uncertain, indefinite and indistinct concept since the founding of this country. It has been applied as courts view each case from the standpoint of "fundamental fairness." We approach its application to the Workmen's Compensation Act for the first known time. For over half a century, we have looked through a wide-angled lens to favor the workman. We should do so now.

The benefits payable to one totally disabled under the Workmen's Compensation Act does not reach the subsistence level. It deprives plaintiff of, or violates, his constitutional rights under the "due process clause." A genuine issue of material fact exists on whether plaintiff receives adequate compensation.

This portion of the partial summary judgment should be reversed.

Plaintiff also sought to have his compensation payments increased by 10% under § 52–1–10(B) which reads:

> In case an injury to * * * a workman results from the failure of an employer to provide safety devices *required by law, or* in any industry in which safety devices are *not prescribed* by statute, if an injury to * * * a workman results from the negligence of the employer in failing to supply reasonable safety devices *in general use for the use or protection of the workman,* then the compensation otherwise payable under the Workmen's Compensation Act shall be increased ten percent. [Emphasis added.]

There are two bases upon which a 10% increase in compensation can be obtained: (1) the failure of an employer to provide safety devices as "required by law" and (2) the negligence of the employer in failing to supply reasonable safety devices in general use for the use or protection of the workman.

Plaintiff produced a qualified engineer to prove the lack of safety devices. When his expert testimony reached the point at which such lack of safety devices was to be shown, plaintiff, for some unaccountable reason, requested the court to refer to the Occupational Health and Safety Act (OSHA), § 50–9–1 et seq., N.M.S.A. 1978. After much objection and argument, the court ruled that OSHA did not apply. For some unaccountable reason, no further questioning of the expert witness took place. Plaintiff then closed his case.

No evidence was offered or presented on the subject of safety devices as required by § 50–9–21(A).

Section 50–9–21(A) reads:

> Nothing in * * * [OSHA] shall be construed or held to supersede or in any manner affect the Workmen's Compensation Act * * * *

This section means (1) that we can take nothing out of OSHA that will take the place of the Workmen's Compensation Act. We do not exercise this replacement in the instant case; (2) "To affect is to produce a result on or to influence." *Gallegos v. Duke City Lumber Co., Inc.*, 87 N.M. 404, 406, 534 P.2d 1116 (Ct.App.1975). We can take nothing out of OSHA that will in any manner produce a result on or influence the Workmen's Compensation Act. What this means is so vague and uncertain as to bear upon speculation. Kentucky holds that OSHA does not prohibit the assessment of the safety device penalty under the Workmen's Compensation Act for violation of a regulation promulgated under the Kentucky KOSHA ACT. *Barmet of Kentucky, Inc. v. Sallee*, 605 S.W.2d 29 (Ky.App. 1980); *Childers International Harvester Co.*, 569 S.W.2d 675 (Ky.1977). See, *American Smelting v. Workers' Compensation, Etc.*, 79 Cal.App.3d 615, 144 Cal.Rptr. 898 (1978). No other authority has been found on this subject matter. Plaintiff is entitled to a 10% penalty if evidence is produced which shows that the employer violated the safety device section of the Act.

No workman should suffer because of the inadvertence of a lawyer who failed to preserve an important issue in an appeal. This case should be reversed and the plaintiff allowed to present evidence, if available, to show a violation of the safety device statute. The time has come in workmen's compensation cases to lay aside technical procedural rules in important cases of public interest. "Fairness" and "justice" should be the emblems of authority.

This case should be reversed. The trial court, in its discretion, should determine from evidence presented, the amount of compensation which would fairly and adequately compensate the plaintiff for total disability during his period of disability and shall allow plaintiff to present evidence, if available, of any violation of the safety device section of the Act.

628 P.2d 337

Ivy W. DESSAUER, Personal Representative, Plaintiff,

v.

MEMORIAL GENERAL HOSPITAL and Glorious Bourque, Defendants and Third-Party Plaintiffs-Appellants,

v.

Ronald J. Malleis, Third-Party Defendant-Appellee.

No. 4637.

Court of Appeals of New Mexico.

April 16, 1981.

Jerald A. Valentine, Crouch, Valentine & Ramirez, P.C., Las Cruces, Bruce Hall, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, for defendant and third-party plaintiff-appellant Memorial General Hospital.

William K. Stratvert, Alan Konrad, Miller, Stratvert, Torgerson & Brandt, P.A., Albuquerque, for third-party defendant-appellee.

Montgomery & Andrews, P.A., Albuquerque, John E. Conway, Durrett, Conway & Jordon, P.C., Alamogordo, for defendant and third-party plaintiff-appellant Bourque.

Howard F. Houk, Albuquerque, Jack M. Campbell, Bruce D. Black, Campbell & Black, P.A., Santa Fe, for amicus curiae The New Mexico Medical Society.

OPINION

WOOD, Judge.

The personal representative of the Estate of Dessauer sought damages for wrongful death on the basis of negligence in administering a dosage of medication. The defendants were the Hospital (Memorial General Hospital) and the Nurse (Bourque), who was an employee of the Hospital. The Hospital and the Nurse filed third-party complaints against the Doctor (Malleis). The third-party claims alleged the Doctor was negligent in his care and treatment of Dessauer, and was negligent in his supervision of the Nurse. The third-party claims sought either contribution or indemnity from the Doctor. Among the defenses to the third-party complaints was the contention that negligence of each of the third-party plaintiffs was the sole cause of Dessauer's death. The Estate's suit against the Hospital and the Nurse was settled for $225,000.00, and a joint tortfeasor release was executed. The third-party contribution and indemnity claims were tried, and the jury's answers to interrogatories were to the effect that neither of the third-party plaintiffs should recover against the Doctor. The Hospital and the Nurse appeal. We (1) answer two issues summarily and discuss (2) the question of a general verdict, and (3) a refused instruction based on vicarious liability of the Doctor.

Issues Answered Summarily

(a) The trial court instructed the jury on the theories of negligence asserted against the Doctor. However, it refused requested instructions which would have told the jury that the Hospital and the Nurse sought either indemnification of the entire $225,000.00, or contribution of one-half of that amount. The refusal of these requested instructions was not error for two reasons. First, as we point out in discussing the issue involving vicarious lia-

bility, the claims of the Hospital and of the Nurse must be distinguished. The refused instructions failed to make any distinction between the difference in the relationship of the Hospital and of the Nurse to the Doctor and, in the form requested, they were incomplete statements of the law which were properly refused. *Panhandle Irrigation, Inc. v. Bates*, 78 N.M. 706, 437 P.2d 705 (1968). Second, the jury's answers to interrogatories determined the rights of both the Hospital and the Nurse to contribution and indemnity; if the answers had determined a right to recovery by either the Hospital or the Nurse, the amounts would have been a simple matter of accounting. If the jury should have been instructed on the facts of the joint tortfeasor settlement, a point we do not decide, the Hospital and the Nurse were not prejudiced because an accounting could have been achieved by utilization of the jury's answers. *Bailey v. Jeffries-Eaves, Inc.*, 76 N.M. 278, 414 P.2d 503 (1966).

(b) The trial court instructed the jury, in accordance with the second paragraph of U.J.I. Civ. 8.1, that the only way it could decide whether the Doctor was negligent was "from evidence presented in this trial by physicians and surgeons testifying as expert witnesses." The Hospital and the Nurse assert that this was not a case for limiting the testimony to expert witnesses; rather, that the circumstances of this case permit application of the "common knowledge" exemption. See *Gerety v. Demers*, 92 N.M. 396, 589 P.2d 180 (1978). We disagree. This case involved emergency treatment. The Hospital and the Nurse rely on one aspect of the matter in asserting applicability of the common knowledge exemption. Singling out one aspect would have been improper because it would have ignored the fact of emergency treatment and distorted the circumstances under which an overdose of the medicine was administered. There was no error in requiring the Doctor's asserted negligence to be determined by expert testimony.

General Verdict

Because the issues being tried involved contribution and indemnity claims of two parties, the trial court was of the view that the best procedure would be by interrogatories which, when answered, would amount to a special verdict. Accordingly, no "general verdict" in the traditional sense was submitted to the jury.

Following are the pertinent interrogatories, and the answers thereto:

> INTERROGATORY NO. 1: Was Dr. Ronald J. Malleis negligent? *Answer*—No.
>
> . . . .
>
> INTERROGATORY NO. 3: Was Glorious Bourque negligent? *Answer*—Yes.
>
> INTERROGATORY NO. 4: If the answer to Interrogatory No. 3 is "yes", was the negligence a proximate cause of the death of Wiley J. Dessauer? *Answer*—Yes.
>
> INTERROGATORY NO. 5. If the answers to Interrogatories Nos. 3 and 4 are "yes", was Memorial General Hospital negligent apart from the negligence of Glorious Bourque? *Answer*—Yes.
>
> INTERROGATORY NO. 6: If the answer to Interrogatory No. 5 is "yes", was the hospital's negligence a proximate cause of the death of Wiley J. Dessauer? *Answer*—Yes.

The Hospital and the Nurse do not claim that the above answers were improper under the evidence. Nor do they claim that the answers would not have disposed of the case if there had been a general verdict. The contention is that the answers have no legal effect because there was no general verdict.

The Hospital and the Nurse rely on R.Civ. Proc. 49, which reads:

> In civil cases, the court shall at the request of either party, in addition to the general verdict, direct the jury to find upon particular questions of fact, to be stated in writing by the party requesting the same. When the special finding of facts is inconsistent with the general verdict, the former shall control the latter,

and the court shall give judgment accordingly.

This rule is very similar to the statute enacted by Laws 1889, ch. 45. This statute is quoted in *Walker v. N. M. & So. Pac. R'y Co.*, 7 N.M. 282, 34 P. 43 (1893), and the United States Supreme Court upheld the statute, against constitutional attack, at 165 U.S. 593, 17 S.Ct. 421, 41 L.Ed. 837 (1897).

Rule of Civ.Proc. 49 refers to a general verdict and "special findings", also known as special interrogatories. A third category is the special verdict, which the trial court utilized in this case.

The United States Supreme Court opinion in *Walker v. Southern Pacific Railroad*, supra, distinguished between general verdicts and special verdicts as follows:

> Now a general verdict embodies both the law and the facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be and express their conclusions in the verdict.... Beyond this, it was not infrequent to ask from the jury a special rather than a general verdict, that is, instead of a verdict for or against the plaintiff or defendant embodying in a single declaration the whole conclusion of the trial, one which found specially upon the various facts in issue, leaving to the court the subsequent duty of determining upon such facts the relief which the law awarded to the respective parties.

The distinction between a special verdict, and special interrogatories with a general verdict, is stated in *Childress v. Lake Erie & W. R. Co.*, 182 Ind. 251, 105 N.E. 467 (1914):

> There is, however—
>
> "a manifest difference between a special verdict and a finding of the facts in answer to interrogatories propounded to the jury. A special verdict is in lieu of a general verdict, and its design is to exhibit all the legitimate facts and leave the legal conclusions entirely to the court. Findings of fact in answer to interrogatories do not dispense with the general verdict. A special verdict covers all the issues in the case, while an answer to a special interrogatory may respond to but a single inquiry pertaining merely to one issue essential to the general verdict." Words and Phrases, vol. 7, p. 6596; *Morbey v. Chicago, etc., R. Co.*, 116 Iowa 84–89, 89 N.W. 105, 107.
>
> If a jury finds on special questions of fact in answer to interrogatories, without a general verdict, the finding is of no force, and the court cannot give to the special finding any weight unless they are sufficiently numerous and explicit to leave nothing for the court to do but to determine questions of law. If they affirmatively show the existence of every fact necessary to entitle plaintiff to a recovery and the nonexistence of every defense presented under the issues, or if they show as a matter of law that a valid defense has been established by the evidence, they may then constitute a special verdict.

The distinction made in *Childress*, supra, was recognized in *Claymore v. City of Albuquerque*, (Ct.App.) Nos. 4804/4805, filed December 9, 1980 (N.M.St.B.Bull. Vol. 20 at 75). However, the distinction seems not to have been recognized in other decisions. *Bryan v. Phillips*, 70 N.M. 1, 369 P.2d 37 (1962), is a special interrogatory situation consistent with the *Childress* distinction. *Bryant v. H. B. Lynn Drilling Corporation*, 65 N.M. 177, 334 P.2d 707 (1959), seems to use special interrogatories and special verdict as interchangeable terms, contrary to *Childress*. The questions answered in *Saavedra v. City of Albuquerque*, 65 N.M. 379, 338 P.2d 110 (1959), amounted to a special verdict although referred to as special interrogatories.

Saavedra answers the question whether the jury's answers in this case are sustainable as a special verdict. It states:

> [T]he only provision for submitting special interrogatories to a jury is when they are accompanied by a general verdict, unless the latter is waived or it is so submitted by consent.
>
> Careful consideration has been given the contention of the defendant that what was done here amounted to a sub-

mission on a special verdict, and that such is not prohibited under our rules, but our rule 49 is too limited to allow such construction. Reversible error was committed by the action taken in this case over the objection of the claimant as he was entitled to a general verdict as a matter of right when he asked for it. Such action must be held to have been prejudicial, and this in the face of the negative answer to interrogatory No. 2, supra.

Because of *Saavedra*, supra, we cannot uphold the jury's answers in this case as a special verdict, despite Judge Sutin's apparent willingness to disregard the prohibition against special verdicts. Because there was no traditional general verdict, as explained in *Walker v. N. M. & So. Pac. R'y Co.*, supra, the question is whether the jury's answers were the equivalent of a general verdict. We particularly consider the answer to Interrogatory No. 1. If that answer was, in fact, the equivalent of a general verdict, the absence of a verdict form labeled "General Verdict" does not matter. *Brannin v. Bremen*, 2 N.M. (Gild.) 40 (1880).

The Hospital and the Nurse requested that three "General Verdict" forms be submitted to the jury. The first would have awarded $225,000.00 to the Hospital and the Nurse on a theory of indemnity. The second would have awarded $112,500.00 to the Hospital and the Nurse on a theory of contribution. As we point out in discussing the issue involving vicarious liability, the claims of the Hospital and the Nurse must be distinguished. Because the verdict forms failed to make that distinction, they were properly refused.

The third general verdict form submitted by the Hospital and the Nurse provided: "We find that the Defendant [Doctor] was free from any negligence . . . ." The answer to Interrogatory No. 1 said the same thing. This verdict form went on to state: "Plaintiffs are not entitled to recover any sum." Such is the legal effect of the jury's answer; not being negligent, the Doctor was not liable for either contribution or indemnity as an alleged tortfeasor. See *Standhardt v. Flintkote Company*, 84 N.M. 796, 508 P.2d 1283 (1973).

Because the jury's answer was determinative of the right of the Hospital and the Nurse to recover damages from the Doctor as an alleged tortfeasor, that answer is the equivalent of, and is to be given effect as, a general verdict. *Smith v. Gizzi*, 564 P.2d 1009 (Okl.1977). This result is not contrary to *Saavedra*, supra, which held that prejudice resulted from the absence of a general verdict; here we have a general verdict.

Although the foregoing disposes of this point, we recommend to the Supreme Court a change in R.Civ.Proc. 49 to permit special verdicts. We do so because (1) an Order of the Supreme Court, dated March 30, 1981, approves special verdicts in comparative negligence cases, and (2) where the jury's answers dispose of a party's right to recover, good judicial administration is not furthered by disputes over the label to be applied to those answers.

Vicarious Liability

Consistent with the third-party claims of the Hospital and the Nurse against the Doctor, the requested instructions and verdicts which were refused, and the instructions and interrogatories submitted to the jury were based on negligence on the part of the Doctor. The jury's answers established that the Doctor was not negligent. Negligence on the part of the Doctor is not involved in this point.

The Hospital and the Nurse requested an instruction which was adopted by the Supreme Court for use beginning April 1, 1981. The heading of U.J.I. Civ. 11.14 is: "Liability of Operating Surgeon—Agency (Captain of Ship Doctrine)". This heading resulted in extensive discussion in the briefs of the special agency rule called "Captain of the Ship". This label was recognized, at the oral argument, to be inappropriate and misleading because the contents of the instruction did not contain this special agency rule. See *Sparger v. Worley Hospital, Inc.*, 547 S.W.2d 582 (Tex.1977). We point this out to emphasize that the requested instruction does *not* involve the Captain of the Ship Doctrine.

The instruction requested read:

A doctor who has the right to control and supervise the activity of assistants, nurses and others, is responsible for negligent acts or omissions of any such person during specific treatment under the immediate and direct control and supervision of the doctor.

The Hospital and the Nurse contend this instruction is no more than the borrowed servant or special employee doctrine approved in *Dunham v. Walker*, 60 N.M. 143, 288 P.2d 684 (1955). The claim is that this doctrine also applies in situations involving doctors, *Sparger v. Worley Hospital, Inc.*, and the trial court erred in refusing this requested instruction.

It is unnecessary to decide whether the borrowed servant doctrine applies in medical malpractice cases where an injured plaintiff is seeking its application. We assume that it does apply. This, however, is not a case where an injured party is seeking its application; the Estate has settled its claims against the Hospital and the Nurse. This case involves contribution and indemnity. Whether a borrowed servant instruction would have been appropriate depends upon the nature of the liability stated in the requested instruction, and the application of contribution and indemnity law to that liability.

The requested instruction, quoted above, would make the Doctor liable for the negligence of the Nurse in this case. Liability to an injured party may be imposed by the doctrine of *respondeat superior*. *Romero v. Shelton*, 70 N.M. 425, 374 P.2d 301 (1962). Liability under this doctrine is a form of vicarious liability. When vicarious liability is imposed upon the master (in this case, the Doctor), the liability "has nothing to do with fault" and, whatever the rationalization, seems to be imposed in order to assist an injured person to collect any damage award from a deep pocket. James, *Vicarious Liability*, 28 Tul.L.Rev. 161 (1954).

The fact that the Doctor could be held vicariously liable to the injured party for the Nurse's negligence requires that the claim of the Hospital and the Nurse be distinguished.

The claims were for contribution and indemnity. The distinction between these claims must also be made. "[T]he difference between indemnity and contribution in cases between persons liable for an injury to another is that, with indemnity the right . . . enforces a duty on the primary wrongdoer to respond for all damages; with contribution, an obligation is imposed by law upon one joint tortfeasor to contribute his share to the discharge of the common liability." *Rio Grande Gas Company v. Stahmann Farms, Inc.*, 80 N.M. 432, 457 P.2d 364 (1969). Indemnity is not allowed, however, when the parties are in *pari delicto*. *Standhardt v. Flintkote Company*, supra; *Harmon v. Farmers Market Food Store*, 84 N.M. 80, 499 P.2d 1002 (Ct.App.1972). Contribution is not allowed unless the party seeking contribution has paid more than its pro rata share. Section 41–3–2(B), N.M.S.A.1978; *Commercial U. Assur. v. Western Farm Bur. Ins.*, 93 N.M. 507, 601 P.2d 1203 (1979). The concepts of contribution and indemnity are "deeply rooted in the principles of equity, fair play and justice." *Aalco Mfg. Co. v. City of Espanola*, 95 N.M. 66, 618 P.2d 1230 (1980).

The Nurse

A common example of indemnity is "where a blameless employer recovers from a negligent employee, after the employer has been held liable to the injured third person upon the theory of respondeat superior." *Rio Grande Gas Company v. Stahmann Farms, Inc.*; see *Employers' Fire Insurance Company v. Welch*, 78 N.M. 494, 433 P.2d 79 (1967). Here we have the converse. The Nurse, who settled the Estate's liability claim against her, seeks indemnification from the Doctor on the basis of *respondeat superior*. Being the primary wrongdoer, she had no claim for indemnification. *Rio Grande Gas Company v. Stahmann Farms, Inc.*, supra; 1 Mechem on Agency § 1608 (2d ed. 1914); see Prosser, Law of Torts § 51 (4th ed. 1971).

Nor can the Nurse obtain contribution from the Doctor because the Doctor's liability, as a tortfeasor, see § 41–3–1, N.M.

S.A.1978, under *respondeat superior*, is based on the Nurse's negligence. *Melichar v. Frank*, 78 S.D. 58, 98 N.W.2d 345 (1959), approved the following from a Uniform Laws publication: " 'Where a master is vicariously liable for the tort of his servant, the servant has no possible claim to contribution from the master . . . .' " If the negligence of the Nurse were eliminated, the Doctor would not be liable at all. It is not equitable to require the Doctor to contribute to the Nurse when the contribution would be based on the Nurse's negligence. *Larsen v. Minneapolis Gas Company*, 282 Minn. 135, 163 N.W.2d 755 (1968); see *Aalco Mfg. Co. v. City of Espanola*, supra. The Nurse had no claim for contribution from the Doctor.

The law does not grant to the servant the same right given to the party injured by the servant's negligence. As we have already noted, the doctrine of vicarious liability developed to provide recovery to plaintiffs injured by servants who (1) were about their masters' business, and (2) were unable to respond in damages themselves. The combination of those circumstances produced what *Prosser* calls "a rule of policy, a deliberate allocation of a risk" because "it is just that he [the master], rather than the innocent injured plaintiff, should bear [losses caused by the torts of servants] . . . ." *Prosser*, supra, § 69 at 459. Nevertheless, *Prosser* also points out in his treatise, § 51 at 311, that "there may be indemnity in favor of one who is held responsible solely by imputation of law because of his relation to the actual wrongdoer, as where an employer is vicariously liable for the tort of a servant . . . ."

If the master may obtain indemnity from a servant, for whose tort the master has responded in damages, it is totally illogical to think the servant may claim a right to contribution or indemnity from the innocent master once the servant has paid his liability to the injured plaintiff. The doctrine of vicarious liability was fashioned to provide a remedy to the innocent plaintiff, not to furnish a windfall to a solvent wrongdoer.

The Hospital

In considering the Hospital's claims, we reiterate that no negligence of the Doctor is involved; the Hospital's claims against the Doctor are based on his assumed vicarious liability for the Nurse's negligence. The Doctor cannot be liable to the Hospital unless the Nurse was liable to the Hospital. See U.J.I. Civ. 4.3 and 4.6. Unless the Hospital has a claim against the Nurse, it has no claim against the Doctor. *Larsen v. Minneapolis Gas Company*, supra.

At the time the requested instruction was refused, the Doctor was claiming that both the Hospital and the Nurse were negligent; this claim was subsequently established by the jury's answers to the interrogatories. Indemnity is allowed against the primary wrongdoer and not against a tortfeasor in *pari delicto*. *Standhardt v. Flintkote Company*, supra; *Harmon v. Farmers Market Food Store*, supra. The Hospital had no indemnity claim against the Nurse as a joint tortfeasor; the Hospital made no claim at the trial that, as between the Hospital and the Nurse, the Nurse was the primary wrongdoer. The Hospital's allegations being insufficient to show an indemnity claim against the Nurse, the Hospital's indemnity claim against the Doctor was also insufficient.

The Hospital's contribution claim against the Doctor was based on the negligence of the Nurse. Similarly to the indemnity claim, the Hospital made no claim at the trial that the Nurse was a joint tortfeasor with the Hospital. However, because the jury's answers to interrogatories subsequently established that the Hospital and the Nurse were joint tortfeasors, we assume that at the time the instruction was refused, a contribution claim against the Doctor, on the basis of the Nurse's negligence, was before the trial court. Such a claim would be for the Nurse to contribute to the Hospital her pro rata share; or, stated another way, that the Hospital had contributed more than its pro rata share. Section 41–3–2(B), supra; *Commercial U. Assur. v. Western Farm Bur. Ins.*, supra.

The record shows that the Hospital and the Nurse had paid $225,000.00 to the Estate, but there is nothing to show which of the two made the payment. Nor is there a claim that the Nurse's part of the $225,000.00 was less than her pro rata share. The Doctor, if liable under any theory, would be in the same position as the Nurse. *Larsen v. Minneapolis Gas Company*, supra. Thus, the Hospital's contribution claim against the Doctor was also insufficient to support a vicarious liability instruction, directed to the Doctor, at the time the instruction was refused.

No instruction told the jury that the Doctor could be held liable for the Nurse's negligence. There being a failure to instruct, the Hospital was required to tender "a correct instruction". R.Civ.Proc. 51(I). An incorrect instruction is properly refused. *Panhandle Irrigation, Inc. v. Bates*, supra. The requested instruction was properly refused because it was incorrect. It was incorrect because (1) it failed to distinguish between the claims of the Hospital and the Nurse; (2) it failed to distinguish between contribution and indemnity; and (3) the instruction was inapplicable, in this case, under all of the distinctions.

The judgment of the trial court is affirmed.

The Hospital and the Nurse are to bear their appellate cost.

IT IS SO ORDERED.

WALTERS, J., concurs.

SUTIN, J., concurs in result.

SUTIN, Judge.

I concur in the result.

INTRODUCTION

Judge Wood's opinion, concurred in by Judge Walters, replaced mine because our views, with respect to the important issues raised by plaintiffs, differ, a commonplace. Points raised in this appeal should be answered perspicaciously to advise the parties, the bench and bar of the basis for the result reached.

With all due deference, Judge Wood did not set forth the issues nor explain their significance. Applicable law has been misplaced. Two crucial issues have been erroneously resolved; (1) The general verdict vs. special verdict as applied to Rule 49 of the Rules of Civil Procedure. If Judge Wood's opinion remains the law, except in comparative negligence cases, the concept of a "special verdict" has been outlawed in New Mexico. (2) The doctor-nurse relationship in treatment of patients and the liability of hospital-nurse-doctor to one another in the treatment of a patient. These issues were not adequately discussed. The resolution of this important, decisive issue, is one of the foremost problems in New Mexico and the country.

The failure to resolve these issues with certainty, leaves them in abeyance. To decide issues summarily, to fail an answer to crucial issues, to resolve issues vaguely and technically, to erroneously state the law to escape a harsh result, contributes nothing to judicial law. It demeans the efficacy of the opinion. As Judge Frank, dissenting, said in *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946):

> The practice of this court—recalling the bitter tear shed by the Walrus as he ate oysters—breeds a deplorably cynical attitude toward the judiciary.

My opinion follows:

Ivy W. Dessauer, as personal representative of the estate of Wiley J. Dessauer, filed her Complaint against Memorial General Hospital and its employee Glorious Bourque, alleging defendants' negligence and that such negligence was the proximate cause of the death of decedent. Defendants filed Third Party Complaints against Dr. Ronald J. Malleis alleging negligence and claiming that his liability was that of a joint tortfeasor; it was further alleged that Dr. Malleis was the sole proximate cause of the death of the decedent and should be held liable for damages found due to plaintiff. At the time of trial, a Stipulation and Release was entered into between plaintiff

Dessauer and defendants. Pursuant to the terms of the Release, Dr. Malleis was also released from liability by Dessauer.

The facts concerning the incident which formed the basis for the lawsuit are straightforward. The deceased was admitted to the Hospital emergency room complaining of chest pains. The nurse on duty was Glorious Bourque, an obstetrical specialty nurse, who was transferred to emergency room duty. Dr. Malleis was called to the Hospital, made the tentative diagnosis that the patient was having an acute myocardial infarction, and ordered that fifty (50) milligrams of Lidocaine be administered to the patient. The nurse erroneously injected the wrong vial which resulted in decedent receiving eight hundred (800) milligrams of Lidocaine. The patient suffered a grand mal seizure and had a cardiac respiratory arrest; resuscitation was undertaken and a relatively normal heartbeat established. However, a subsequent diagnosis of irreversible brain damage was made, life support was discontinued, and the patient died.

The action was tried upon the Third Party Complaint. The trial court designated the Hospital and Glorious Bourque as plaintiffs and Dr. Malleis as defendant. The case was submitted upon six "Interrogatories to the Jury," unaccompanied by a general verdict. In accordance with the answers returned by the jury, judgment was entered for defendant and plaintiffs appeal. We should affirm.

Plaintiffs raise four points in this appeal, each of which will be discussed *seriatim.*

A. *The submission of interrogatories not accompanied by a general verdict was not erroneous.*

Plaintiffs claim that the trial court erred in submission of the case to the jury on interrogatories unaccompanied by a general verdict and in the court's statement of issues for decision.

1. *The forms of verdicts tendered by plaintiffs were erroneous.*

The trial court submitted six interrogatories to the jury but refused to submit the following three verdicts requested by plaintiffs:

(1) *VERDICT*

We find that the Plaintiffs and the Defendant are jointly guilty of negligence which was the proximate cause of the death of Wiley J. Dessauer and Plaintiffs are entitled to contribution from the Defendant in the amount of $112,500.00.

(2) *VERDICT*

We find that the Defendant was free from any negligence which was the proximate cause of the death of Wiley J. Dessauer and that the negligence of the Plaintiffs herein was the proximate cause of the death of Wiley J. Dessauer and Plaintiffs are not entitled to recover any sum.

(3) *VERDICT*

We find that the Defendant was negligent and was the primary wrongdoer and that such negligence was the proximate cause of Wiley J. Dessauer's death and the Plaintiffs are entitled to indemnification from the Defendant in the amount of $225,000.00.

"In drawing verdict forms care must be taken to ensure that they cover every possible finding the jury may make under the evidence from the point of view of each plaintiff and each defendant. Illinois Pattern Jury Instructions, p. 201. These forms of verdict do not." *Eggimann v. Wise,* 41 Ill.App.2d 471, 191 N.E.2d 425, 432 (1963); *McDrummond v. Montgomery Elevator Company,* 97 Idaho 679, 551 P.2d 966 (1976).

The first requested verdict form on contribution was erroneous. It was not a general verdict form required under UJI 18.9, entitled Uniform Contribution Among Joint Tort-Feasors Act. Under Directions For Use, "This form of verdict is to be used when Instruction UJI 14.30 is applicable." Plaintiffs did not request UJI 14.30 which pertains to "Uniform Contribution Among Joint Tort-Feasors Act Where Settlement Is Made With One Of The Several Defendants." This instruction could have been adapted for use in the instant case. The

first requested verdict form was also erroneous because it treated the Hospital and Glorious Bourque, the nurse, as one party entitled to a 50% recovery. The evidence raised issues of active negligence on the part of both the Hospital and the nurse. No provision was made in the requested verdict form for three tort-feasors—hospital, nurse, doctor.

The third requested verdict form on indemnity was erroneous. Based upon the evidence, the Hospital and Bourque were not entitled to indemnification.

To have submitted the second requested verdict form alone would have been reversible error. *Eggimann, supra; McDrummond, supra.* To have submitted the three requested verdict forms would have been reversible error.

The requested verdict forms were erroneous.

2. *Rule 49 of the Rules of Civil Procedure is not applicable.*

The trial court, *sua sponte*, submitted six interrogatories to the jury. No request was made by plaintiffs or defendant. In fact, they objected. Error is claimed for failure of the trial court to submit a general verdict along with the interrogatories, based primarily on Rule 49 of the Rules of Civil Procedure and *Saavedra v. City of Albuquerque*, 65 N.M. 379, 338 P.2d 110 (1959).

Rule 49 of the Rules of Civil Procedure reads:

> In civil cases, *the court shall at the request of either party*, in addition to the general verdict, *direct the jury to find upon particular questions of fact*, to be stated in writing by the party requesting the same. When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly. [Emphasis added.]

We should look askant at this rule in effect since territorial days. It mandates the submission of questions of fact when requested, yet is judicially declared to be within the discretion of the trial court. The word "shall" has been translated to mean "may" in the application of the rule. Rule 49 should be amended to read that "the court may at the request of either party . . . direct the jury to find upon particular questions of fact." Otherwise "shall" and "may" will remain a thorn in the side of § 12–2–2(I), N.M.S.A.1978 wherein "shall" is declared to be mandatory and "may" permissive.

Rule 49 becomes applicable when either party requests the trial court "to direct the jury to find upon particular questions of fact." In the instant case, none of the parties made a request of the trial court. Rule 49 is not applicable. Plaintiffs mistakenly rely upon Rule 49.

Judge Wood agrees with plaintiffs that Rule 49 is applicable and states:

> Because of *Saavedra*, supra, we cannot uphold the jury's answers in this case as a special verdict. . . .

Judge Wood relied on *Smith v. Gizzi*, 564 P.2d 1009 (Okl.1977) to support the position that answers to interrogatories in the instant case were in effect a general verdict in compliance with *Saavedra* and Rule 49. To follow Judge Wood's attempt to escape *Saavedra*, is to force a reversal of this case, not an affirmance, because *Saavedra* specifically rejected Oklahoma law.

I join with Justice Clark who opened a dissent in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1946) as follows:

> The ipse dixit of the majority has no support in our case.

"Ipse dixit" statements of the law have caused confusion and explanation through the course of New Mexico judicial history. *State v. Alderette*, 86 N.M. 600, 608, 526 P.2d 194 (Ct.App.1974), Sutin, J., dissenting.

In *Saavedra*, the employer claimed that special interrogatories submitted to the jury amounted to a special verdict. The court said:

> [B]ut our Rule 49 is too limited to allow *such construction*. . . . [Emphasis added.] [65 N.M. 382, 338 P.2d 110.]

"Too limited to allow such construction" means that we cannot construe Rule 49 to include a special verdict because it is confined within limits to such a degree as to be regrettable. When a party relies upon Rule 49 in the district court, the party cannot change horses in an appeal and seek relief by way of special verdict. *Saavedra* did not say that "special verdict" is forbidden, prohibited, cannot be used, or does not allow the use of "special verdict," in the trial of a case. Neither did it deny a district court the right to seek a special verdict *sua sponte*. By judicial interpretation of Rule 49, it lacks common sense to say the Supreme Court intended so horrendous a result. To read into Rule 49 that "special verdicts are outlawed in New Mexico," which creates "a horse of a different color," is like calling a black horse a white horse or like calling an eagle a humming bird.

By omission of "special verdict" from Rule 49, the Supreme Court simply discouraged use of special interrogatories alone rather than special interrogatories accompanied by a general verdict. Rule 49 of the Federal Rules of Civil Procedure, which includes the "special verdict," was designed to encourage the use of the special verdict. *Keller v. Brooklyn Bus Corporation*, 128 F.2d 510 (2d Cir. 1942), Frank, J., dissenting.

3. *Any right to have general verdicts submitted was waived.*

Even though Rule 49 be applicable, plaintiffs waived their right to submission of a general verdict to the jury. In *Saavedra*, interrogatories were submitted to the jury unaccompanied by a general verdict. The claimant objected. The court said:

> Because of the long established practice of submitting these compensation cases to a jury on special interrogatories alone, we have . . . reluctantly reached the conclusion that the only provision for submitting special interrogatories to a jury is when they are accompanied by a general verdict, *unless the latter is waived* or it is so submitted by consent. [Emphasis added.] [65 N.M. 382, 338 P.2d 110.]

The Hospital objected only to the court's refusal to submit the Hospital's requested verdicts in lieu of interrogatories. No request for proper general verdicts were made and denied. No objection having been made for failure of the court to submit proper general verdicts, plaintiffs waived any right to have proper general verdicts submitted to the jury along with questions of fact. Neither is it an issue that can be raised for the first time in this appeal.

Plaintiffs waived the giving of a general verdict. This waiver avoided the application of *Saavedra*.

4. *Saavedra has been interpreted to include a special verdict.*

In *Wright v. Atchison, Topeka and Santa Fe Railway Co.*, 64 N.M. 29, 37, 323 P.2d 286 (1958), the Supreme Court said:

> *[I]t is within the sound discretion of the trial judge*, based upon the facts and circumstances involved in the particular case, *to determine whether the matter shall be submitted to the jury on general verdicts of special interrogatories or both.* . . . [Emphasis added.]

One year later, in 1959, *Saavedra* appeared. In arriving at its "reluctant" conclusion, *Saavedra* did not mention *Wright, supra*. However, *Saavedra* stands alone in New Mexico. Under Rule 49, it was followed in the appellate courts of Illinois, *Haywood v. Swift and Company*, 53 Ill.App.2d 179, 202 N.E.2d 880 (1964); *Sangster v. Van Heck*, 41 Ill.App.3d 5, 353 N.E.2d 192 (1976) until *Sangster*, on review, was reversed by the Supreme Court, *Sangster v. Van Heck*, 7 Ill.Dec. 92, 67 Ill.2d 96, 364 N.E.2d 79 (1977). One interrogatory was submitted to the jury on the contributory negligence of Billy Sangster. The jury answered "yes" but did not sign a general verdict. Based solely on the affirmative answer to the special interrogatory, judgment was entered for defendant. The Court of Appeals reversed. In reversing the Court of Appeals and affirming the trial court, the Supreme Court said:

> There is, in our judgment, no reasonable doubt as to the intent of the jurors in this case. They were clearly and ade-

quately instructed and informed in plain language that neither plaintiff could recover if they found Billy Sangster failed to exercise ordinary care in a manner proximately contributing to his injury. They so found. The addition of "yes" before each of their names lends emphasis to that finding.... In any event, we do not believe the failure to sign a general verdict form in this case casts any doubt upon the intent of the jurors. Since it is not contended their finding is unsupported by the evidence, we believe no useful purpose would be served by putting the defendant to the expense and inconvenience of a new trial. To hold otherwise, in our judgment, would truly exalt form over substance. [Id. 364 N.E.2d 82.]

To exalt substance over form, the same result is reached in the instant case. Following *Wright, supra*, the district court exercised its discretion in submitting special interrogatories *sua sponte*. They were answered absent a general verdict. *Sangster* converted Rule 49 into a "special verdict" rule. We can do the same.

Saavedra cites a case directly in point under a "special verdict" rule which case was not in point in *Saavedra*. *Cooper v. Evans*, 1 Utah 2d 68, 262 P.2d 278 (1953) involved an action by a business-invitee who suffered injuries received in a fall over a portion of the merchandise platform. "Upon trial, instead of submitting a general verdict, the trial court instructed the jury that it would only be required to find answers to certain questions of fact to which the court would then apply the law.... According to the answers given, the jury found the defendant guilty of negligence, but also found the plaintiff was contributorily [sic] negligent, upon the basis of which the trial court entered a judgment for the defendants." [Id. 279.] In affirming the judgment, the court said:

In the instruction the court correctly defined negligence and contributory negligence and therein set out the standard of care required of Mrs. Cooper: that which an ordinary, reasonable, and prudent person would use under the circumstances. The interrogatory was to be understood in the light of such instructions. Its effect therefore was to ask them whether she failed to meet the standard. Their affirmative answer precludes her recovery. Neither the fact that the jurors may have been disappointed with the result, nor that they may not have understood the full legal consequences of their findings, affect their validity. Under the procedure followed by the trial judge their function was but to make the finding of fact. [Id. 280–281.]

Being realistic, not technical, using common sense, not nonsense, Rule 49 and "special verdict" are identical because the general verdict is a useless appendage, to be later pointed out.

5. *The trial court did not err in the statement of issues to be decided.*

Plaintiffs' claim of error arises over the court's refusal to give its first requested instruction on the issues in which plaintiffs sought reimbursement by way of indemnity or alternatively for contribution. In other words, the court's instructions left the jury in the dark as to the nature and elements of indemnity and contribution, the claims being tried. These omissions were not erroneous.

The crucial issues were those of negligence and proximate cause which was submitted to the jury by special interrogatories. If the answers were favorable to plaintiffs, the resolution of indemnity or contribution would have been a simple matter of accounting by the court. *Bailey v. Jeffries-Eaves, Inc.*, 76 N.M. 278, 414 P.2d 503 (1966).

Plaintiffs cite no authority to support the need for an instruction on contribution and indemnity.

To support their position, plaintiffs argue this way:

[T]he jury might not appreciate that liability for the settlement could be shared between the nurse, hospital and doctor. The jury could well conclude that the doctor, if responsible at all, might be re-

> sponsible for the entire settlement amount or reason that the hospital and nurse, if negligent, should not recover regardless of the doctor's conduct.... the jury was totally in the dark about the significance of answers to interrogatories. The extent to which this ignorance influenced the answers to interrogatories can never be known.

This argument is pure speculation. We cannot read the minds of the jury during deliberations. Additional unnecessary instructions are deemed to be harmful. Experience has proved that simplicity in instructions leads to a better knowledge of the law and its application to the facts. The omission of such instructions from UJI is the best teacher of that principle.

Ignorance of the law of contribution and indemnity did not influence the answers to interrogatories. Prejudice has not been shown.

The trial court properly presented a statement of the issues to be decided by the jury.

6. *The instant case is one in which the "special verdict" is applicable, not Rule 49.*

The trial court, *sua sponte*, submitted the following six interrogatories to the jury, five of which were answered so as to exonerate Dr. Malleis:

> *INTERROGATORY NO. 1*: Was Dr. Ronald J. Malleis negligent? *Answer*—No.
>
> *INTERROGATORY NO. 2*: (Omitted)
>
> *INTERROGATORY NO. 3*: Was Glorious Bourque negligent? *Answer*—Yes.
>
> *INTERROGATORY NO. 4*: If the answer to Interrogatory No. 3 is "yes", was the negligence a proximate cause of the death of Wiley J. Dessauer? *Answer*—Yes.
>
> *INTERROGATORY NO. 5*: If the answers to Interrogatories Nos. 3 and 4 are "yes", was Memorial General Hospital negligent apart from the negligence of Glorious Bourque? *Answer*—Yes.
>
> *INTERROGATORY NO. 6*: If the answer to Interrogatory No. 5 is "yes", was the hospital's negligence a proximate cause of the death of Wiley J. Dessauer? *Answer*—Yes.

In summary, the jury found that Dr. Malleis was not negligent. It also found that the hospital and nurse were each negligent and the negligence of each proximately caused the death of decedent.

From the answers to these interrogatories, the trial court entered judgment for Dr. Malleis.

The question is: Did the answers to interrogatories constitute a "special verdict"? The answer is "Yes."

New Mexico has no statute, rule or decision which defines a "special verdict" or its method of use. This procedural rule must be judicially declared. In adopting Rule 49, the Supreme Court followed the statute enacted by the territorial legislature—Laws 1889, ch. 45, § 1. The "special verdict" was not included. The instant case appears to be the first that presents us with this verdict problem of ancient origin.

In the first instruction given all issues between the parties were set forth. Plaintiffs claimed that the proximate cause of the death of decedent was certain claims of negligence on the part of Dr. Malleis, the burden of proving such negligence being upon plaintiffs. Defendant denied plaintiffs' claims and asserted that plaintiffs were negligent and their negligence was the proximate cause of decedent's death, the burden of proving such negligence being on Dr. Malleis. General UJI instructions were given but the last instruction read as follows:

> Upon retiring to the jury room and before commencing your deliberations you will select one of your members as foreman.
>
> When as many as ten of you have agreed upon the answer to each interrogatory, your foreman must indicate the answer and sign the interrogatory.
>
> When you have agreed upon the answer to all interrogatories requiring an answer, you will all then return to open court.

Plaintiffs did not object to the submission of interrogatories to the jury. They objected only to "the court's submission of interrogatories to the jury as being misleading." We should disagree. The interrogatories were clear in scope and covered all of the material facts and issues in this appeal.

The difference between a "general verdict" and "special verdict" was stated in *Walker v. New Mexico & S. P. R. Co.*, 165 U.S. 593, 17 S.Ct. 421, 41 L.Ed. 837 (1897) which case arose from the Territory of New Mexico. [7 N.M. 282, 34 P. 43.] In the Legislative Assembly of 1889, an Act in Relation to Trial by Jury was enacted (N.M. Laws 1889, ch. 45, p. 87) which today is Rule 49 of the Rules of Civil Procedure. In the course of its opinion the court said:

> Now a general verdict embodies both the law and the facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be and express their conclusions in the verdict.... it was not infrequent to ask from the jury a special rather than a general verdict, that is, instead of a verdict for or against the plaintiff or defendant embodying in a single declaration the whole conclusion of the trial, one which found specially upon the various facts in issue, leaving to the court the subsequent duty of determining upon such facts the relief which the law awarded to the respective parties. [165 U.S. 596, 17 S.Ct. 422, 41 L.Ed. 841.]

The definition of a "special verdict" was quoted concisely in *Roske v. Ilykanyics*, 232 Minn. 383, 45 N.W.2d 769, 775 (1951):

> "A special verdict is one by which a jury finds the facts only. It so presents the findings of fact as established by the evidence that nothing remains for the court to do but to draw therefrom conclusions of law."

Cook v. State, 506 S.W.2d 955, 959 (Tenn. Cr.App.1973) stated the definition of "special verdict" in this fashion:

> A special verdict is one in which the jury reports to the court specific findings upon controlling issues of fact, usually submitted to the jury in the form of factual questions for consideration and determination from the evidence. A special verdict thus returned must on its face embrace a finding of all the facts that may be required to warrant a judgment....

The above are the common definitions of a "special verdict," 39A Words and Phrases, *Special Verdict*, p. 389 (1953).

The distinction between a special verdict and special interrogatories with a general verdict was stated in *Childress v. Lake Erie & W. R. Co.*, 182 Ind. 251, 105 N.E. 467 (1914). It makes this distinction:

There is, however—

> "a manifest difference between a special verdict and a finding of the facts in answer to interrogatories propounded to the jury. A special verdict is in lieu of a general verdict, and its design is to exhibit all the legitimate facts and leave the legal conclusions entirely to the court. Findings of fact in answer to interrogatories do not dispense with the general verdict. A special verdict covers all the issues in the case, while an answer to a special interrogatory may respond to but a single inquiry pertaining merely to one issue essential to the general verdict." Words and Phrases, vol. 7, p. 6596; *Morbey v. Chicago, etc., R. Co.*, 116 Iowa 84–89, 89 N.W. 105, 107.

If a jury finds on special questions of fact in answer to interrogatories, without a general verdict, the finding is of no force and the court cannot give to the special finding any weight unless they are sufficiently numerous and explicit to leave nothing for the court to do but to determine questions of law. If they affirmatively show the existence of every fact necessary to entitle plaintiff to a recovery and the nonexistence of every defense presented under the issues, or if they show as a matter of law that a valid defense has been established by the evidence, they may then constitute a special verdict.

In the instant case, the trial court submitted the case to the jury to obtain a "special verdict."

A "special verdict" is one used in lieu of a "general verdict." *Walker* held that a "special verdict" rather than a general verdict is appropriate, one that leaves "to the trial court the duty of determining upon such facts the relief which the law awarded the respective parties."

Frank, Courts on Trial, pp. 141–142 (1949) says:

> . . . a "special verdict" (or "fact verdict") [is one in which]: the trial judge tells the jury to report its beliefs, its findings, about specified issues of fact raised at the trial. . . . To those facts, thus "found" by the jury, the trial judge applies the appropriate legal rule. . . . The special verdict is nothing new. It was used in England centuries ago, and was early imported into this country. . . . A streamlined form of special verdict and of special interrogatories was authorized in the federal courts in 1938. In those courts, as in the courts of some states, it is optional with the trial judge in each civil jury case to employ either or neither of these methods, and the judges seldom use either of them. I think that one or the other should be compulsory in most civil suits.

Sunderland, *Verdicts, General and Special*, XXIX Yale L.J. 253, 262 (1920) says:

> The real objection to the special verdict is that it is an honest portrayal of the truth, and the truth is too awkward a thing to fit the technical demands of the record. . . . [the general verdict] covers up all the shortcomings which frail human nature is unable to eliminate from the trial of a case. . . . In short, the general verdict is valued for what it does, not for what it is. It serves as the great procedural opiate, which draws the curtain upon human errors and soothes us with the assurance that we have attained the unattainable.

For an excellent discussion of special verdicts, see *Sahr v. Bierd*, 354 Mich. 353, 92 N.W.2d 467 (1958); *Skidmore v. Baltimore & O. R. Co.*, 167 F.2d 54 (2nd Cir. 1948); Lipscomb, *Special Verdicts Under The Federal Rules*, 25 Wash.U.L.Q. 185 (1940); *Nylander v. Rogers*, 41 N.J. 236, 196 A.2d 1 (1963); *Sudia v. Hill Corp.*, 6 Ohio St.2d 160, 216 N.E.2d 882 (1966); Finz, *Does the Trend in Our Substantive Law Dictate an Expended Use of the Special Verdict?*, 37 Albany L.Rev. 229 (1973).

In essence, when rendered by way of a special verdict, the answers to interrogatories on essential issues pierce the conscience of the jury during deliberations. The answers make public that which is hidden. When rendered by way of a general verdict, the deliberations of the jury cannot be questioned. The truth revealed in "special" findings of fact, less in scope than a special verdict, overrides an inconsistent general verdict. *Bryant v. H. B. Lynn Drilling Corporation*, 65 N.M. 177, 334 P.2d 707 (1959); *Upton v. Santa Rita Mining Co.*, 14 N.M. 96, 89 P. 275 (1907). In other words, a general verdict is a useless appendage where the truth is sought from the jury by way of answers to interrogatories. For this reason, rarely do either of the parties request a special verdict.

It is unquestionable that the answers to interrogatories were supported by substantial evidence and stand in the posture as that of unchallenged findings of fact. *Lovato v. Hicks*, 74 N.M. 733, 398 P.2d 59 (1965). Absent any reversible error on other grounds, defendant was entitled to judgment as a matter of law.

The submission of interrogatories in the instant case, unaccompanied by a general verdict, was not erroneous. The matter was properly submitted to the jury as for a special verdict.

B. *The trial court properly instructed jury on borrowed servant doctrine.*

Plaintiffs tendered proposed Uniform Jury Instructions on malpractice based upon those in preparation by the Supreme Court's Advisory Committee on Uniform Jury Instructions. As now approved by the Supreme Court, they read:

UJI 11.14, entitled *Liability of Operating Surgeon—Agency (Captain of Ship Doctrine)*:

> [*A doctor*] [An operating surgeon] who has the right to control and supervise the activity of assistants, nurses and others, is responsible for negligent acts or omissions of any such person during [an operation] [*specific treatment*] under the immediate and direct control and supervision of the doctor. [Emphasis added.]

UJI 11.24, entitled *Hospital Liability—Loan Servant Exception*:

> A hospital is not responsible for acts or omissions of its employees where [a doctor] [an operating surgeon] has *assumed the exclusive right to control and supervise the activity of* _____ [hospital nurses, assistants, attendants, etc.] during the course of an operation [during specific treatment under the immediate and direct control and supervision of the doctor]. [Emphasis added.]

UJI 11.14 is not a "Captain of Ship Doctrine" instruction insofar as it includes "specific treatment" by a surgeon. This doctrine first arose in *McConnell v. Williams*, 361 Pa. 355, 65 A.2d 243, 246 (1949), two justices dissenting. In the course of the majority opinion, the court said:

> And indeed it can readily be understood that in the course of an operation in the operating room of a hospital, and until the surgeon leaves that room at the conclusion of the operation . . . he is in the same complete charge of those who are present and assisting him as is the captain of a ship over all on board . . . . [Emphasis added.]

It is obvious that this doctrine is not applicable to a doctor treating a patient in the hospital.

Plaintiffs abandoned the "Captain of the Ship" doctrine. They claim Dr. Malleis was liable under the "Borrowed Servant" doctrine. The essential elements are set forth in *Ballard v. Leonard Brothers Transport Co., Inc.*, 506 S.W.2d 346, 350 (Mo.1974):

> . . . Essentially, they are: "(a) consent on the part of the employee to work for the special employer; (b) actual entry by the employee upon the work of and for the special master pursuant to an express or implied contract so to do; and (c) *power of the special employer to control the details of the work to be performed and to determine how the work shall be done and whether it shall stop or continue.*" [citations omitted.] . . . [Emphasis added.]

This rule applies in medical malpractice cases in which a hospital nurse is "borrowed" by a doctor. *Elizondo v. Tavarez*, 596 S.W.2d 667 (Tex.Civ.App.1980). The court said:

> . . . Under the borrowed servant doctrine in a suit for malpractice against a doctor, *the controlling question is whether the doctor had the right to control the "servant" in the details of the specific act or omission raising the issue of liability.* [Citation omitted.] . . . [Emphasis added.] [Id. 671.]

UJI 11.14, stripped of excessive verbiage, and as tendered by plaintiffs, reads:

> A doctor who has the right to control and supervise the activity of assistants, nurses and others, is responsible for negligent acts or omissions of any such person during specific treatment under the immediate and direct control and supervision of the doctor.

Plaintiffs claim the trial court erred in refusing to instruct the jury on a doctor's right *and duty* to supervise the conduct of a nurse under his control.

The court instructed the jury as to the doctor's control and supervision of the nurse as follows:

* * * * * *

> 2. *The Defendant [Dr. Malleis] had the right and duty to control and supervise the activity of Plaintiff, Glorious Bourque*, during the entire treatment of Wiley J. Dessauer, deceased, from the time Dr. Malleis arrived to commence his treatment at the emergency room until the patient was transferred to the intensive care unit of Memorial General Hospital *and that he was negligent in such control and supervision.*

3. That the Plaintiff Glorious Bourque, advised the Defendant, Ronald J. Malleis, that there was a problem in administering the medication to the patient and that *the Defendant, Ronald J. Malleis, failed to use the care as a specialist in internal medicine in thereafter assuming direct control, treatment and caring for the patient.* [Emphasis added.]

To summarize these instructions, Dr. Malleis had the right *and duty* to control and supervise the activity of Glorious Bourque, a nurse; that he was negligent in such control and supervision; that after Bourque advised him of the problem, Dr. Malleis failed to use the care as a specialist after "assuming direct control, treatment and caring for the patient."

There is no realistic difference between these instructions and UJI 11.14 tendered by plaintiffs. In fact, the "control" instruction given was more harmful to Dr. Malleis than UJI 11.14. The latter reads "a doctor who has the right to control." .This is an issue of fact. The instruction given reads "The doctor had the right *and duty* to control and supervise." This is a statement of law. The duty to control and supervise the nurse was imposed on Dr. Malleis. This was more than compliance with the "Borrowed Servant" doctrine.

Plaintiffs say they "tendered these instructions on the theory of Dr. Malleis' vicarious liability and Dr. Malleis' own negligence in failing to discover and prevent the medication overdose."

"Vicarious liability" is defined in *Nadeau v. Melin*, 260 Minn. 369, 110 N.W.2d 29, 34 (1961) as follows:

> Vicarious liability is based on a relationship between the parties, irrespective of participation, either by act or omission, of the one vicariously liable, under which it has been determined as a matter of policy that one person should be liable for the act of the other. Its true basis is largely one of public or social policy under which it has been determined that, irrespective of fault, a party should be held to respond for the acts of another.

"In this sense the policy behind vicarious statutory liability is identical to the policy which holds a master vicariously liable, without personal participation, for the torts of his servants." *LaBonte v. Federal Mutual Insurance Company*, 159 Conn. 252, 268 A.2d 663, 666 (1970). Where, however, the master, or one who has the right to control another, is present, failure to exercise a control which he has, when it should have been exercised, may well constitute negligence of the one in control, as well as other affirmative acts or failure to act when reasonable prudence would require it. *Nadeau, supra; Siburg v. Johnson*, 249 Or. 556, 439 P.2d 865 (1968).

Plaintiffs tendered these instructions on the theory that Dr. Malleis, who had the right and duty to control Bourque, the nurse, was liable for her negligent acts. UJI 11.24 was tendered and refused, properly so, for two reasons.

(1) As heretofore shown, UJI 11.24 was given by the court. No error could arise by the court's refusal to give it.

(2) Plaintiffs were not entitled to this instruction under the "Borrowed Servant" doctrine. It does not apply to the hospital-nurse-doctor relationship wherein a nurse, in the performance of the regular course of services furnished by the hospital, negligently administers treatment to a patient in a specific act that the doctor orders to be performed. The rule comes into play when the doctor orders "the details of the specific act or omission." In *Elizondo, supra*, a nurse on the order of a surgeon, inserted a Levin Tube to relieve the plaintiff. The court said:

> *Where an attempt is made to apply the borrowed servant doctrine to the field of medicine in a non-operating room situation*, such as is the case here, absent any special circumstances, *vicarious liability cannot be imposed upon the attending doctor for negligence in the treatment prescribed by him, but administered by a floor nurse employed by the hospital in the regular course of the services furnished by the hospital*. . . . [Emphasis added.] [Id. 671–2.]

This rule was also applied where a nurse administered an injection of morphine and vistaril in the left buttock of a patient upon the order of the doctor. *Su v. Perkins*, 133 Ga.App. 474, 211 S.E.2d 421 (1974). Summary Judgment for the doctor was affirmed. The court quoted the following from a previous case:

> "Accordingly, following the lead of the Minnesota Supreme Court, 'we adopt the rule that a hospital is liable for the negligence of its nurses in performing mere administrative or clerical acts, which acts, though constituting a part of a patient's prescribed medical treatment, do not require the application of the specialized technique or the understanding of a skilled physician or surgeon. . . .'" [Id. 425.]

Beaches Hospital v. Lee, 384 So.2d 234, 237 (Fla.App.1980), in which a hospital sought contribution from a physician, the court held that "when the nurse's services are simply ministerial in character [mistake in sponge count], she is not regarded as the doctor's borrowed servant, but rather as the servant of the hospital, so that the latter may be vicariously liable to the patient."

In the instant case, Dr. Malleis did not exercise any right or duty to supervise and control Glorious Bourque. He did not engage her service, supervise the method and manner in which the medication should be administered, nor supervise the type of vial and syringe to use. The evidence showed that Bourque was seeking assistance from Dr. Malleis, and Dr. Malleis did not give any orders.

The philosophical basis of this rule was stated in *Foster v. Englewood Hospital Association*, 19 Ill.App.3d 1055, 313 N.E.2d 255, 259 (1974):

> We are not persuaded of the fairness of a rule which would permit the invocation of the doctrine of respondeat superior for every act of negligence by an employee of the hospital simply because the employee came under the temporary supervision or control of the operating surgeon. As a practical matter, the personnel of the hospital and their abilities are often unknown to the surgeon. He may request the assignment of a particular person but usually has little voice in the selection of those who will assist him. The surgeon's own acts, which most directly affect the life and well being of a patient, charge him with his own awesome responsibility. He should not also be saddled with the role of guarantor of the patient's safety from the negligence of others.

A judicial approach to the awesome responsibility of a doctor must recognize that the primary duty of a doctor in an emergency is to focus upon the serious medical problem from which a patient suffers. In such emergency, the primary duty of the hospital is to focus upon the competence of nurses to perform their duties. The doctor's and hospital's duties are independent primary duties, each of which should serve to seek the best possible recovery of the patient. To rule otherwise would divert the doctor from his primary duty. The duty of the hospital should not be shifted to a doctor by way of the "Borrowed Servant" doctrine unless the doctor selects the hospital nurse as an assistant due to his knowledge of her competence and exercises control and supervision over the details of her work, or, unless the doctor orders an assigned nurse to perform duties which the doctor knows are beyond her competence and the duties for which she was employed, thus exercising control and supervision. A doctor has the right to rely upon a hospital to furnish a nurse who is qualified, competent and trustworthy in the performance of her duties. Glorious Bourque, admittedly, was not.

UJI 11.24, stripped of excessive verbiage and as tendered by plaintiffs, reads:

> A hospital is not responsible for acts or omissions of its employees *where a doctor has assumed the exclusive right to control and supervise the activity of the nurse* during specific treatment under the immediate and direct control and supervision of the doctor.

Foster, supra, held that the hospital employee must become wholly subject to the

control and direction of the doctor, and free from the control of the hospital during the temporary period. It said:

> . . . In order to create the [borrowed servant] relation, therefore, the original employer must resign full control of the employee for the time being, it not being sufficient that the employee is partially under the control of a third person. (I.L.P. Employment § 2, page 368.) It would thus appear under this doctrine that both the doctor and the hospital could not be liable for the same negligent act of the hospital's "employee." [Id. 313 N.E.2d 259.]

Piehl v. Dalles General Hospital, 280 Or. 613, 571 P.2d 149 (1977) involved cross-claims filed by a surgeon and the hospital against each other. This was an operating room case in which the nurses were assigned to keep track of sponges which were used in the operation. The trial court directed a verdict erroneously by requiring the hospital to indemnify the doctor. In the course of its opinion, the court stated:

> . . . There is no doubt that the nurses were regular employees of the hospital and that they were negligent. The hospital contends, however, that at the time the sponges were counted the nurses were the loaned servants of the surgeon, who had the right to control their activities, and not the servants of the hospital; therefore, the surgeon had responsibility for their negligence.
>
> *The hospital can act only through its employees. It furnished services to plaintiff through the work of the nurses for which it was being paid by plaintiff. It owed a duty to plaintiff not to perform these services negligently.* That duty was breached when the nurses miscounted the sponges. There was no disproportion in the character of the duty owed to plaintiff by each defendant. The gravity of the fault of the nurses was as great as any fault that could have been committed by the surgeon. . . . *Regardless of whether or not the nurses were the loaned servants of the surgeon for some purposes, they remained servants of the hospital in carrying out the work for which it was being paid by plaintiff.* [Emphasis added.] [Id. 152.]

Dr. Malleis did not "assume the exclusive right to control and supervise the activity of Glorious Bourque during specific treatment" as required under UJI 11.24. To have given this instruction would have been reversible error. Circumstances may arise under which a doctor might "assume the exclusive right to control and supervise the activity of" a nurse. No such event has yet been found in doctor-hospital-nurse relationships.

The trial court properly instructed the jury on the "Borrowed Servant" doctrine.

D. *Giving second paragraph of UJI 8.1 on Duty of Doctor was not erroneous.*

Plaintiffs claim the second paragraph of UJI 8.1 on "Duty of Doctor" given to the jury was erroneous. It reads:

> The *only* way in which you may decide whether the defendant possessed and applied the knowledge and used the skill and care which the law required of him is from evidence presented in this trial by physicians testifying as exepert witnesses. In *deciding this question you must not use any personal knowledge of any of the jurors.* [Emphasis added.]

Under "Directions for Use," it is stated:

> The second paragraph of this instruction will be used in most cases *but occasionally the breach of duty complained of may be a matter of common knowledge and in such cases the second paragraph must be omitted.* [Emphasis added.]

Plaintiffs claim that expert testimony was not required to establish the violation of a standard of care of knowledge by Dr. Malleis. On the vial selected by nurse Bourque was a warning which read: "FOR DILUTION ONLY. NOT FOR DIRECT INJECTION." Dr. Malleis failed to read this warning and the description of the medication which appeared on the vial and syringe used by Bourque. Dr. Malleis handled this vial and syringe himself two and perhaps three times immediately before the contents were injected into decedent.

There was expert testimony that failure to read the label did not fall below the standard of care. There was no lay testimony. Plaintiffs say that the jurors were in as good a position as the physicians to arrive at a final conclusion because it was a non-medical judgment.

The second paragraph of UJI 8.1 is a "common knowledge" exception to the rule requiring expert medical testimony in malpractice cases.

Webb v. Lungstrum, 223 Kan. 487, 575 P.2d 22, 25 (1978) says:

> . . . This common knowledge exception applies if what is alleged to have occurred in the diagnosis, treatment, and care of a patient is so obviously lacking in reasonable care and the results are so bad that the lack of reasonable care would be apparent to and within the common knowledge and experience of mankind generally.

Without reference to "Direction for Use," *Pharmaseal Laboratories, Inc. v. Goffe*, 90 N.M. 753, 758, 568 P.2d 589 (1977) says:

> [I]f negligence can be determined by resort to common knowledge ordinarily possessed by an average person, expert testimony as to standards of care is not essential. [citations omitted.] *Such evidence includes lay testimony regarding non-technical mechanical acts by the physician, as we have here.* [Emphasis added.]

"Non-expert witnesses can testify as to external appearances and manifest conditions observable by anyone." *Hiatt v. Groce*, 215 Kan. 14, 523 P.2d 320, 325 (1974).

Plaintiffs may have misconstrued the meaning of the second paragraph of UJI 8.1 and its relation to the "common knowledge" concept. The jury must listen only to the testimony of physicians in determining whether a doctor violated the standards of skill and care. It must not rely on its own personal knowledge. In the event the standard calls for a non-medical judgment, the jury can take into consideration *the testimony of lay people* with reference to the standard. In *Webb, supra*, the court said:

> . . . When, in a given case, the diagnosis, treatment or care of a patient brings such bad results that lack of reasonable care would be apparent, using the common everyday knowledge of persons generally, such facts may be testified to by persons other than physicians. . . . [575 P.2d 25.]

There was no such testimony by persons other than physicians.

Plaintiffs' argument leads in the wrong direction. They state:

> The very simple question for the jury, a question which juries are quite capable of determining, is whether, *under all the circumstances*, Dr. Malleis had sufficient information to cause him to read the warning on the instrument in his hand? . . .
>
> * * * * * *
>
> The jurors were in as good a position as the physicians to arrive at the final conclusion. . . .
>
> * * * * * *
>
> It is the position of plaintiffs . . . that the jurors should not have been required to evaluate the reasonable prudence of Dr. Malleis' conduct solely ". . . from evidence presented in this trial by physicians testifying as expert witnesses." UJI 8.1. Rigidly applying this rule, the jurors may have concluded that Dr. Malleis should prevail for the sole reason that two experts testified on his behalf and only one on behalf of plaintiffs.

This argument is far removed from the second paragraph of UJI 8.1 and "Directions for Use."

What the "common knowledge" concept means can be illustrated:

Pharmaseal involved the care exercised by a surgeon in the withdrawal of an intestinal tube which had been inserted through the nose down through the stomach. Expert testimony was unnecessary because any person watching the withdrawal could testify as to whether the surgeon pulled out the tube fast, jerked it several times and forcefully pulled on the tube as though it had been stuck, thereby extracting it.

Mascarenas v. Gonzales, 83 N.M. 749, 497 P.2d 751 (Ct.App.1972) involved a chiropractor who pressed down on plaintiff's body and fractured the patient's ribs. Expert testimony was unnecessary because any person observing the performance could testify as to the method and force used.

Webb involved the failure of an orthopedic surgeon to take x-rays. The court said:

> . . . We feel there should be expert medical testimony to establish the standard of care in this and similar cases. [595 P.2d 26.]

The difference between the application of the "common knowledge" concept and the "physician-only" concept in the above cases appears to be observation by a person of non-technical aspects of a doctor's work as stated in *Hiatt*, and the alleged failure of a doctor to perform a duty required in the practice of medicine. Following this theory, there should be expert medical testimony to establish the standard of care required in the reading of a description of the medication which appeared on the vial and syringe selected by a nurse and shown to the doctor.

For a review of cases which held that expert testimony is necessary and the exceptions and limitations, see Annot. *Necessity of expert evidence to support an action for malpractice against a physician or surgeon*, 81 A.L.R.2d 597 (1962) and Later Case Service supplementing this annotation.

The trial court did not err in giving the second paragraph of UJI 8.1 on Duty of Doctor.

628 P.2d 683

GENERAL MOTORS ACCEPTANCE CORPORATION, a Delaware Corporation, Petitioner,

v.

Patrick CHISCHILLY, Respondent.

No. 13226.

Supreme Court of New Mexico.

April 21, 1981.

Rehearing Denied May 26, 1981.

Campbell, Cherpelis & Pica, Nicholas R. Pica, John F. Nivala, Albuquerque, for petitioner.

Wayne H. Bladh, Window Rock, Ariz., for respondent.

Jeff Bingaman, Atty. Gen., Thomas L. Dunigan, Deputy Atty. Gen., Thomas P. Whelan, Jr., Asst. Atty. Gen., Santa Fe, amicus curiae.

OPINION

PAYNE, Justice.

The plaintiff, Patrick Chischilly, entered into a retail installment contract with a New Mexico corporation bank in Albuquerque for the purchase of a pickup truck. The sale was financed by the General Motors Acceptance Corporation (GMAC) which took a security interest in the truck. The plaintiff is a member of the Navajo Tribe, but resides off the reservation on lands owned by the United States and held in trust for the Navajo Nation. On two occasions the truck was repossessed by employees of GMAC from the plaintiff's residence. The plaintiff brought an action against GMAC for violating Navajo tribal law in the repossession. The issue raised in the trial court was which law, New Mexico civil or Navajo tribal, should apply. The trial court held that New Mexico had the most significant contacts with the case and so its law should be applied. Applying New Mexico law, the court dismissed the case for failure to state a cause of action. Following the dismissal the plaintiff appealed to

the Court of Appeals which reversed, Chief Judge Wood dissenting. The majority held that Navajo law should have been applied, and that if applied, the plaintiff had a cause of action. We granted certiorari and now reverse the Court of Appeals.

Before Navajo tribal law can be applied to the instant case, there must be a showing that the tribe had jurisdiction. Both the trial court and the Court of Appeals, in order to reach their respective decisions, necessarily assumed, without discussion, that the tribe had the requisite jurisdiction.

In *Begay v. First National Bank of Farmington*, 84 N.M. 83, 499 P.2d 1005 (Ct. App.1972), *cert. denied*, 84 N.M. 77, 499 P.2d 999 (1972), the Court of Appeals held in a case very similar to the instant case that to recover for the unlawful repossession of a pickup truck in violation of the Navajo Tribal Code, the plaintiff had the burden of proving that the repossession occurred on the Navajo Reservation. In the instant case the parties have agreed by way of stipulation that the repossession did not occur within the boundaries of the Navajo Reservation. The plaintiff argues instead that the tribe's civil jurisdiction extends beyond the reservation boundaries to include all lands that are in "Indian country." We hold that this extension of the tribe's civil jurisdiction beyond the reservation boundaries as against a non-Indian defendant is unjustified.

In 1832 the concept of tribal sovereignty and self-government was first recognized by the United States Supreme Court in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832). There Justice Marshall stated that the Indian nations were

> distinct, independent, political communities, retaining their original natural rights. . . .
>
> . . . .
>
> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force.

Id. at 559–60. Although this absolute view of Indian sovereignty has been modified somewhat by subsequent cases, the principle that Indian jurisdiction is territorial in nature remains the touchstone of Indian jurisprudence. The idea that the territorial boundaries of the tribe's civil jurisdiction are co-existent with the boundaries of the reservation was discussed in the case of *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 272, 3 L.Ed.2d 251 (1959) as:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the rights of the Indians to govern themselves. It is immaterial that the respondent is not an Indian. He was *on the Reservation* and the transaction with an Indian *took place there.* Cf. *Donnelly v. United States, supra* [228 U.S. 243, 269–272, 33 S.Ct. 449, 458–459, 57 L.Ed. 820]; *Williams v. United States, supra* [327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962]. The cases in this Court have consistently guarded the authority of Indian governments *over their reservations.* (Emphasis added.)

And also in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49, 93 S.Ct. 1267, 1270–71, 36 L.Ed.2d 114 (1973) as:

> Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state. (Citations omitted.)

The extension of tribal jurisdiction beyond the exterior boundaries of the reservation must be done only for overriding policy considerations or to avoid hampering the Indians' right of self-government as it carries with it the problem of "checkerboard" jurisdiction. This "checkerboard" pattern of jurisdiction would require lawyers and judges to consult tract books to determine whether to apply New Mexico or tribal law. *See* Justice Marshall's dissent in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). This type of confusing "checkerboard" jurisdiction currently exists in the field of criminal law because of the way 18 U.S.C. § 1151 (1977) defines Indian country. 18 U.S.C. § 1151 is a federal regulation which expands the tribe's jurisdiction over minor crimes in-

volving members of the tribe taking place on land defined as Indian country. This section defines Indian country as:

> [T]he term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the boarders (sic) of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

We feel that there is no compelling reason, in absence of federal law, to extend the same confusing pattern of jurisdiction into the civil area.

The plaintiff would have us close our eyes to the problems inherent in expanding the tribe's civil jurisdiction and rule that the tribal court has jurisdiction where an Indian brings suit against a non-Indian over civil matters arising on trust lands lying outside the reservation. As support for this proposition the plaintiff relies on: (1) a Navajo tribal ordinance; (2) a federal statute, 18 U.S.C. § 1151, dealing with federal criminal jurisdiction, and (3) dictum in the case of *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975).

■ The tribe has enacted Navajo Tribal Resolution CMY–28–70, compiled as 7 N.T.C. 134 (1969 Ed.) and subsequently recompiled as 7 N.T.C. 254 (1977 Ed.). This ordinance grants the tribal courts civil and criminal jurisdiction over the reservation, and also over trust lands, allotments, dependent Indian communities, etc. This ordinance follows the definition of Indian country as found in 18 U.S.C. § 1151. This ordinance is helpful to the plaintiff only if the tribe has the power or authority to enact such a statute with respect to a non-Indian defendant. We hold that a tribe cannot sua sponte enlarge the jurisdiction of its tribal courts over non-Indians without express federal delegation. We find no federal delegation in this case.

■ The plaintiff argues that 18 U.S.C. § 1151 is authority for the tribe's ordinance and for the extension of tribal civil jurisdiction to lands outside of the reservation. However, Title 18 U.S.C. § 1151 merely defines the geographic area over which the federal government, and to a lesser extent the tribal government, may exercise criminal jurisdiction, and must be read in conjunction with the other sections defining criminal jurisdiction. Section 1152 allows the tribe to exercise criminal jurisdiction only over minor crimes involving Indians. The tribe has no jurisdiction when a non-Indian is involved. Section 1151 cannot be read to grant the tribe authority to enact ordinances like 7 N.T.C. 254 which would extend their civil jurisdiction over non-Indians.

Finally the plaintiff refers to the footnote in *DeCoteau v. District County Court, supra*, n. 2, as authority for the extension of 18 U.S.C. § 1151 to civil as well as criminal matters. While this footnote may be read to support this theory, it is ambiguous and the cases cited in support of the statements in the footnote do not refer to any civil application of 18 U.S.C. § 1151. We feel that the plaintiff's reading of the footnote would be a departure from the direction of *Mescalero Apache Tribe v. Jones, supra*, and *Williams v. Lee, supra*, and other cases indicating that the tribe's civil jurisdiction ends at the reservation line, and beyond it Indians, even in trust lands, are subject to the same nondiscriminatory laws as are all citizens of the state.

For the foregoing reasons we hold that the tribal court did not have jurisdiction over the instant case and the district court was correct in applying New Mexico law and dismissing the case. This case is remanded to the district court for entry of judgment consistent with the foregoing opinion.

IT IS SO ORDERED.

EASLEY, C. J., SOSA, Senior J., and FEDERICI and RIORDAN, JJ., concur.

[redacted]

[redacted]

628 P.2d 687

KAISER STEEL CORPORATION, Appellant,

v.

REVENUE DIVISION, TAXATION AND REVENUE DEPARTMENT, State of New Mexico, Appellee.

No. 4495.

Court of Appeals of New Mexico.

March 31, 1981.

Certiorari Denied May 6, 1981.

Irwin S. Moise, Norman S. Thayer, Sutin, Thayer & Browne, Albuquerque, for appellant.

Jeff Bingaman, Atty. Gen., Edward F. Barnicle, Jr., Richard M. Kopel, Asst. Attys. Gen., Santa Fe, for appellee.

OPINION

ANDREWS, Judge.

This appeal brought pursuant to the Tax Administration Act [§ 7–1–1 et seq., N.M.S.A.1978], involves a question of the applicability of the compensating tax deduction authorized by § 7–9–77, N.M.S.A.1978.

Kaiser Steel Corporation (Kaiser) operates a coal mine in Colfax County, New Mexico, for which it acquired certain pieces of mining equipment, including a "dragline" and "continuous miner," the taxable value of which is the subject of this appeal. At the time of the purchase Kaiser paid compensating tax on the full value of the two pieces of equipment. Some time later, Kaiser reduced the amounts of values of other property upon which it was liable for compensating tax by an amount it calculated as the sum it asserted it might have claimed as a deduction pursuant to § 7–9–77 at the time it originally acquired the dragline and continuous miner. Thereafter, the Revenue Division of the Taxation and Revenue Department (Department) assessed Kaiser for the compensating tax deducted by it. Kaiser filed a protest which, together with a "request for refund" was heard at a formal administrative hearing. Kaiser appeals from the Decision and Order entered pursuant to the hearing where the Revenue Division Director (Director) deter-

mined that the fifty percent deduction provided in § 7-9-77 does not apply to the dragline and continuous miner and accordingly denied Kaiser's request for refund and affirmed the assessment.

Section 7-9-77(A) provides that "[f]ifty percent of the value of agricultural implements, farm tractors, aircraft or vehicles that are not required to be registered under the Motor Vehicle Code may be deducted from the value in computing the compensating tax due." In an apparent attempt to further define the types of vehicles which are within the general terms of the section, the Director adopted G.R. Regulation 14.-17:4, which declares the following "mining equipment" to be "vehicles" not required to be registered:

> Shuttle cars are self-contained mobile mining machines mounted on rubber tire wheels, used to transport broken ore from the ore face in the mine to a loading point, where the ore is loaded into an underground train.
>
> Undercutting machines are self-contained mobile mining machines mounted on rubber tire wheels. These machines are used to undercut or bottom cut the ore face prior to drilling.
>
> Mining drills are self-contained mobile mining machines mounted on rubber tire wheels used to drill holes above the undercut prior to shooting.
>
> Loading machines are self-contained mobile mining machines mounted on tractor treads and are similar to front end loaders. They are used to load ore into shuttle cars.
>
> Electric shovels are self-contained mobile mining machines mounted on tractor treads and are used in open pit mining operations to load ore and waste material into dump trucks.

Kaiser, in seeking to have the deduction applied to the purchase of the dragline and continuous miner, asserts that: (1) the two pieces of equipment are "vehicles," exempt from registration under the Motor Vehicle Code; or, (2) the regulation as interpreted by the Director brings about an arbitrary and capricious result in violation of Kaiser's rights; and (3) the regulation discriminates against Kaiser because the regulation grants the deduction on machines similar to Kaiser's while denying Kaiser the deduction on its equipment.

Initially, we address a jurisdictional issue. The Tax Administration Act specifically defines the procedures by which a taxpayer can call into question his liability for any tax or the application to him of any provision of the Act. The Act requires that a taxpayer elect to dispute his liability for the payment of taxes either by protesting the assessment without making payment or by claiming a refund after making payment. § 7-1-23. If the taxpayer protests without making payments he is entitled to an administrative hearing before the Director. § 7-1-24, but if he claims a refund he is entitled to file a civil action in district court. § 7-1-26. In the first instance, if the taxpayer is dissatisfied with the action and order of the Director after a hearing, he may appeal to the Court of Appeals for further relief, § 7-1-25, and where the matter is in district court, either the taxpayer or Director may appeal to the Court of Appeals. § 7-1-26(A)(2).

Kaiser has not strictly followed either of these methods in its attempt to obtain tax relief. It first pursued the tax refund. On December 31, 1974, Kaiser wrote to the Bureau of Revenue regarding the "sales tax exemption" on mining equipment. The Bureau's position was that the tax was applicable. On December 12, 1977, Kaiser wrote a letter constituting a claim for refund on the compensating tax. This claim was within the three-year period of limitations provided in § 7-1-26(B), N.M.S.A.1978. Had the claim been granted, it would have had the effect of approving the refund already taken by Kaiser. The claim for refund of compensating tax was denied on February 14, 1978. Kaiser did not commence a civil action in district court within thirty days of the denial, as provided in § 7-1-26(A)(2). On November 5, 1979, the Division issued a Notice of Assessment of taxes for the compensating tax. Kaiser filed protest of the assessment on Novem-

ber 19, 1979, within the thirty-day period of § 7–1–24(B). On December 17, 1979, a hearing on the protest was held by the Department. At the hearing, the Department's attorney stated, "[t]he claim for refund and assessment is what is before Your Honor, claim for refund as it applies to compensating tax only." The Director's Decision and Order was entered on January 11, 1980, and Kaiser's complaint on appeal to this Court was filed on February 8, 1980. The appeal was thus timely filed under § 7–1–25(A).

At no time prior to this appeal did the Division assert that Kaiser had failed to properly pursue its remedies under the Tax Administration Act. The Division did not raise an issue relating to waiver of remedies by Kaiser under § 7–1–23 at the administrative hearing. A party will not be permitted to change his theory of the case on appeal; this principle applies on review by courts of administrative determinations so as to preclude from consideration questions or issues which were not raised in the administrative proceedings. *Board of Education v. State Board of Education*, 79 N.M. 332, 443 P.2d 502 (Ct.App.1968); *see Till v. Jones*, 83 N.M. 743, 497 P.2d 745 (Ct.App. 1972). The Department's actions constitute a waiver of its right to present the issue, *see Stuckey's Stores, Inc. v. O'Cheskey*, 93 N.M. 312, 600 P.2d 258 (1979), so the issue is not before this Court for review.

This is an appeal from the Director's Decision and Order as authorized by § 7–1–25, where the taxpayer is dissatisfied with the action and order of the Director. Accordingly, this Court has jurisdiction. It does not matter whether the legal issues are deemed to arise out of a claim for refund, or out of the protest of the subsequent assessment. Kaiser is entitled to one review and the questions are the same. Upon appeal, this Court shall set aside a Decision and Order of the Director only if found to be: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law. § 7–1–25(D). Our review of this case is so restricted; it does not include the jurisdictional question, which the Director could and should have addressed in his Decision and Order. *See Floyd & Berry Davis Co. v. Bureau of Revenue*, 88 N.M. 576, 544 P.2d 291 (Ct.App. 1975).

According to Kaiser, the Director erred in deciding that the deduction provided in § 7–9–77 was not applicable in connection with the purchase of the dragline and continuous miner since the machines are "vehicles" as defined in § 66–1–4(B)(71), which are not required to be registered under the Motor Vehicle Code because: (1) neither is a "motor vehicle" as defined in § 66–1–4(B)(39); (2) neither is a trailer, semi-trailer, or pole trailer required to be registered as provided in § 66–3–1; (3) neither is driven or moved upon a highway so as to be subject to registration and certificate of title provisions of the Motor Vehicle Code, § 66–3–1; (4) the provisions of § 66–3–1(B) apply in that the machines are "driven or moved upon a highway, only for purposes of crossing from one property to another;" and, (5) they are "special mobile equipment" as defined in § 66–1–4(B)(60).

Kaiser asserts that the Director's findings do not support the conclusion that § 7–9–77 is not applicable to the dragline and continuous miner; consequently, the order is not supported by substantial evidence and is not in accordance with applicable law. *See Union County Feedlot, Inc. v. Vigil*, 79 N.M. 684, 448 P.2d 485 (Ct.App.1968). In analyzing this argument it appears that the ultimate question to be answered is whether the dragline and continuous miner are "vehicles not required to be registered under the Motor Vehicle Code." In order to make this determination the first issue to be addressed is whether the two pieces of equipment are "vehicles."

The Decision and Order describe the two pieces of machinery as follows:

> The dragline is a huge machine powered by outside sources—electricity furnished by trailing electrical cables carrying 6,900 volts. It is equipped with a long boom with cable hoists to operate a

suspended 35 cubic yard bucket for digging and casting overburden. It is 21 stories high and weighs 4 million pounds. The dragline has a tub-type turntable and large "walking shoes" mounted as outriggers on the sides. Each shoe is about 49 feet long and 10 feet wide. The cab, machinery house and boom, rotate on the tub by means of rollers and drive gears to permit the boom to be positioned over the overburden to be moved. The bucket is lowered to the overburden and pulled forward into the overburden by a drag hoist until the bucket is loaded. The bucket is then hoisted, the machine rotates to position the bucket over the spoil pile and the bucket tripped to dump the overburden clear of the area being stripped. The overburden can be moved up to 500 feet by rotating the machine 180 degrees between digging and dumping. The dragline moves by lowering the walking shoes to the ground, by means of an eccentric drive, then raising the machine (except the shoes); then the elevated machine is moved horizontally about six feet. After this move, the machine is set back down on the ground, the shoes are elevated, moved and lowered again. This motion is repeated. The shoes do not move horizontally on the ground. The machine normally digs material at or below the level of the tub and can dump in piles 135 feet above the tub level. This permits removing the overburden from the coal seam in approximately 120 feet wide benches and casting the overburden to one side to allow access to the coal.

The continuous miner is a mobile coal cutting and loading machine on caterpillar type treads. This machine is used for mining coal in underground entries and pillars. The machine advances to the coal face on caterpillar type tractor treads and by means of a rotating cutting drum, equipped with pointed bits, cuts coal from the solid face by raising and lowering the rotating cutting drum as the machine advances. Loosened coal is scooped at the front and conveyed to the rear of the machine where the coal is dumped. The cutting drum is arranged to cut a greater width than the machine body width so the machine can be advanced into the cut. After mining a cut or pillar the machine moves to another entry or pillar and repeats the mining cycle. It is powered by electricity furnished by a trailing 440 volt cable which is connected to an in-mine transformer. The machine is between 8–9 feet wide, 32 feet long, 3½ high and weighs between 30 and 40 tons.

Kaiser finds no fault with the Director's description of both machines, but argues that additional facts as to them were adduced at the hearing. The operator "rides" in the cab of each machine, and both machines are powered by electric power by necessity. The continuous miner, being a machine used underground is powered by electricity for safety reasons, and draglines the size of the one in question here, although used above ground, are "always" powered by electricity brought to the machine by a trailing cable.

Section 66–1–4(B)(71), N.M.S.A.1978, of the Motor Vehicle Code defines "vehicle" as "every device in, upon or by which, any person or property is or may be transported or drawn upon a highway, including any frame, chassis or body of any vehicle or motor vehicle, except devices moved by human power or used exclusively upon stationary rails or tracks."

The Director made the following findings and conclusions in regard to this definition:

11. There is no evidence that either of the two machines "is" used to transport any person or property upon a highway. Each machine moves or transports property off the highway; the bucket on the dragline moves soil through the air and the continuous miner moves coal in coal mines by means of a built-in conveyer. One machine, the dragline crossed a paved road once (and it depressed the road by about six inches). Nor is there any evidence that either machine is "drawn" upon highway.

12. May either machine transport persons or property upon a highway? Transport means to move something or someone from one place to another. And in

moving itself, a machine is not transporting property within the meaning of § 66–1–4(71). See *State v. Griswold*, 225 Iowa 237, 280 N.W. 489 (1938).

13. To be a "vehicle" within the meaning of § 7–9–77, the machine must be capable of being utilized as a means of carrying people or other property over the highways. Neither of these machines can be so used. Neither of these machines are vehicles as defined in § 66–1–4(71), and neither are "vehicles that are not required to be registered" within the meaning of § 7–9–77.

According to Kaiser, when the definition of "vehicle" in § 66–1–4(B)(71), is analyzed, it is clear that both the dragline and continuous miner fall into the definition and are, therefore, "vehicles" subject to the deduction authorized in § 7–9–77. As noted by Kaiser, the "dragline" and "continuous miner" are each a "device" or a "piece of equipment or a mechanism designed to serve a special purpose or perform a special function." Webster's Third Int. Dictionary 618 (1961); *see Illinois Bell Telephone Company v. Miner*, 11 Ill.App.2d 44, 136 N.E.2d 1 (1956). Relying then on the Director's findings that each machine "moves" or is "mobile," Kaiser asserts that "although not included in the Director's findings, it is uncontroverted that both machines are capable of moving persons or property on the highway and are self-contained except that operate with a trailing cable which conveys electricity to them from an outside source," and each piece of equipment is therefore a device upon which a person or property may be transported upon a highway. However, in attempting to show that these two pieces of equipment are "vehicles," under the definition set out in § 66–1–4(B)(71), Kaiser relies upon two premises not established in the record; first, that both machines are "capable of" moving persons or property "upon the highway," and second, that the machines are "self-contained."

As to the first premise, the description of the dragline and continuous miner adopted by the Director establish that they do not come within the general "descriptive terms" of § 66–1–4(B)(71). Although the dragline crossed a paved road, there is no evidence in the record that the continuous miner ever made this trek. The mere fact that a machine once crossed a paved road is clearly not the same as it being a machine which "moves on a highway." The highway was a mere impediment—one which was severely damaged by the visitation. *Accord Standard Oil Co. of California v. Philbrick*, 47 Cal.App.2d 591, 118 P.2d 497 (1941). As to whether the pieces of equipment are "self-contained," the issue is whether a device which operates from a trailing cable which conveys electricity to it from an outside source is "self-propelled," as required by § 66–1–4(B)(39), defining "motor vehicle" as "every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from batteries or from overhead trolley wires, but not operated upon rails." "Self-propelled" means "propelled by its own motor" or "fuel." Webster's Third Int. Dictionary 2061 (1961). Clearly, where a mechanical device is not so powered, but instead receives its power through a trailing cable which conveys electricity to it from an outside source, the "device" is not "self-propelled." *See Halliburton Company v. Property Appraisal Dept.*, 88 N.M. 476, 542 P.2d 56 (Ct.App. 1975). From all the foregoing, we find it impossible to conclude that the continuous miner and dragline are "vehicles" under the Motor Vehicle Code. *Accord Gibbons & Reed Company v. Bureau of Revenue*, 80 N.M. 462, 457 P.2d 710 (1969).

Kaiser asserts that, even if we so conclude we must, nevertheless, determine whether the dragline and continuous miner are "vehicles not required to be registered under the code," for which Kaiser would be entitled to the deduction authorized by § 7–9–77; the argument being that § 7–9–77 creates a separate class of "vehicles" which are not included in other definitions. Section 66–3–1 subjects every "motor vehicle, trailer, semitrailer and pole trailer, when driven or moved upon a highway," to the registration provisions of the Motor Vehicle Code. However, certain exceptions to this requirement are listed in the section and include:

B. any such vehicle which is driven or moved upon a highway only for the purpose of crossing such highway from one property to another;

* * * * * *

D. any special mobile equipment . . . .

According to Kaiser, the dragline and continuous miner fit into these exceptions because they are driven or moved on the highway only to cross from one property to another, and are "special mobile equipment" as that term is defined in § 66–1–4(B)(60).

Because the machine must, in the first instance, be a "vehicle" in order to qualify under either exception, *see Gibbons & Reed Company v. Bureau of Revenue, supra*, and, as shown above, neither the dragline nor continuous miner can be so classified, under § 66–1–4(B)(71), neither are "vehicles not required to be registered" within the meaning of § 7–9–77. Further, as to the requirements of § 66–3–1(B), a finding that a machine "moves" or is "mobile" does not in itself support a conclusion that the machine can be "driven or moved upon a highway" for any purpose. In fact, the evidence here is to the contrary.

Although defining the term "special mobile equipment" as "every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways, including farm tractors, road construction or maintenance machinery, ditch digging apparatus, well-boring apparatus and concrete mixers," § 66–1–4(B)(60) also declares the "enumeration" above to be "partial" and states that it "shall not operate to exclude other such vehicles which are within the general terms of [the] section." [1] Because the dragline and continuous miner are similar to some of the equipment enumerated in the section, Kaiser would have the "partial" enumeration expanded to include its equipment. While we would agree that the equipment is not "used primarily for the transportation of persons or property," the machines do not meet the other criteria of the section. First, the machines are not "vehicles." Second, neither the dragline nor continuous miner are "incidentally operated or moved over the highways." We are unable to conclude that either the dragline or continuous miner come within the general descriptive terms of § 66–1–4(B)(60). The Director's Decision and Order is amply supported by the record. Neither the dragline or continuous miner are "vehicles" exempt from registration under the Motor Vehicle Code.

We turn then to Kaiser's final two contentions—that the regulation creates an irrational classification which violates due process and equal protection rights. Kaiser does not contend that the legislature may not classify for taxing purposes, or that § 7–9–77 is defective or unconstitutional. Rather, it argues that G.R. Regulation 14.-17:4, as applied by the Director is so "whimsical, arbitrary and capricious as to make the attempted application unreasonable and illegal."

The Decision and Order states that:

"Regulation 14.7:4 is presumed to be in proper implementation of the law. Section 7–1–5(G). So the question is not the validity of the regulation (although some might question it); rather the question is the applicability of the regulation to the two machines in question. The regulation does not state a general rule as to what is a vehicle within the meaning of § 7–9–77. It simply lists certain equipment which, it says, meets the vehicle test. The two machines in question are not listed in the regulation (although they may be similar to the listed machines in some particulars). So, the regulation does not directly apply to the dragline and the continuous miner. Moreover, it

1. A similar case was presented in *Gibbons & Reed Company v. Bureau of Revenue*, 80 N.M. 462, 457 P.2d 710 (1969), which held that a piece of mining equipment called a "mole" was not "special mobile equipment" because it did not come within the general descriptive terms of the section. [§ 64–1–12, N.M.S.A.1953 Comp., now § 66–1–4(B)(60), N.M.S.A.]. The "mole" which weighed approximately one hundred tons, was used to move employees and supplies in and out of a tunnel and to remove excavated material from the tunnel.

should be noted that each of the machines listed in the regulation is described as "self-contained." Although, "self-contained" is not defined in the regulation, the words cannot be ignored. As used in the regulation, self-contained means self-propelled. The two machines involved in this hearing are powered by external electrical sources; they are not self-contained and they are not of the type listed in the regulation. Accordingly, the Taxpayer cannot rely on the regulation to support its position.

Kaiser considers this holding to misconstrue its position in regard to this case because its reference to the regulation was for the purpose of demonstrating that the machines covered by the regulation are similar to the dragline and continuous miner. The "electric shovel" is used for the identical purpose as the dragline, differing only in that it is smaller and in its method of operating the bucket. Both items of equipment are mobile; both perform their functions as a discrete unit of machinery; both have their own motors mounted on board; both are operated with trailing cables. As concerns the continuous miner, it performs the same operations as an undercutting machine, mining drill and loading machine, plus "additional services."

According to Kaiser, if the characteristics not required by the Motor Vehicle Code definition of "vehicle," § 66–1–4(B)(71), were eliminated from the regulation, there would be no basis upon which the dragline and continuous miner could be distinguished from other mining equipment listed in the regulation. The statute makes no mention of the requirement that the machines be "self-contained," "rubber-tired" or "mounted on tractor treads." Kaiser questions the "total absence of reason for [the] differences" treatment between the various pieces of equipment and asserts that a tax rate based on these distinctions is discriminatory. Kaiser's position is that there is no reasonable basis upon which an electric shovel described in G.R. Regulation 14.7:4 can be distinguished from the electric dragline here involved, and that similarly, mining drills, undercutting machines and loading machines cannot be distinguished from the continuous miner; thus, the tax imposed cannot be equal and uniform on these similar or comparable items, and accordingly cannot be sustained. N.M.Const. Art. II, § 18, U.S.Const. Amend. XIV, § 1.

In approaching the question of the constitutionality of a statute, every presumption is to be indulged in favor of the validity and regularity of the legislative enactment. *Gruschus v. Bureau of Revenue*, 74 N.M. 775, 399 P.2d 105 (1965). We are under no duty to inquire into the wisdom, the policy, or the justness of an act of the legislature, but must resolve all doubts as to its constitutionality in favor of the validity of the law. *Gruschus v. Bureau of Revenue, id.; State ex rel. Hannah v. Armijo*, 38 N.M. 73, 28 P.2d 511 (1933). It is well-established that in the exercise of its taxing power, the State may select its subjects of taxation, and, so long as the tax is equal and uniform on all subjects of a class and the classifications for taxation are reasonable, such legislation does not offend these provisions of the state and federal constitutions. *Gruschus v. Bureau of Revenue, supra; Lougee v. New Mexico Bureau of Revenue Commissioner*, 42 N.M. 115, 76 P.2d 6 (1938).

When a statute or regulation, as applied, discriminates as between taxpayers, that discrimination must rest on some rational basis. We agree then with Kaiser, that there is discrimination in the treatment of the dragline and continuous miner as compared to the other mining equipment listed in the G.R. Regulation 14.17:4. However, it is clearly the burden of the taxpayer at the time of the hearing to "negative every conceivable basis which might support the discriminatory classification.[2] *Markham Advertising Co. v. Bureau of*

2. This principle lies in taxation perhaps as in no other area of law, because of the implied rational basis underlying every tax statute, that the State has the right, power, and duty to raise the necessary funds for its public purposes. *Markham Advertising Co. v. Bureau of Revenue*, 88 N.M. 176, 538 P.2d 1198 (Ct.App.1975).

Revenue, 88 N.M. 176, 538 P.2d 1198 (Ct. App.1975); *Michael J. Maloof & Co. v. Bureau of Revenue*, 80 N.M. 485, 458 P.2d 89 (1969).

In this case, Kaiser did not "negative every conceivable basis which might support the discriminatory classification"[3] where the "only question to be asked is whether the machines in question are vehicles not required to be registered under the Motor Vehicle Code as special mobile equipment." As shown above, Kaiser failed to prove that either the dragline or continuous miner are "vehicles" as defined in § 66–1–4(B)(71).

We hold that the taxpayer has not met its burden of proving the lack of a rational basis for this State to discriminate between the dragline and continuous miner and other mining equipment defined in its regulation, and that neither piece of equipment is "special mobile equipment" or a "vehicle not required to be registered" under the Motor Vehicle Code. As the penalty has been abated in this case, the Decision and Order of the Director as to the tax is affirmed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

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

I agree with the opinion insofar as it holds that this Court has jurisdiction to consider the appeal. However, I disagree as to applicability of the compensating tax deduction to Kaiser's mining equipment.

Section 7–9–77 provides that a deduction from compensating tax may be taken for "[f]ifty percent of the value of agricultural implements, farm tractors, aircraft or vehicles that are not required to be registered under the Motor Vehicle Code * * *." Section 66–3–1 of the Motor Vehicle Code provides:

> Every motor vehicle, trailer, semitrailer and pole trailer, when driven or moved upon a highway, shall be subject to the registration and certificate of title provisions of the Motor Vehicle Code except:
>
> * * * * * *
>
> B. any such vehicle which is driven or moved upon a highway only for the purpose of crossing such highway from one property to another;
>
> * * * * * *
>
> D. any special mobile equipment as herein defined * * *.

Kaiser contends that the dragline and continuous miner are covered by §§ 66–3–1(B) and 66–3–1(D). I agree.

The evidence clearly shows that this equipment would only be driven or moved upon a highway for the purpose of crossing that highway to another property. The dragline, as noted, once crossed a paved road and left six-inch depressions in its surface. The continuous miner has not been shown to have ever even crossed a paved road. Both pieces of equipment thus meet the requirements of § 66–3–1(B).

"Special mobile equipment" is defined as "every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways * * *." § 66–1–4(B)(60). The record shows that the equipment is not designed or used primarily for transportation of persons or property. The dragline and continuous miner are similar to the construction equipment listed in the partial enumeration of § 66–1–4(B)(60) in that respect; both pieces of equipment are lacking design features which allow such transportation. Kaiser's mining equipment is within the general terms of "special mobile equipment," according to the Motor Vehicle Code's defining subsection, regardless of whether the equipment is "self-contained" or not. The basis for finding a requirement

3. Were this an issue where the Director had applied varying rates or methods of evaluation to two similar draglines, this might not be so, but taxing a "4 million pound" mechanism differently than a much smaller and less complex electric shovel is not the same sort of issue. *See generally Ernest W. Hahn, Inc. v. County Assessor, Etc.*, 92 N.M. 609, 592 P.2d 965 (1978).

that special mobile equipment be "self-contained" is nowhere evident in the statute or GR Regulation 14.17:4. The mining equipment is similar in purpose and operation to other equipment listed in the statute and regulation, and meets the criteria of the Motor Vehicle Code as a vehicle not subject to registration.

The *Gibbons & Reed* case is not applicable, in my opinion, given the facts of this case. That case involved a piece of equipment which ran on "approximately 5.6 miles of two-parallel lines of 70-pound-railroad rail," and which was operated by "15-ton locomotives, operated either by electric batteries or diesel fuel." *Gibbons & Reed Co. v. Bureau of Revenue*, 80 N.M. 462, 464, 457 P.2d 710 (1969). In addition, the "mole" was used to transport people and property into the mine tunnels. Such equipment clearly does not fit within the general descriptive terms of "special mobile equipment," but Kaiser's equipment is not at all like the "mole" in *Gibbons*. The continuous miner operates on caterpillar treads, powered by an electric motor. It does not transport people or supplies. The dragline operates on "walking shoes" and is also powered by an electric motor. Both are similar in design, operation, and purpose to the "road construction or maintenance machinery" and "ditch-digging apparatus" mentioned in § 66–1–4(B)(60). Accordingly, I would hold that the Decision and Order is not supported by substantial evidence in the record and is not in accordance with law, so the compensating tax deduction is applicable to Kaiser's equipment.

628 P.2d 696

STATE of New Mexico, Plaintiff-Appellee,

v.

Richard E. LUCERO, Defendant-Appellant.

No. 4848.

Court of Appeals of New Mexico.

May 7, 1981.

John B. Bigelow, Chief Public Defender, Andrea L. Smith, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Carol Vigil, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

ANDREWS, Judge.

Richard Lucero appeals from his conviction on two counts of commercial burglary. The following events gave rise to Lucero's appeal.

Lucero, two other men and a woman were arrested by Officer Heshley on suspicion of commercial burglary. The three men were handcuffed, given their *Miranda* [1] warnings, and placed in the officer's patrol car. Officer Heshley secretly turned on a tape recorder on the front seat of the patrol car, and then left the three men alone while he inventoried their car.

When Officer Heshley returned to the patrol car he told the three men, "[y]ou might want to listen to this tape," and played back part of the tape for them. According to Officer Heshley, the tape contained inculpatory statements.

On the way to the detention center and after they had heard their recorded conversation, the three suspects initiated a conversation with the officer in which they made several incriminating statements.[2] Lucero was given his *Miranda* rights again after he arrived at the detention center. He signed a written waiver of his rights and gave a statement admitting his participation in the burglaries. Officer Heshley subsequently destroyed the taped conversation.

At a motion hearing to suppress the statements Lucero made after hearing the tape, Officer Heshley stated that he made the secret recording "to see what they were

1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

2. Defendants were given their *Miranda* rights a second time while in the patrol car; however, it is not clear whether this occurred before or after the tape was played for the defendants.

saying." At trial, the officer testified that he recorded the conversation "as a safety precaution for myself and also to hear what's going on in my police car when I'm not in it."

Two issues are raised on appeal: (1) whether the trial court erred in denying Lucero's motion to suppress his oral and written statements because they were involuntary; and, (2) whether Lucero was denied his right to due process and to confront witnesses against him because of the destruction of the tape recording.

Initially, Lucero contends that recording of his communication with his confederates constitutes an unlawful incursion into his Fourth Amendment rights. We disagree.

> It appears to be the general rule that a prisoner in jail has no reasonable expectation of privacy and that the custodians of such a detention center have the right to exercise constant surveillance of inmates, including eavesdropping on their conversations. This rule has been held to include electronic surveillance while a person is under detention in a police building and not yet formally imprisoned.
>
> The question at hand is whether the rule applies to arrested persons confined in a police vehicle; we think it does. Once a person is taken into custody by law enforcement authorities, his right to privacy has been effectively diminished, and he has no reasonable expectation that his conversation will be private.

Brown v. State, 349 So.2d 1196 (Fla.App. 1977); *see also, People v. Chandler*, 262 Cal.App.2d 350, 68 Cal.Rptr. 645 (1968). When they sat in Officer Heshley's patrol car, these suspects had no reasonable expectation of privacy. Thus, Lucero's oral statement was not the "fruit" of an unlawful seizure of evidence.

The question then, is whether the officer exerted "an improper influence" when he played the recorded conversation back to Lucero.

> To be admissible, a confession must be free and voluntary; that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.

Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). In reviewing the trial court's ruling to admit defendant's statements, this Court must view the facts in a light most favorable to the trial court's decision. *State v. Bloom*, 90 N.M. 192, 561 P.2d 465 (1977). Admission or exclusion of evidence resides within the sound discretion of the trial court, and absent an abuse of discretion, the trial court will be affirmed. *State v. Greene*, 92 N.M. 347, 588 P.2d 548 (1978). Although the trial court stated that what occurred in the police car was an "interrogation in the sense of *Brewer*,[3] his conclusion that Officer Heshley's purpose in playing the tape to defendant was to elicit additional inculpatory statements, does not require a holding that defendant's second statement was involuntary as a matter of law.

In *State v. Gallegos*, 92 N.M. 336, 587 P.2d 1347 (Ct.App.1978), this Court stated two prerequisites for the admission of incriminating statements made by a defendant in the presence of the police; that the defendant was advised of his *Miranda* rights, and that the statements were voluntary. In this case, *Miranda* warnings were given to Lucero. The remaining question is whether the statements made by Lucero in the patrol car and shortly after reaching the detention center were voluntary.

In *State v. Aguirre*, 91 N.M. 672, 579 P.2d 798 (Ct.App.1978), this Court adopted the test for "voluntariness" established in *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973):

> In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances--both the characteristics of the accused and the details of the interrogation.

3. *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

The only evidence offered at the suppression hearing was the testimony of Officer Heshley. Defendant never, in any way, contradicted the officer's testimony, which was: (1) the officer played a part of the tape but asked no questions; (2) he did not threaten to use the tape against defendant; (3) the conversation en route to the police station was initiated by defendant and his confederates; and, (4) the only content of the tape would be conversation among the co-defendants. Under these uncontroverted facts, we cannot reach the conclusion that defendant's will was overborne. *State v. Aguirre, supra.* While the playing of the tape can be likened either to an "adjuration to tell the truth" or "deception", as discussed in *Aguirre*, these two "items" were not, in themselves, a basis for suppression; they were simply an aspect of the totality of the circumstances. Under the above circumstances we cannot hold that Lucero's will was overborne and cannot say that the trial court erred in holding, in the totality of the circumstances, that defendant's statements were voluntary.

Lucero next contends that he was denied due process of law and his right to confrontation because material evidence was destroyed.

Where evidence is destroyed, defendant must show: (1) that the state either breached some duty or intentionally deprived the defendant of evidence; (2) that the improperly "suppressed" evidence was material to the guilt or innocence of the accused; and, (3) that the suppression of the evidence prejudiced him. *State v. Lovato*, 94 N.M. 780, 617 P.2d 169 (Ct.App. 1980); *Chacon v. State*, 88 N.M. 198, 539 P.2d 218 (Ct.App.1975). We need not decide whether or not the first two prongs of this test are met because it is clear that the last element is not present. Lucero can show no prejudice from the destruction of the tape.

The evidence before the trial court was that Officer Heshley recorded over defendant's first statement. The prosecutor never had access to the statement, and the officer did not testify as to the statements made on the tape. The matter was only raised during cross-examination. On appeal, defendant argues that:

> The tape may have indicated that Lucero only committed one of the burglaries and that his co-defendants had committed the other one. Lucero may have owed his friends a favor and they may all have figured that it was better for only one of them to go to jail than all three.

Defendant's assertion that he was prejudiced by the destruction of this evidence consists of mere speculation, and flies in the face of his and his co-defendant's signed statements. It was never suggested to the trial court that any such hypothesized evidence would be found on the destroyed tape.

The trial court did not err in refusing to grant Lucero's motion for a dismissal on the basis of the unavailability of the tape recording. Defendant Richard Lucero's conviction is affirmed.

IT IS SO ORDERED.

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

628 P.2d 1126

Luis S. CARDOZA, Plaintiff-Appellee,

v.

The TOWN OF SILVER CITY, Defendant-Appellant.

No. 4697.

Court of Appeals of New Mexico.

March 19, 1981.

Mark C. Meiering, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, for defendant-appellant.

Anthony F. Avallone, Las Cruces, for plaintiff-appellee.

OPINION

SUTIN, Judge.

This is a personal injury action brought by plaintiff to recover damages sustained when he drove his vehicle over a manhole cover in a street in Silver City, New Mexico. The jury found for plaintiff and defendant appeals from the judgment rendered. We affirm.

At about 3 a. m. on November 28, 1976, plaintiff was driving down 21st Street in Silver City, New Mexico. The street was snow packed. Suddenly, plaintiff felt a big jolt, as though the car hit a brick wall. He was thrown up to the ceiling of the car. After the car stopped, plaintiff walked back to the scene of the accident and found an open manhole with the cover on one side of it. The police were called. An officer arrived and was taken to the scene. He attempted to put the cover on the manhole but it was too heavy. It weighed 250 pounds.

The cover had been placed on the manhole some 20 to 25 years prior to the date of the accident. After the accident, the cover and the ring were replaced. The Superintendent of the Water and Sewer Department did not know the disposition of the cover. He said, "It might be in a scrap pile somewhere, it might be in Japan."

Roger Zimmerman, professor of civil engineering at New Mexico State University testified that a gap of ¾ of an inch existed between the cover and the ring and that a portion of the edge of the cover had worn away. When asked to state what caused the manhole cover to pop out, he answered:

> Based on my investigation of the photographs primarily, dealing with this particular thing, *my observation is that there was a mismatch in the size of the cover and ring.* And that due to this mismatch that there is a tendency for the cover to be able to rotate and pop up, in a sense, a vernacular of pop up.
>
> * * * * * *
>
> *The photograph on this indicates that there is an unusually large gap between the cover and the rim,* and that this, with the other geometry of the rim and the ring, could cause a potential where the cover could rotate.
>
> * * * * * *
>
> So I took the measurements on the photograph and I estimated this to be three-quarters of an inch * * * *
>
> * * * * * *
>
> [B]ut again this mismatch idea, *that possibly this cover and this rim weren't made for each other, because this height seems*

to be in the order up to three-eights or greater in height * * * *

* * * * * *

* * * Now, there's one other thing I wanted to point out before I finish. In Photograph No. 6, the one that shows the big gaps . . . *there appears to be an unequal, uneven circle around the outer rim of the cover.* You'll notice that the concentric rings that are there that are due to the castings are somewhat symmetrical, *but you'll notice that the rim is not symmetrical* * * * * [All emphases added.]

The manhole cover "popped out" because a "mismatch" existed in the size of the cover and ring, i. e., the cover and the ring may not have been made for each other due to the gap, and the worn out portion triggered the rotation of the cover upward. As the wheel of a car hit the cover, one side of the cover could be pushed down causing the other side to come upwards. When shown a photograph taken shortly after the accident, of the manhole cover in a tilted manner, Professor Zimmerman said: "I'm saying that could certainly happen." The cover when vertically rotated would stick 12 inches above the surface of the street.

All city sewer mains were maintained periodically. In the course of sewer maintenance, manholes were inspected. However, no written reports of those inspections were kept, and no record maintained of the last time this manhole was inspected. No record of repair was kept for the last 10 years. After the accident, the defendant began to keep a log of inspection of sewer lines.

Defendant raises four points in this appeal. They will be discussed *seriatim*:

A. *Defendant Town failed to install and maintain a properly fitting manhole cover.*

Defendant claims there was a complete failure to show that Silver City knew or should have known of the existence of this dangerous condition in time to repair the condition prior to plaintiff's accident; that specifically there was no evidence establishing the duration of the condition. We disagree. Actual or constructive notice is not applicable. The duration is known. The court asked the Superintendent of the Water and Sewer Department to state how long the manhole cover had been installed. He answered:

Well, my knowledge would be, let's say twenty, twenty-five years.

Whether actual or constructive notice is or is not necessary, depends on whether the municipality caused or did not cause the defect.

In *Wisener v. State*, 123 Ariz. 148, 598 P.2d 511 (1979), omitting citation of authorities, the court said:

* * * For a municipality to be liable for a failure to repair, it must have first received actual or constructive notice of the defect. *However, if the city itself caused the defect, or if the repairs or improvements were defective when made, notice of the defects is not a prerequisite to holding the municipality liable.* [Emphasis added.] [Id. 148, 598 P.2d 513.]

Actual or constructive notice loses its effectiveness when the city itself, which has full and complete charge of its streets, sidewalks, or systems, including the sewer system, creates or causes a defective or dangerous condition to exist. Its duty is to protect the public, not to cause injury to those who carefully operate motor vehicles on the streets or carefully walk on sidewalks.

The court instructed the jury that:

1. The City failed to install and maintain a properly fitting manhole cover.

Upon objection made, the court stated that proof of knowledge of any hazardous condition was not an issue in the case; that the City had installed it and maintained it, completely under their jurisdiction. We agree.

We begin with the proposition that if there is doubt as to whether a city is liable for its torts, the question will be resolved against the city. *Barker v. City of Santa Fe*, 47 N.M. 85, 136 P.2d 480 (1943). There is no doubt in the instant case.

The defense is not based upon whether the City "failed to install and maintain a properly fitting manhole cover"; but upon whether it had actual or constructive notice of the defective condition a sufficient length of time prior to the accident to enable it to put the street in a state of repair. It claims that New Mexico Supreme Court decisions follow this rule. It relies on *Napoleon v. City of Santa Fe*, 38 N.M. 494, 35 P.2d 973 (1934); *Bryan v. City of Clovis*, 54 N.M. 235, 220 P.2d 703 (1950); *Primus v. City of Hot Springs*, 57 N.M. 190, 256 P.2d 1065 (1953). We disagree.

Napoleon involved injuries sustained by slipping on snow covered ice in a sidewalk depression where the City had constructive notice of the defect. Plaintiff was allowed to recover. *Bryan* involved injuries by slipping on a ramp which led from a sidewalk to a street where the City had adequate notice. Plaintiff was allowed to recover. These cases do not support defendant's position. They are not cases where plaintiff was allowed to recover absent any actual or constructive notice. *Primus* does not support defendant's position. It involved a narrow street bordered by a high bank and arroyo where the driver of an automobile failed to make the turn. This dangerous condition was apparently created by the City. Omitting citation of authorities, the court said:

> A municipal corporation is required to exercise ordinary care to maintain its streets in a reasonably safe condition for travel in the usual modes by day and night.
>
> A municipality which has full and complete charge of its streets (and they have such charge in New Mexico except over state highways) is liable in damages for injuries sustained in consequence of its failure to use reasonable care to keep them in a reasonably safe condition for travel. [57 N.M. 194, 256 P.2d 1065.]

Defendant avoids other New Mexico cases which do not support its position. *Roswell v. Davenport*, 14 N.M. 91, 89 P. 256 (1907) held that where evidence was shown of the generally unsafe condition of a sidewalk, this evidence alone, would charge a municipal corporation with notice "or at least be evidence of, notice of the particular defect causing the injury." [Id. 96, 89 P. 256.] *Johnson v. City of Santa Fe*, 35 N.M. 77, 290 P. 793 (1930) holds that when a street's dangerous condition is caused by improvement of an open sewer trench being made by the City, it is unnecessary in an action for personal injury to allege or prove notice of such condition.

Pfleiderer v. City of Albuquerque, 75 N.M. 154, 402 P.2d 44 (1965) was a sewage back-up case. The court said:

> The appellant makes the contention that since the cause of the back-up was unknown and *that it did not have notice of the cause*, the city is not liable in damages. The appeal cannot be disposed of on this hypothesis. *While the fact that a sewer does back-up is not of itself proof of negligent operation, nevertheless, a municipality is liable for negligence in the operation and maintenance of its system.* [Emphasis added.] [Id. 155–6, 402 P.2d 44.]

The negligence was defendant's failure to exercise reasonable care to keep its sewer line free of obstructions.

The *Pfleiderer* rule is applicable here. The fact that the manhole cover had not rotated vertically before may not be evidence of negligence, but when defendant was negligent in the operation and maintenance of its system, by providing a defective cover, it was liable.

White v. City of Lovington, 78 N.M. 628, 630, 435 P.2d 1010 (Ct.App.1967) said:

> * * * The *Pfleiderer* opinion neither approves nor disapproves the notice requirement as a correct statement of law. In other jurisdictions there is a difference of opinion as to whether notice is a condition precedent to liability for failure to maintain a sewer. Annot., 59 A.L.R.2d 281, 304 (1958).

Later Case Service of this Annotation issued in 1976, mistakenly put *Pfleiderer* in the category that a municipality must have had actual or constructive notice. [P. 294.]

See, *City of Tucson v. Hughes*, 23 Ariz. App. 350, 533 P.2d 561 (1975) where *Pfleiderer* and *White* are followed. Municipal liability existed without proof of actual or constructive notice of sewer obstruction.

U.J.I.Civ. 13.17 states:

> A city has a duty to use ordinary care to maintain [streets] [sidewalks] in a reasonably safe condition.

A violation of this duty establishes municipal liability, irrespective of actual or constructive notice.

Immunity granted a municipality under the "Tort Claims Act"

> * * * does not apply to liability for damages resulting from bodily injury * * * caused by negligence * * * in the maintenance of or for the existence of any * * * street * * * * Section 41–4–11, N.M. S.A. 1978.

For the meaning of this language, see *Moore v. State*, 95 N.M. 300, 621 P.2d 517 (Ct.App.1980). A municipality is liable for damages for negligent maintenance of any existing street. "Maintenance" means "upkeep and repair." *Clay v. City of Los Angeles*, 21 Cal.App.3d 577, 98 Cal.Rptr. 582 (1971). In the instant case 21st Street was established by Silver City. The legislature directed the municipality to serve the public with due care in the maintenance of existing streets. Life or bodily injury is involved. No burden was imposed upon the public to prove notice of a defect or danger. It did not direct the public to investigate the basis of the defect or danger, search the City's records for prior accidents, times of inspection repair or improvements and then deposition the City's personnel to learn whether the City had actual or constructive notice. The only duty of the person injured is to prove the City's negligence.

Defendant had knowledge of its duties. The Council of the Town of Silver City adopted Ordinance No. 536 on November 6, 1977. With reference to manhole covers, Section 15 states:

> * * * All covers in the roadways shall be of a class to withstand the anticipated wheel loads. Covers and rims shall be two hundred fifty (250) pounds total weight *and shall be ground to insure full bearing for the entire circumference.* [Emphasis added.]

From the record in this case, the manhole cover should have been carefully inspected. Perhaps it should have been replaced before the accident, not afterwards.

Defendant relies on "manhole cover" cases such as *District of Columbia v. Jones*, 265 A.2d 594 (D.C.App.1970); *City of Paris v. Browning*, 55 Tenn.App. 104, 396 S.W.2d 372 (1965); *City of Phoenix v. Williams*, 89 Ariz. 299, 361 P.2d 651 (1961); *Thomas v. City of New York*, 131 N.Y.S. 697 (1911).

The *Jones* court said "* * * nowhere in the record is there a scintilla of evidence of what caused the cover to slip out of place * * * *" [265 A.2d 595.] The *Browning* case involved a temporary cover with a heavy weight on top, the weight having been removed by some unknown person. The *Williams* case held the City liable when a police officer was sent to investigate a call that the manhole cover was loose. He found it not loose. Later this manhole cover was imperfectly seated and plaintiff's leg slipped into the service hole. The *Thomas* case involved a person who walked into a hole in a park that was not covered by a grate. The City could not anticipate removal of the grate. *Thomas* was not followed in *Warner v. City of Albany*, 262 App.Div. 677, 31 N.Y.S.2d 75 (1941). Warner sat down upon a bench owned and maintained by the City. The bench tipped over because a pin on one side of the bench was missing. If the City failed to show that it exercised due diligence with respect to the bench, the plaintiff was not required to show notice. *Warner* illustrates the heavy burden placed on the City.

Forty years before *Thomas*, the New York rule on notice was established in *McCarthy v. The City of Syracuse*, 46 N.Y. 194 (1871), a defective sewer system case. The court said:

> The mere absence of this notice does not necessarily absolve the city from the charge of negligence. Its duty to keep its sewers in repair, is not performed, by

waiting to be notified by citizens that they are out of repair, and repairing them only when the attention of the officials is called to the damage they have occasioned by having become dilapidated or obstructed; but it involves the exercise of a reasonable degree of watchfulness in ascertaining their condition, from time to time, and preventing them from becoming dilapidated or obstructed. Where the obstruction or dilapidation is an ordinary result of the use of the sewer, *which ought to be anticipated* and could be guarded against by occasional examination and cleansing, the omission to make such examinations and to keep the sewers clear, is a neglect of duty which renders the city liable. [Emphasis added.] [Id. 197–8.]

McCarthy was followed in *Knoechel v. Inzirillo*, 16 N.Y.S.2d 680 (1940); *City of Tucson, supra*; *Rotella v. McGovern*, 109 R.I. 529, 288 A.2d 258 (1972); *City of Portsmouth v. Mitchell Mfg. Co.*, 113 Ohio St. 250, 148 N.E. 846 (1925).

The burden placed upon the City is a heavy one. Defendant installed the sewer system for the benefit of the public. It placed a manhole cover in the middle of a street. It had a duty at that time to have its engineer determine whether the cover was mismatched, whether over the years, it had worn to the point where it was dangerous to the traveling public, and whether reasonable inspections of this cover had been made and reported. Defendant produced no evidence of these facts. Defendant cannot sit idly by and escape liability by pushing the burden of actual and constructive notice on the public, injured by the negligence of defendant.

Defendant failed to install and maintain a properly fitting manhole cover and was thereby negligent. It is liable absent any proof of actual or constructive notice. It was charged with this notice.

B. *Plaintiff's evidence was adequate to prove a case against defendant.*

Defendant claims that portions of plaintiff's expert testimony cannot serve as an adequate basis to prove a case against defendant because he testified as to "possibly" not "probably," as causes of the so-called mismatch or gap. Professor Zimmerman testified from photographs taken by plaintiff. Zimmerman's estimate of the gap differed from that of plaintiff. This difference did not disturb the jury's verdict. The answer to defendant's argument is this: If defendant had not thrown the manhole cover in a stock pile somewhere or sent it to Japan, and then replaced it with a new cover and ring after the accident, it would have been available to determine the exact measurement of the gap as well as its worn condition. In the trial of cases, evidence is the controlling factor. The failure of defendant to produce the cover or make it available or for unaccountable reasons dispose of it, arouses a sense of injustice to members of the public who are injured.

Professor Zimmerman was learned in the use of photographs. He testified with reasonable certainty. It was acceptable to the trial court and the jury. We will not disturb the verdict because the expert used the word "possibly" twice. The use of this word was proper. Professor Zimmerman testified that:

> * * * but again his mismatch idea, that possibly this cover and this rim weren't made for each other * * * *
>
> * * * * * *
>
> Now, the other thing that could happen, although the photographs in my opinion don't support this, is that possibly again there is a mismatch * * * *

Douglas v. Sheridan, 26 N.J.Super. 544, 98 A.2d 632, 633 (1953) says:

> * * * *Since "may be" is equivalent to "possibly" or "probably" as distinguished from "certainty"* (Webster's New International Dictionary (2d ed. 1949), 1517), it would appear that the defendants are only required to show that there is a probability or possibility of liability to them from the third party in order to join the alleged joint tortfeasors as third-party defendants. [Citations omitted.] [Emphasis added.]

Eichenhofer v. City of Philadelphia, 248 Pa. 365, 93 A. 1065 (1915) involved a nine year old son whose death was caused by falling from a bridge. In a portion of a charge to the jury, the trial judge said in effect that the City would be negligent if it built a bridge with an open space "which would possibly allow people that were properly using the bridge to fall into that space." The court said:

> * * * "Possibly" is defined in the Standard Dictionary as:
>
> "(1) By any power, mental or physical, that is possible; (2) by extreme or improbable chance; perhaps."
>
> If this statement stood alone, it might constitute reversible error. Taken in connection with the other instructions contained in the charge, *it is apparent that "possibly" here was used in the sense of "perhaps,"* and the proper limitations were frequently repeated in subsequent portions of the charge. *In our opinion the jury could not misunderstand the direction on this point when the charge is considered as a whole* * * * * [Emphasis added.] [Id. 1067.]

Whether we substitute "may be" or "perhaps" for "possibly," Professor Zimmerman's testimony was proper and adequate to prove a case against defendant. In evidentiary matters, parties who seek reversible error on an isolated word used in a mass of expert testimony do not reach the conscience of a court. The occasional use of a wrong word by an expert witness might have a tinge of reversible error but when used during a wealth of testimony, it does not affect the jury during deliberations. Our duty is to study the case as a whole to determine whether reversible error exists and whether the party who complains had a fair trial. Use of the word "possibly" does not cause a ripple in this case. Dr. Zimmerman's testimony was substantial, competent and adequate to establish plaintiff's case.

C. *Failure to instruct on active or constructive notice was not erroneous.*

Defendant argues that the trial court disregarded the legal principles set forth in *Napoleon, Primus* and *Bryan* and committed reversible error when it refused to instruct the jury on actual or constructive notice. As shown in point (A), this claim is without merit.

D. *The mention of insurance does not warrant a mistrial or a new trial.*

After a long recross examination of plaintiff by defendant, the last question and answer given were:

Q. And it's true that Mr. Acosta did not indicate that he knew anything about any manhole problem there; isn't that true?

A. Well, he told me he didn't know anything about any manhole.

On redirect examination, plaintiff was asked this question to which he gave this answer:

Q. What else did Mr. Acosta tell you about this manhole?

A. Well, when we went up there to look at it, he told us that some man from the insurance had gone up to ask him which—

Defendant immediately objected. After some extensive argument on the mention of insurance, the trial court denied a motion for a mistrial. It told plaintiff that he ran the risk if the trial court allowed the trial to continue. Plaintiff withdrew the question and took the risk. The risk was well taken.

Defendant's argument consisted of speculative and conjectural effects that the mention of "insurance" would have upon the jury. The only authority cited is Rule 411 of the Rules of Evidence. It 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.

Rule 411 has codified the general rule that evidence that a defendant carries

liability insurance is inadmissible in an action for negligence because it is immaterial to the issues tried and prejudicial. *Mac Tyres, Inc. v. Vigil*, 92 N.M. 446, 589 P.2d 1037 (1979). See, *Grammer v. Kohlhass Tank & Equipment Co.*, 93 N.M. 685, 604 P.2d 823 (Ct.App.1979). However, to be prejudicial, a party must offer such fact in evidence, or intentionally use some circuitous method of informing the jury of liability insurance, followed by the admission thereof. If the fact is denied admission, the party whose insurance coverage has somehow been disclosed, may request the court to give UJI Civ. 2.8. This instruction explains the fact that insurance has no bearing on any issue and the jury must refrain from giving it any consideration. Defendant did not want this instruction given because it would focus the issue in the minds of the jury.

We have held, Sutin, J., dissenting, that where defense counsel's reference to insurance in an opening statement was improper, prompt admonishment thereof by the court was sufficient to avoid a mistrial because the admonishment eliminated any prejudicial effect. *Chavez v. Chenoweth*, 89 N.M. 423, 553 P.2d 703 (Ct.App.1976). Defendant did not want the trial court to admonish the jury.

Rule 411 is not applicable. Plaintiff's response to the question asked would have been proper if the word "insurance" had not been used. Lawyers in the trial of tort cases should advise their witnesses to refrain from mentioning the word "insurance" unless it is relevant to an issue set forth in Rule 411. Plaintiff's answer was irresponsive or inadvertent.

The rule appears to be uniform that if a lawyer propounds a question which calls for proper evidence, the fact that an irresponsive or inadvertent answer includes a reference to insurance will not be grounds for declaring a mistrial. Annot. *Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death action carries liability insurance*, 4 A.L.R.2d 761, 784, § 12 entitled "Voluntary, unexpected, unresponsive, and incidental answers; invited answers" (1949), Later Case Service (1971) and Supplement (1980). Citation of other authority is unnecessary.

Another factor that we mention in passing is that defendant was represented by an attorney other than defendant's city attorney or its staff. The record does not show any introduction of attorneys to the jury. If defendant's attorney was introduced to the jury as one who was neither a city attorney nor a member of his staff, nor an appointed special assistant attorney, but a nonresident, experience is a teacher that the jury might assume defendant was insured. Insurance coverage is commonplace knowledge.

The mention of "insurance" by plaintiff did not warrant a mistrial or new trial.

Defendant shall pay the costs of this appeal.

Affirmed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HERNANDEZ, C.J., dissents.

HERNANDEZ, Chief Judge (dissenting).

I respectfully dissent.

In my opinion, there is not sufficient evidence of causation to support the jury's verdict. Plaintiff, to establish the elements of his cause of action, should have shown negligence on the municipality's part in keeping its streets in a reasonably safe condition, and that this negligence caused an injury to plaintiff. *See Gallagher v. Albuquerque Metro.*, 90 N.M. 309, 563 P.2d 103 (Ct.App.1977). The mere fact that an unexplained accident occurs, or an accident is sustained, is not sufficient from which to infer negligence. *Waterman v. Ciesilski*, 87 N.M. 25, 528 P.2d 884 (1974).

The evidence, viewed in the light most favorable to plaintiff, shows that only Dr. Zimmerman advanced a theory explaining the City's possible negligence and how that

negligence might have caused plaintiff's injury. Dr. Zimmerman, from photographs taken by plaintiff, calculated that the gap between the manhole cover and the rim was three-quarters of an inch. He then concluded that the cover and rim were broken or worn to account for the gap, and that a gap of this size might cause the cover to rotate and pop out when the car drove over it. This theory was entirely based on Dr. Zimmerman's calculation of at least a three-quarter inch gap between the cover and rim, as he testified:

> I'm drawing my conclusions, based upon the physical situation that exists in those photographs * * * * So I took the measurements on the photograph and I estimated this to be three-quarters of an inch [the gap between the rim and manhole cover] * * * *

Q. If you are incorrect in that, being able to do that to that fine a degree, then all the rest of your discussions about dimensions, they all rise and fall on that one dimension, don't they?

A. That's right.

Q. And the rest of what you said becomes totally irrelevant information, if you're wrong about what the gap was?

A. I said that my main assumption was the gap * * * *

Plaintiff then testified that he had actually measured the gap between the cover and rim after the accident, and that the gap by his measurement was three-eighths of an inch and not three-quarters of an inch, as Dr. Zimmerman calculated. With this testimony, the factual basis of Dr. Zimmerman's opinion disappeared, and his opinion and conclusions became mere speculation which will not support a judgment. A jury may infer the existence of facts reasonably and logically resulting from facts proved, *Samora v. Bradford*, 81 N.M. 205, 465 P.2d 88 (Ct.App.1970); I see no reasonable inference which may be drawn from the facts as proven that would support a finding that the City's negligence caused plaintiff's injuries. Accordingly, I would remand with instructions to the trial court to vacate the judgment and enter a judgment in favor of defendant.

628 P.2d 1134

STATE of New Mexico, Plaintiff-Appellee,

v.

Doyle Michael SANDERS, Defendant-Appellant.

No. 4678.

Court of Appeals of New Mexico.

May 5, 1981.

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

Jeff Bingaman, Atty. Gen., Heidi Topp Brooks, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

Defendant appeals his conviction of custodial interference. Section 30–4–4, N.M.S.A.1978, reads:

A. Custodial interference consists of the taking from this state or causing to be taken from this state, or enticing to leave this state or causing to be enticed to leave this state, a child who is less than sixteen years of age by a parent with the intention of holding the child permanently or for a protracted period, knowing that he has no legal right to do so.

There is evidence that defendant took his daughter, under two years of age, to Texas with the intention of keeping the child there for a protracted period. Defendant contends the evidence is insufficient to show that defendant knew he had no legal right to do so. We agree that the evidence is insufficient and reverse the conviction. We discuss (1) "knowing"; (2) "legal right"; (3) parents' legal right to custody; and (4) the effect of two oral orders and one written order of the children's court. References to rules are to the Children's Court Rules, unless otherwise noted; statutory references are to N.M.S.A.1978, unless otherwise noted.

It appearing that the child had been left unattended, a police officer took the child into custody on August 10, 1979. Section 32–1–22(D). The officer turned the child over to the Department of Human Services (hereinafter "Department"), and thereafter, until October 14, 1979, the child was in the physical custody of the Department. Rule 3(e).

A neglect petition was filed by the Department on August 14, 1979; a hearing was held on this petition on August 23, 1979, at which defendant was present. Rule 53. At the conclusion of this hearing, Rule 54, the court orally ordered that the Department have temporary custody of the child; this temporary custody was to continue until there was an adjudicatory hearing under Rule 60. No written temporary custody order was ever entered.

Although the adjudicatory hearing was scheduled for October 2, 1979, and defendant had oral notice that the hearing was scheduled for that date, the hearing was actually held on September 28, 1979, ex parte, and without notice to defendant. At this hearing the court orally awarded the Department custody of the child for two years. A written custody order was filed October 16, 1979.

On October 14, 1979 defendant and his wife were permitted to visit the child. During this visit the child was taken from the building where the visit was taking place, and defendant took the child to Texas.

Knowing

Defendant cannot be guilty of violating § 30–4–4 unless he knew he had no legal right to take the child to Texas. Section 30–4–4 does not define "knowing".

Webster's Third New International Dictionary (1966) defines "knowing" as "something that is apprehended or capable of being apprehended". This meaning accords with New Mexico decisions. *In Adoption of Doe*, 89 N.M. 606, 555 P.2d 906 (Ct.App. 1976), "knowing" was equated with "awareness". *Taylor v. Hanchett Oil Co.*, 37 N.M. 606, 27 P.2d 59 (1933), states:

> "Knowledge" does not necessarily mean "actual knowledge," but means knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent man ought to exercise, to a knowledge of the actual facts. One who intentionally remains ignorant is chargeable in law with knowledge.

The "knowing" requirement of § 30–4–4 is met if defendant was actually aware of the court's custody orders or, in the exercise of reasonable diligence, should have been aware of the several custody orders.

Legal Right

Demers v. Gerety, 92 N.M. 749, 595 P.2d 387 (Ct.App.1978), rev'd on other grounds, 92 N.M. 396, 589 P.2d 180 (1978), defined "legal consent" as "actual or express consent according to law." *Kau v. Bennett*, 91 N.M. 162, 571 P.2d 819 (Ct.App.1977), defined "legally entitled to support" as "'entitled to support according to law.'"

The "legal right" requirement of § 30–4–4 means a right according to law. *Kau v. Bennett.*

Parents' Legal Right to Custody

"Parents have a natural and legal right to custody of their children. This right is prima facie and not an absolute right." *Roberts v. Staples*, 79 N.M. 298, 442 P.2d 788 (1968); see *Shorty v. Scott*, 87 N.M. 490, 535 P.2d 1341 (1975). Our Adoption Act defines " 'parental rights' " to mean "all rights of a parent with reference to a minor, including parental right to control . . . ." Section 40–7–2(I).

Defendant, the parent, had a legal right to the custody of the child in this case unless that right had been terminated, however temporarily, by appropriate authority.

Effect of Court Orders

There is no question that the court had authority to terminate defendant's legal right to custody of his child. Section 32–1–3(J) (1980 Cum.Supp.), and § 32–1–34(A)(3).

(a) Oral Order of August 23, 1979

At the August 23rd hearing, under Rule 54, on the Department's neglect petition, the trial court ordered temporary custody in the Department as follows:

> THE COURT: * * * This will be set for another hearing within forty-five days.
>
> * * * * * *
>
> THE COURT: * * * In the meantime, this Court is going to temporarily place the custody of your child with the . . . Department * * * and they will have the care, control and custody until a hearing is had in this cause.
>
> MRS. SANDERS: Within forty-five days?
>
> THE COURT: Can we give a date now? October the 2nd. The hearing will be October the 2nd, 1979, 9:00 o'clock.

No written order was entered as to this temporary custody. Assuming, at this point, that the oral order was legally sufficient to deprive defendant his right to custody of the child, this oral order had expired, by its own terms, when defendant took the child on October 14, 1979. If the order was to continue to the next hearing, that hearing was held on September 28, 1979; if the order continued until the scheduled hearing date of October 2nd, that date had passed; if the order continued for 45 days, the 45th day expired prior to October 14, 1979.

Defendant's conviction cannot be sustained on the basis of the oral order of August 23, 1979 because the knowledge attributable to defendant is knowledge that the oral order, even if legally effective, did not deprive defendant of his legal right to the child's custody on October 14, 1979.

(b) Oral Order of September 28, 1979

The hearing scheduled for October 2, 1979 was held on September 28, 1979, ex parte, without notice to defendant. At that hearing the court orally granted the Department's request that it be awarded custody of the child for two years. See § 32–1–38 (1980 Cum.Supp.).

Defendant testified that he did not learn of the results of the September 28th hearing until April of 1980. This testimony is uncontradicted; accordingly, defendant did not have actual knowledge of the court's oral order at the September 28th hearing when he took the child on October 14, 1979.

However, defendant testified that he telephoned "Social Services" (the Department) on October 2, 1979, asked whether the hearing was to be held on that date, and was informed that the hearing had been held on September 28th. Defendant's testimony supports the inference that he made little effort to become aware of what took place at the September 28th hearing. "I guess, Your Honor, you could just say that I was (pause) ignorant of the laws. I didn't think they could, you know, that all of this could happen without your finding out about it or getting a—some kind of paper."

Defendant's testimony also supports the inference that, in the exercise of reasonable diligence, he could have learned of the oral order of September 28th prior to October

14, 1979. Defendant is chargeable with knowledge of the oral order of September 28, 1979, which awarded custody of the child to the Department for two years.

We do not consider whether the oral order of September 28, 1979 was legally sufficient to deprive defendant of his legal right to custody because of a hearing held without notice to defendant. See *Wells Fargo Bank v. Dax*, 93 N.M. 737, 605 P.2d 245 (Ct.App.1979).

We do consider the legal sufficiency of the order of September 28th because it was oral, not written.

Rule 62(a) provides: "The judge shall sign a written judgment and disposition in neglect proceedings. The judgment and disposition shall be filed. The clerk shall give notice of entry of the judgment and disposition." This requirement, of a written and filed judgment, is not an aberration; such is also required in civil and criminal proceedings. Rule of Civ.Proc. 58 provides for a written and filed judgment: "[N]o judgment shall be effective for any purpose until the entry of same, as hereinbefore provided." *Navajo Development Corporation v. Ruidoso Land Sales Corporation, Inc.*, 91 N.M. 142, 571 P.2d 409 (1977). See also R.Crim.Proc. 46(a).

Chargeable with knowledge of the oral order of September 28, 1979, defendant subjected himself to the possibility of contempt proceedings. *State ex rel. Bliss v. Casarez*, 52 N.M. 406, 200 P.2d 369 (1948). However, defendant's legal right to custody of the child did not end until entry of, and the giving of, notice of a judgment in compliance with Rule 62(a). Compare *State v. Morris*, 69 N.M. 89, 364 P.2d 348 (1961); *Wray v. Pennington*, 62 N.M. 203, 307 P.2d 536 (1956); *Quintana v. Vigil*, 46 N.M. 200, 125 P.2d 711 (1942).

■ Defendant's conviction cannot be sustained on the basis of the oral order of September 28, 1979 because the order, as to custody, was not effective until there was compliance with Rule 62(a). The order, being oral, did not deprive defendant of his legal right to custody of his child.

(c) The Written Order of October 16, 1979

A written order referring to the September 28, 1979 hearing found that the child was neglected and purported to transfer custody to the Department for two years. This order was entered October 16, 1979. We do not consider that no notice of entry was given as to this order. See Rule 62(a).

The State claims, on appeal, that this written order should be considered to have been entered nunc pro tunc as of September 28, 1979. We doubt that this order could properly have been considered as entered nunc pro tunc. See *Mora v. Martinez*, 80 N.M. 88, 451 P.2d 992 (1969); *Gonzales v. City of Albuquerque*, 90 N.M. 785, 568 P.2d 621 (Ct.App.1977). However, the answer to the State's contention is that the court did not enter the order nunc pro tunc, and the court instructed the jury that it was "not to take into account the order I signed on October the 16th, 1979."

■ Defendant's conviction cannot be sustained on the basis of the written order of October 16, 1979, having been entered two days after defendant took the child.

■ Neither the oral orders nor the written order provide a basis for sustaining the conviction. Defendant's conviction is reversed; the cause is remanded with instructions to discharge defendant.

IT IS SO ORDERED.

HENDLEY and ANDREWS, JJ., concur.

628 P.2d 1139

Lola LOPEZ, Plaintiff-Appellee,

v.

SEARS, ROEBUCK AND COMPANY, Defendant-Appellant.

No. 5086.

Court of Appeals of New Mexico.

May 12, 1981.

Charles B. Larrabee, Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for defendant-appellant.

M. Terrence Revo, P. C., Albuquerque, for plaintiff-appellee.

OPINION

WOOD, Judge.

This appeal involves a default judgment in a worker's compensation case. Plaintiff's claim was filed September 24, 1980 and a copy of the complaint was received by defendant on September 26, 1980. No answer was filed within thirty days. Plaintiff's motion for a default judgment was filed November 6, 1980; an order declaring defendant in default was also entered on November 6, 1980. This order provided for a hearing to determine "injuries and disability"; thus, the effect of the order was to foreclose the question of liability to pay compensation. Plaintiff, by letter dated November 7, 1980, informed defendant of entry of the default judgment. Defendant's motion to set aside the default judgment was filed November 25, 1980. We do not know when this motion was heard by the trial court; an order denying defendant's motion was filed March 16, 1981.

This Court's order of March 25, 1981 granted defendant's application for an interlocutory appeal and provided:

> Plaintiff shall file * * * a written memorandum showing cause why this Court should not summarily reverse the district court's order of March 16, 1981. *Springer Corporation v. Herrera*, 85 N.M. 201, 510 P.2d 1072 (1973); *Gengler v. Phelps*, 89 N.M. 793, 558 P.2d 62 ([Ct.App.] 1976); *Rogers v. Lyle Adjustment Co.*, 70 N.M. 209, 372 P.2d 797 (1962).

The trial court's order questioned whether the civil rules and decisions under those rules apply to defaults in compensation cases. Plaintiff's memorandum correctly concedes that the general law on defaults applies in compensation cases.

Section 52–1–34, N.M.S.A.1978, states:

> The Rules of Civil Procedure for the District Courts * * * shall apply to all claims * * * under the * * * Compensation Act [52–1–1 to 52–1–69 NMSA 1978] except where provisions of the * * * Compensation Act directly conflict with these rules, in which case the provisions of the * * * Compensation Act shall govern.

There is no claim that any provision of the Compensation Act conflicts with the default judgment rule, R.Civ.Proc. 55, and the rule for relief from a judgment, R.Civ. Proc. 60. Those rules, and decisions applying them, apply to a default in a compensation case.

Plaintiff's memorandum states that there is no record of the hearing on defendant's motion to vacate the default judgment; "the Court must review what is available." The material before us consists of defendant's motion to vacate, copies of letters exchanged between defendant and plaintiff's attorney in July, 1980, an affidavit of defendant's personnel manager, copies of medical reports and a proposed answer by defendant.

The above items were a far stronger showing than was made in *Springer Corporation v. Herrera*, supra, for setting aside a default judgment; *Springer* held that the trial court erred in failing to set aside the default judgment. Defendant's showing, uncontroverted in the record before us, is (1) that the failure to file a timely answer resulted from excusable neglect, mistake and inadvertence; the failure to file occurred because of a procedural mix-up during the time the employee who looked after compensation claims was on vacation; and (2) meritorious defenses involving statutes of limitation and no accidental injury. The trial court abused its discretion in denying the motion to set aside the default judgment.

The cause is remanded with instructions to vacate the order of default and to permit the filing of defendant's answer.

IT IS SO ORDERED.

HERNANDEZ, C. J., concurs.

LOPEZ, J., dissents.

LOPEZ, Judge (dissenting).

I agree that the Rules of Civil Procedure relating to default judgments apply to Workmen's Compensation cases. I have read the record and I do not find any evidence of excusable neglect, mistake, or inadvertence on the part of the defendant to justify a reversal. At best, defendant has shown to me that, while Christine Turner was on vacation, presumably nobody else could handle workmen compensation cases in the Albuquerque store. Defendant should have had someone else to assume this responsibility while she was gone. I do not see any evidence of a meritorious defense to justify reversal. The question of disability and payment of benefits is yet to be litigated later on.

I would affirm the trial court's judgment.

628 P.2d 1140

Donna EMERY and Carl Emery, Individually and on behalf of Steven Emery, a Minor, Plaintiffs-Appellants,

v.

UNIVERSITY OF NEW MEXICO MEDICAL CENTER, Defendant-Appellee.

No. 4903.

Court of Appeals of New Mexico.

May 12, 1981.

Harold Worland, Duhigg & Cronin, Albuquerque, for plaintiffs-appellants.

W. Robert Lasater, Jo Saxton Brayer, Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for defendant-appellee.

OPINION

WOOD, Judge.

This appeal involves the notice provisions of § 41–4–16, N.M.S.A.1978. We discuss: (1) procedural matters; (2) actual notice; and (3) when the notice provision began to run.

The pertinent provisions of § 41–4–16, supra, are:

> A. Every person who claims damages from the state or any local public body under the Tort Claims Act [41–4–1 to 41–4–25 NMSA 1978] shall cause to be presented to the risk management divi-

sion for claims against the state, the mayor of the municipality for claims against the municipality, the superintendent of the school district for claims against the school district, the county clerk of a county for claims against the county, or to the administrative head of any other local public body for claims against such local public body, within ninety days after an occurrence giving rise to a claim for which immunity has been waived under the Tort Claims Act, a written notice stating the time, place and circumstances of the loss or injury.

B. No suit or action for which immunity has been waived under the Tort Claims Act shall be maintained and no court shall have jurisdiction to consider any suit or action against the state or any local public body unless notice has been given as required by this section, or unless the governmental entity had actual notice of the occurrence. The time for giving notice does not include the time, not exceeding ninety days, during which the injured person is incapacitated from giving the notice by reason of injury.

The complaint alleges that Donna gave birth to Steven while Donna was a patient at defendant hospital; that defendant, through its agents and employees, was negligent in the care of Steven with the result that Steven suffered brain damage. Defendant asserted, as an affirmative defense, that plaintiffs failed to comply with § 41–4–16, supra.

Procedural Matters

(a) We make no distinction between the plaintiff-parents and the plaintiff-infant without deciding whether such a distinction might be appropriate in another case.

(b) The complaint alleges that defendant is a "division" of the State of New Mexico not qualified under the Medical Malpractice Act. The answer admits that defendant is not a "qualified" health care provider, see § 41–5–5, N.M.S.A.1978, but denies that defendant is a division of the state. The written notices given by plaintiffs were given both to the state and to the county. Those notices refer to a claim against Bernalillo County Medical Center. There is no contention that a distinction should be made between defendant and the Bernalillo County Medical Center, and such a distinction is not considered in deciding the appeal.

(c) Plaintiffs moved for a hearing on the defense of noncompliance with § 41–4–16, supra, asserting that such a hearing "would be despositive [sic] of Plaintiffs' claims." At the hearing, the court and counsel treated plaintiffs' notices as a "motion to dismiss the affirmative defense raised concerning the lack of notice . . . ." The motion would seem to be a motion under R.Civ.Proc. 12(f), to strike the defense as "insufficient", rather than a motion under R.Civ.Proc. 12(b)(6), to dismiss for failure to state a claim upon which relief could be granted. However, it is unnecessary to consider the proper characterization of plaintiffs' motion.

A motion to dismiss may be granted only when the claimant cannot be entitled to relief under any state of facts provable under the claim. *Candelaria v. Robinson*, 93 N.M. 786, 606 P.2d 196 (Ct.App. 1980). A motion to strike a defense as "insufficient" raises the question of the legal sufficiency of the defense. See *Harrison v. Lucero*, 86 N.M. 581, 525 P.2d 941 (Ct.App.1974). The notice defense is accorded by § 41–4–16, supra; it is a defense under which a defendant might be entitled to relief against plaintiffs' claim and, thus, a defense not to be stricken as insufficient as a matter of law. Our point is that regardless of how plaintiffs' motion might be characterized, it could not be decided as a matter of law in this case.

(d) At the hearing on plaintiffs' motion, counsel for both parties made an occasional reference to a factual matter, but nothing was presented to the court which could be considered as evidence of the facts. Most of the argument went to the legal meaning of § 41–4–16, supra. After listening to this argument, the trial court denied the right of plaintiffs to proceed "based upon the 90 day notice". This was a ruling that the notice requirement of § 41–4–16,

supra, was not met as a matter of fact. The arguments of counsel are not evidence. *Phillips v. Allstate Ins. Co.*, 93 N.M. 648, 603 P.2d 1105 (Ct.App.1979); see *State v. Edwards*, 54 N.M. 189, 217 P.2d 854 (1950); U.J.I. Civ. 1.6(6). There being no evidence on which to decide the notice defense as a matter of fact, this oral ruling of the trial court was erroneous.

(e) Early in his argument, plaintiffs' counsel referred to an affidavit. After the trial court's oral ruling denying plaintiffs' counsel the right to proceed, counsel asked for permission to file the affidavit. Permission was granted; the trial court told plaintiffs' counsel to "[f]ile your affidavit". After the affidavit was filed, defendant's counsel was to "present your order, which will be signed—". Compare *Johnsen v. Fryar*, (Ct.App.) No. 4477, decided October 2, 1980 (St.B.Bull. Vol. 19, No. 45 at 1024, cert. granted November 21, 1980).

(f) The affidavit, together with attachments purporting to be copies of written notices to the state and county and copies of medical records, was filed August 29, 1980. Over a month later an order was entered dismissing plaintiffs' complaint with prejudice.

Plaintiffs rely on the affidavit and attachments to show that dismissal was erroneous. Defendant contends these items cannot properly be considered. If this contention is correct, then the trial court's order must be reversed because there would be no factual basis for the order.

(g) Defendant claims that the affidavit and attachments were not before the trial court at the time of the hearing. This argument overlooks the fact that permission was granted to file the affidavit. Defendant asserts the contents of the affidavit and attachments went beyond the subject matter of the trial court's permission. Defendant had more than 30 days to raise such an objection, but did not do so. Defendant also complains that the contents of the attachments are not in the proper form to be considered. No such objection was raised to the trial court. These contentions not having been raised in the trial court, they will not be considered. See *Cordova v. City of Albuquerque*, 86 N.M. 697, 526 P.2d 1290 (Ct.App.1974).

The affidavit and attachments were before the trial court without objection on defendant's part. These items converted the "motion to dismiss" hearing into one for summary judgment, see R.Civ.Proc. 12(b), and the order dismissing with prejudice was a summary judgment in favor of defendant.

Actual Notice

Section 41–4–16(A), supra, is a provision for written notice to the state or local public body against whom the claim is made. Section 41–4–16(B), supra, states a jurisdictional bar to suit unless the required notice has been given "or unless the governmental entity had actual notice of the occurrence." Actual notice of the occurrence in § 41–4–16(B), supra, which excuses written notice, is similar to actual notice of the occurrence excusing written notice in § 52–1–29(B), N.M.S.A.1978, of our workmen's compensation statute; these provisions should be interpreted similarly. See *Martinez v. City of Clovis*, 95 N.M. 654, 625 P.2d 583 (Ct.App.1980). If defendant had actual knowledge of the incident on which plaintiffs' claim is based, written notice was excused. *Beckwith v. Cactus Drilling Corporation*, 84 N.M. 565, 505 P.2d 1241 (Ct. App.1972).

One of the attachments to plaintiffs' affidavit is a letter to the plaintiff-parents. The letter has a letterhead "BERNALILLO COUNTY MENTAL HEALTH/MENTAL RETARDATION CENTER—The University of New Mexico Mental Health Programs". It is signed by a "Nurse Specialist". The letter refers to Steven's problem with "movements, mainly because of the brain damage he sustained shortly after he was born." The letter states that Steven's mental abilities are "delayed"; that he was acting like a younger child; "[t]his also is because of the brain damage he sustained after birth." Another attachment is a "DISCHARGE SUMMARY" showing Steven was discharged from the hospital on March 26, 1979. This summary states:

> Approximately 24 hours of age the baby experienced some sort of insult with a questionable seizure activity noted. After the next 5 days the baby was in a state of semi-coma with very little spontaneous movement. EMI scan on 3/7 showed equivocal increase of coefficients in the left frontal lobe representing either a small focal acute hemorrhage or infarct.

The foregoing is the showing made by plaintiffs who were *opposing* dismissal of their claim on the basis of lack of notice. Defendant, who was seeking a judgment sustaining its defense of noncompliance with § 41–4–16, supra, had the burden of showing an absence of a fact issue on the question of non-compliance. *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972). Defendant did not make such a showing; it presented nothing to show an absence of a factual issue except its counsel's argument: "There's nothing in the medical records, as far as I can find, that would really give the state or its agents any notice that there was anything that went wrong here . . . ." We have previously pointed out that arguments of counsel are not evidence.

The only showing in the record is that there was a question of fact as to whether defendant had "actual notice" of the occurrence on which plaintiffs' claim is based. There being a question of fact as to actual notice, summary judgment in favor of defendant was erroneous.

When the Notice Provision Begins to Run

Steven was a premature child. Plaintiffs' affidavit states that early on the morning of March 2, 1979, while Donna was gowning for a visit with Steven,

> an alarm went off, hospital personnel were working on Steven, she [Donna] saw that the heart rate indicator showed that Steven's heart had stopped. She was told to go into another room, and was subsequently advised by one of the hospital personnel that a medical student had inserted a tube that was supposed to go into Steven's throat, into one lung, and that this had caused the problem.

Defendant contends the incident of March 2, 1979 is the "occurrence" on which plaintiffs' claim is based, and that no written notice was given within 90 days of this occurrence.

Plaintiffs respond that although the discharge summary reports "some sort of insult" to Steven when he was approximately 24 hours old, the hospital records have no mention of brain damage until the physician with whom the parents met on November 7, 1979 raised the question in the records after the parents expressed their concern with Steven's development. "Brain damage?" is again noted in the hospital record after the parents' visit of November 21, 1979. Although brain damage is raised as a question in the hospital records in November, 1979, the affidavit states that plaintiffs were never advised of this brain damage as a possibility. "At the time of the January 24, 1980 visit, we were first advised that Steven did definitely have brain damage and that it was probably related to the incident in the hospital following his birth." Thereafter, the parents received the letter of February 6, 1980 from which we quoted in discussing actual knowledge. Plaintiffs' written notices, to the state and county, are dated February 29, 1980. On the basis of the items in this paragraph, plaintiffs contend their written notices were timely.

Section 41–4–16(A), supra, requires a written notice "within ninety days after an occurrence giving rise to a claim for which immunity has been waived under the Tort Claims Act . . . ." Plaintiffs' claim is one for which immunity has been waived, § 41–4–9, N.M.S.A.1978. Defendant's contention, that the 90–day notice provision runs from the "occurrence", gives no effect to the statutory language—"occurrence giving rise to a claim". More than an occurrence is involved; compare the difference in the occurrence language of § 41–4–16(A) and (B), supra.

In *Peralta v. Martinez*, 90 N.M. 391, 564 P.2d 194 (Ct.App.1977), we considered a statute of limitations that began to run

from the "injury" and held that the limitation period began to run "from the time the injury manifests itself in a physically objective manner *and* is ascertainable." (Emphasis in original.) In so holding, we pointed out that "there is no cause of action for malpractice until there has been a resulting injury."

If there was an occurrence, as plaintiffs contend, on March 2, 1979, that occurrence did not give rise to a claim until there was an injury. If *Peralta v. Martinez* may be applied, the time period for notice did not begin to run until the injury manifested itself in a physically objective manner *and* was ascertainable.

Defendant asserts that *Peralta*, supra, may not be applied because it involved a statute of limitations rather than a notice, required as a contention precedent to suit. Defendant states: "Although cases interpreting a medical malpractice statute of limitation may be of value in interpreting the statute of limitations provision in the Tort Claims Act, they are of no value in interpreting the notice of claims provision."

The notice provision considered in *Yotvat v. Roth*, 95 Wis.2d 357, 290 N.W.2d 524 (Ct.App.1980), provided that notice was to be given within 90 days " 'of the event causing the injury' ". *Yotvat* held this provision was a "notice of injury statute .... If the [date of] discovery rule is to apply to a notice of injury statute, this is as much a policy decision to be implemented by legislation as is application of the discovery rule to statutes of limitation."

New Mexico, like Wisconsin, has recognized the similarity between notice statutes and statutes of limitation. *Espanola Housing Authority v. Atencio*, 90 N.M. 787, 568 P.2d 1233 (1977). However, unlike Wisconsin's decision in *Yotvat v. Roth* to leave the matter to the Legislature, New Mexico, in *Peralta v. Martinez*, supra, applied a "manifestation and ascertainable" rule in interpreting a statute of limitations.

An approach similar to that of *Peralta v. Martinez* was taken by the United States Supreme Court. *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979). *Kubrick* considered a statute requiring that a claim be presented in writing " 'within two years after such claim accrues.' " *Kubrick* held that the claim accrued when the plaintiff knew both the existence and cause of his injury, and not when plaintiff knew that the acts inflicting the injury might constitute medical malpractice. See also *Paul v. State*, 88 Misc.2d 972, 389 N.Y.S.2d 277 (1976).

A defendant in a suit under our Tort Claims Act has two "time" defenses, a notice requirement as well as the statute of limitations, § 41–4–15, N.M.S.A.1978. Section 41–4–15(A) has language similar to, and § 41–4–15(B) has language identical to, the language of § 41–4–16(A), supra—"occurrence giving rise to a claim".

In light of the similarity of language between §§ 41–4–15 and 41–4–16, we do not agree that *Peralta v. Martinez*, supra, should not be considered; rather, we view the *Peralta* decision as applicable precedent. Following *Peralta*, there was no occurrence giving rise to a claim until Steven's injury manifested itself in a physically objective manner *and* was ascertainable. The affidavit and attachments to the affidavit show this to be a question of fact. Defendant presented nothing showing an absence of a factual issue and, thus, did not meet its burden under *Goodman v. Brock*, supra. It was not entitled to judgment in its favor on this issue.

The order dismissing plaintiffs' complaint is reversed. The cause is remanded for proceedings consistent with this opinion. Plaintiffs are to recover their appellate costs.

IT IS SO ORDERED.

WALTERS, J., concurs.

SUTIN, J., specially concurring in result.

SUTIN, Judge (specially concurring in result).

I specially concur in the result.

I specially concur solely to attempt to protect plaintiffs' rights although these

rights may have been lost in accordance with our Rules of Civil Procedure and judicial announcements.

Judge Wood's opinion has disregarded the issues raised in the trial court, cast aside defendant's excellent and provocative brief and created a non-existent summary judgment. The purpose of the opinion was to discover some procedural method that would preserve plaintiffs' rights in order to effect "justice" as the public understands it—the right to be heard in court. Parties should not suffer the loss of this right if some reasonable method can be devised to overcome serious errors committed in the trial court. I choose to take the route that defendant's second defense be stricken from the answer.

A. *The trial court did not enter a summary judgment.*

On June 26, 1980, plaintiffs erroneously sued defendant under the Medical Malpractice Act for injuries suffered by a minor child in defendant's hospital on February 29, 1978, 16 months prior thereto. Plaintiffs' complaint did not state a claim for relief because it did not show compliance with § 41–4–16, N.M.S.A.1978. But this issue was not raised in the district court. If it had been, perhaps plaintiffs would have filed an amended complaint to show compliance.

On July 18, 1980, defendant filed an answer, the second defense being:

> Plaintiffs have failed to comply with the provision of Section 41–4–1, et seq. (N.M.S.A. Comp., 1978) and particularly Section 41–4–16.

On July 28, 1980, plaintiffs filed a Motion for Hearing on Affirmative Defense as follows:

> Comes now the Plaintiffs and show to the Court that Defendant's Second Affirmative Defense, Failure to Comply with the provisions of Section 41–4–1, et seq. NMSA 1978 should be set down for hearing as it would be despositive [sic] of Plaintiffs' claim.

This motion was not accompanied by any affidavit nor any indication that testimony or depositions would be presented in its support.

On the same day, plaintiffs gave notice to defendant that on August 25, 1980, at 9:15 A.M., the motion would be heard. Plaintiffs estimated that the total time required for all parties and witnesses would be *15 minutes.* Defendant expected a "legal argument" hearing. At the hearing, plaintiffs made a two-pronged factual argument: (1) the 90 day notice, as provided in § 41–4–16, was waived due to the minority of the child; (2) the parents did not know of the injury and gave notice within 90 days after the knowledge was obtained. Most of plaintiffs' argument was spent on the unconstitutionality of § 41–4–16. Authority cited was *Turner v. Staggs*, 89 Nev. 230, 510 P.2d 879 (Nev.1973), 59 A.L.R.3d 81 (1974). The annotation is devoted to "*Modern Status of the Law as to Validity of Statutes and Ordinances Requiring Notice of Tort Claim Against Local Government Entity.*"

During the course of plaintiffs' argument, the statement was made that, unfortunately, although plaintiffs had almost 30 days to prepare one, plaintiffs did not yet have an affidavit prepared to present at the hearing. Plaintiffs' attorney had been in trial all week and did not "get a chance to get this affidavit prepared and filed." The trial court orally denied the right of plaintiffs "to proceed, based upon the 90 day notice" and requested an Order to that effect. Plaintiffs then requested that the court allow the filing of an affidavit. The request was allowed. The court stated that plaintiffs would first file the affidavit, then the Order would be signed. This allowance was an accommodation to plaintiffs.

On August 29, 1980, four days after the hearing, plaintiffs filed an affidavit with letters and hospital records attached as exhibits but not made upon personal knowledge. It was subscribed and sworn to on August 27, 1980, two days after the hearing. The record does not show mailing or delivery to defendant nor to the court. No request was made of the court to consider this affidavit and apparently the court did

not. On September 30, 1980, a month later, a final Order was entered which dismissed plaintiffs' complaint with prejudice.

By a series of convolutions unknown to a court of review, by twisting, turning and meandering, Judge Wood's opinion concluded:

> . . . These items converted the "motion to dismiss" hearing into one for summary judgment, see R.Civ.Proc. 12(b), *and the order dismissing with prejudice was a summary judgment in favor of defendant.* [Emphasis added.]

In this fashion, defendant obtained summary judgment. It was accomplished by way of defendant filing an affirmative defense in its answer. This mystery I cannot solve. It requires the wisdom of Solomon and the dexterity of Houdini. The trial court dismissed plaintiffs' claim with prejudice for failure to give defendant notice as required by § 41–4–16. To convert it into a summary judgment is not a reasonable method of preserving plaintiffs' rights.

B. *Defendant's affirmative defense should be stricken from the answer.*

Section 41–4–16 provides that written notice shall be given "within ninety days after an occurrence giving rise to a claim." Otherwise, plaintiffs' claim is lost "unless the . . . [hospital] had actual notice of the occurrence." If the hospital "had actual notice of the occurrence," an action may be "commenced within two years after the date of occurrence resulting in loss, injury or death, except that a minor under the full age of seven years shall have until his ninth birthday in which to file." Section 41–4–15(A).

Defendant takes the position that the affidavit and exhibits filed late by plaintiffs should not be considered by this Court. To do so compels an affirmance of the judgment below. If the defense were based upon substantial evidence, I would agree. If, however, the defense were filed with knowledge that the hospital "has actual notice of the occurrence," then, it was not filed in good faith. Plaintiffs and defendant were in a sense *in pari delicto*, equally at fault. In the trial court, plaintiffs did not argue that defendant "had actual knowledge of the occurrence" as shown by the hospital records. This failure falls within the perimeter of inadvertence or lack of preparation. Defendant, on the other hand, knew that it "had actual knowledge of the occurrence" and remained silent. After the fact, all parties know that if the truth were disclosed to the trial court, the affirmative defense would have been stricken from the answer.

" 'Even where the contracting parties are in pari delicto, the courts may interfere from motives of public policy.' " *Dahms v. Swinburne*, 31 Ohio App. 512, 167 N.E. 486, 487 (1929). The same rule should be applied here. "The peculiar function of equity is to afford relief for wrong where there is no remedy or no adequate remedy at law." *Bullard v. Zimmerman*, 82 Mont. 434, 268 P. 512, 520 (1928).

An "occurrence" is an "event, incident, episode, circumstance," something that happens or takes place. The "occurrence" took place in the hospital and was recorded from the time of the child's birth on February 28, 1979, to the time of the last visitation on January 24, 1980, and a hospital report of February 6, 1980. The hospital "had actual notice of the occurrence" which gave rise to a claim. In its Answer Brief in this appeal, the hospital carefully avoided any mention of its actual knowledge.

True, we sit as a court of review to search the record for alleged errors committed in the trial court. On appeal, we do not consider questions which have not been passed upon below. *Miller v. Smith*, 59 N.M. 235, 282 P.2d 715 (1955); *State v. Quesenberry*, 72 N.M. 291, 383 P.2d 255 (1963). But, if in the record itself, we discover evidence such as hospital records, the truth of which is not denied by defendant, we do not sit idly by to deprive parties of fundamental rights. We must not allow "injustice" to prevail over "justice" in a court of law or equity. As a result, in an appeal, we cast aside the errors, omissions and mistakes made below and rules applicable thereto. This court is a judicial tribunal

engaged in the administration of justice. We adhere to a judicial attribute that parties should not suffer an injustice due to representation if a reasonable method can be found to avoid it.

This discussion does not cast any aspersions on the conduct of the trial court. It had no duty, in advance of a hearing, to study the case in order to resolve a perplexing problem of which it has no knowledge. In advance of a hearing, lawyers have a duty to submit memoranda to assist the court. In the instant case, the trial court had nothing before it other than arguments of lawyers. No request was made either that the trial court consider the affidavit and exhibits before a final order be entered, or that the order be set aside based upon this information.

The hospital's defense that plaintiffs failed to comply with § 41–4–16 should be stricken.

C. *Whether commencement of the notice provision is the day of occurrence is a question of fact.*

Section 41–4–16(A) reads in pertinent part:

> Every person who claims damages . . . under the Tort Claims Act . . . shall cause to be presented . . . *within ninety days after an occurrence giving rise to a claim* . . . a written notice stating the time, place and circumstances of the loss or injury. [Emphasis added.]

The statute is silent on the meaning of "an occurrence giving rise to a claim." It is a difficult and complex legal problem that demands a fair result to both the governmental entity and the person who claims damages.

Absent "actual notice of the occurrence" by the governmental entity, the notice provision is a condition precedent to the bringing of an action. The giving of the notice is jurisdictional. *Fry v. Willamalane Park & Recreation District,* 4 Or.App. 575, 481 P.2d 648 (1971); *Awe v. University of Wyoming,* 534 P.2d 97 (Wyo.1975); *Yotvat v. Roth,* 95 Wis.2d 357, 290 N.W.2d 524 (1980). See, *Espanola Housing Authority v. Atencio,* 90 N.M. 787, 568 P.2d 1233 (1977). It is not a statute of limitations. It creates a new liability unknown to the common law. It is a statute of creation that does not fix the time in which an action may be commenced. The time of commencement is fixed by a statute of limitations.

Avoiding the circumstances under which *Peralta v. Martinez,* 90 N.M. 391, 564 P.2d 194 (1977) became the opinion of this Court, Judge Wood held in this medical malpractice case that "the limitation period begins to run from the time the injury manifests itself in a physically objective manner *and* is ascertainable." [Id. 394, 564 P.2d 194.] Judge Wood now states:

> . . . If *Peralta v. Martinez* may be applied, the time period for notice did not begin to run until the injury manifested itself in a physically objective manner *and* was ascertainable.

In other words, a notice "within ninety days after an occurrence giving rise to a claim" may be synonymous with a notice within ninety days (after an occurrence) when an injury manifested itself in a physically objective manner and was ascertainable. By this analogy, § 41–4–16(A) was changed into a "notice of injury" statute. If so, *Yotvat, supra,* relied on by the hospital is directly in point.

In *Yotvat,* plaintiffs' complaint was dismissed for failure to show compliance with the notice statute and for lack of jurisdiction. Plaintiffs discovered that they had a claim within the 90 day period but did not give notice until some six days after the period had run. The Wisconsin statute provided that notice be given "within ninety days of the event *causing the injury* . . . giving rise to a civil action . . . ." [Emphasis added.] The court said that the statute "is a notice of injury statute . . ." and:

> We conclude that the period in which notice must be given . . . *runs from the event causing the injury . . . regardless when the event is discovered by the claimant.* [Emphasis added.] [Id. 528.]

The Wisconsin statute adds a factor that is absent from the New Mexico statute—

"the event causing the injury." An "event" that causes an injury is an event of such nature, force and effect that a reasonably prudent person knows or should know that it has resulted in what would be called a "medical" injury. A "pain" can be classified as injury. *Herndon v. Albuquerque Public Schools*, 92 N.M. 635, 593 P.2d 470 (Ct.App.1978).

In 1914, Justice Shelton, in the case of *In re Burns*, 218 Mass. 8, 105 N.E. 601, 603 (1914) defined "injury" in common speech that has been generally adopted. It reads:

> . . . In common speech the word "injury" as applied to a personal injury to a human being, includes whatever lesion or change in any part of the system *produces harm or pain or a lessened facility of the natural use of any bodily activity or capability.* If one by external violence had his optic nerve severed close to the brain, or its function destroyed so as to result in blindness, although nothing whatever had been done to the eyes themselves or to the structures immediately surrounding them, it yet would be said in common speech that his eyes had been injured to the point of uselessness. *Whatever part of the human body thus has been made inAPPLICable of its normal use so that practically it has ceased to be available for the purpose for which it was adapted, is certainly injured according to the common understanding of men. . . .* [Emphasis added.]

In re Fitzgibbons' Case, 374 Mass. 633, 373 N.E.2d 1174 (1978); *Workmen's Comp. v. Bernard S. Pincus Co.*, 479 Pa. 286, 388 A.2d 659 (1978); *Jennings v. Louisiana and Southern Life Ins. Co.*, 290 So.2d 811 (La. 1974); *Aetna Casualty and Surety Company v. Moore*, 361 S.W.2d 183 (Tex.1962); *Roper v. Kimbrell's of Greenville*, 231 S.C. 453, 99 S.E.2d 52 (1957); *Brown Shoe Company v. Reed*, 209 Tenn. 106, 350 S.W.2d 65 (1961); *Burlington Mills Corporation v. Hagood*, 177 Va. 204, 13 S.E.2d 291 (1941); *Wasmuth-Endicott Co. v. Karst*, 77 Ind. App. 279, 133 N.E. 609 (1922).

The "Notice of injury" statute requires an occurrence of such nature, force and effect that it "produces harm or pain or a lessened facility of the natural use of any bodily activity or capability." If the event is of such magnitude, or the injuries are of such degree as to compel notice as a matter of law, the 90 day notice commences to run from this event. If the event is trivial as a matter of law, one that is commonplace, ordinary, or insignificant, the 90 day notice does not commence to run even though casual or latent injuries subsequently develop into serious ones. If either event does or does not compel notice as a matter of law, it is proper to leave the matter to the jury under an appropriate instruction which states the plaintiff's duty to give notice in accordance with the statute. The jury shall say whether the circumstances of the event were such as would suggest to one of ordinary and reasonable prudence whether the 90 day notice commenced to run from the day of the event.

This rule is equally applicable under the New Mexico statute. It provides that notice shall be given "within 90 days after an occurrence giving rise to a claim." To give rise to a claim, the event must be of such magnitude, force and effect that it causes an injury. When this occurs as a matter of law, the 90 day notice commences to run the day of the event. Otherwise, the day of commencement becomes an issue of fact for the jury.

This fair and reasonable view is supported by *Southern Surety Co. v. Heyburn*, 234 Ky. 739, 29 S.W.2d 6 (1930); *Lennon v. American Farmers Mutual Insurance Co.*, 208 Md. 424, 118 A.2d 500 (1955); *Silver v. Indemnity Ins. Co. of North America*, 137 Conn. 525, 79 A.2d 355 (1951). These are insurance policy cases with provisions such as "any occurrence which might result in a claim," or notice "as soon as practical" which means an accident sufficiently serious to give rise to a claim for damages.

The reasoning is fluent. It all depends upon whether the occurrence is sufficiently serious to lead a person of ordinary intelligence and prudence to believe that it might give rise to a claim. The information about the occurrence ordinarily is peculiarly with-

in the knowledge of the person who seeks a claim for relief. Therefore, the duty is laid upon this person to give notice to the local government entity in accordance with law. No duty arises if the person, such as the mother of a minor child, is ignorant of the fact that an occurrence has taken place with reference to her child. It would not be reasonable to lay upon the mother the obligation to disclose information of which she is justifiably ignorant. The same is true if the mother knew the facts surrounding some event affecting her child which were trivial. The 90 day notice does not begin to run the day of the occurrence. As a result, no occurrence took place which gave rise to a claim within 90 days thereafter. Only, when a question of fact exists as to whether the occurrence gave rise to a claim, does the trier of the fact determine whether or not the 90 day notice commenced on the day of the occurrence.

This question of fact should be submitted to the jury.

The constitutional question has been left in abeyance. See *Martinez v. City of Clovis*, 95 N.M. 654, 625 P.2d 583 (1980), Sutin, J., specially concurring.

629 P.2d 231

UNITED NUCLEAR CORPORATION,
Plaintiff–Appellee,

v.

GENERAL ATOMIC COMPANY,
Defendant–Appellant,

and

Indiana & Michigan Electric Co.,
Defendant–Appellee.

UNITED NUCLEAR CORPORATION,
Plaintiff–Appellee,

v.

GENERAL ATOMIC COMPANY,
Defendant–Appellant,

and

Indiana & Michigan Electric Co.,
Defendant–Appellee.

Nos. 11988, 12052.

Supreme Court of New Mexico.

Aug. 29, 1980.

Rehearing Denied Oct. 23, 1980.

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Bigbee, Stephenson, Carpenter & Crout, Donnan Stephenson; Harry L. Bigbee, Santa Fe, James T. Paulantis, Albuquerque, Charles D. Olmsted, Santa Fe, Simpson, Thacher & Bartlett, Rogers M. Doering, New York City, for plaintiff–appellee United Nuclear.

Jones, Gallegos, Snead & Wertherim, James E. Snead, Santa Fe, for defendant–appellee Indiana & Michigan Elec. Co.

OPINION

PAYNE, Justice.

This is an appeal from a default judgment entered against General Atomic Company (GAC) in Santa Fe District Court for its alleged willful and bad faith failure to comply with the court's discovery orders.[1]

This case is by far the single largest litigation in the history of New Mexico, both in terms of the dollar value of the judgment, which approaches one billion dollars, and the sheer volume of the record, which contains more than 28,000 pages in the record proper, 13,000 pages of transcripts, thousands of documents, and over 100 depositions containing approximately 16,000 pages of testimony and 2,700 exhibits. The facts are largely disputed and are extremely complex. Although we begin with a general factual background and summary of the proceedings below, additional factual details are contained in the separate discussions of the issues raised on appeal.

This action was instituted by United Nuclear Corporation (United) against GAC, a partnership made up of Gulf Oil Corporation (Gulf) and Scallop Nuclear Corporation (Scallop).[2] Scallop is a wholly–owned subsidiary of Dutch–Shell Oil Company. As amended, United's complaint sought a declaratory judgment that two contracts under which United was to supply approxi-

1. This case has been the subject of a number of previous decisions of this Court: *United Nuclear Corp. v. General Atomic Co.*, 93 N.M. 105, 597 P.2d 290 (1979) (upholding trial court's refusal to stay its proceedings pending arbitration), *cert. denied*, 444 U.S. 911, 100 S.Ct. 222, 62 L.Ed.2d 145 (1979); *United Nuclear Corp. v. General Atomic Co.*, 91 N.M. 41, 570 P.2d 305 (1977) (upholding personal jurisdiction of trial courts), *rev'd, General Atomic Co. v. Felter*, 434 *Atomic Co. v. Felter*, 90 N.M. 120, 560 P.2d 541 (1977) (upholding injunction prohibiting the parties from instituting related actions in other courts), *rev'd General Atomic Co. v. Felter*, 434 U.S. 12, 98 S.Ct. 76, 54 L.Ed.2d 199 (1977); and *United Nuclear Corp. v. General Atomic Co.*, 90 N.M. 97, 560 P.2d 161 (1976) (upholding personal jurisdiction of trial court over GAC). In addition, this Court refused to consider the issue of the disqualification of United's counsel as either an appeal from a final judgment or as a petition for an extraordinary writ (No. 11,469, June 29, 1977, and No. 11,484, July 1, 1977, respectively).

In addition to the two decisions mentioned above which were taken to the United States Supreme Court, that Court has had this case before it on at least three other occasions. On May 30, 1978, the Supreme Court held that the trial court could not enjoin GAC from proceeding with its right to arbitration against United. *General Atomic Co. v. Felter*, 436 U.S. 493, 98 S.Ct. 1939, 56 L.Ed.2d 480 (1978). GAC applied for a stay of all proceedings in the trial court on the basis that the threat of sanctions under Rule 37 violated the act of state doctrine. This application was denied. *General Atomic Co. v. Felter*, 435 U.S. 920, 98 S.Ct. 1481, 55 L.Ed.2d 514 (1978). After sanctions were imposed, GAC sought immediate review by the Supreme Court of the sanctions order and default judgment. This petition was also denied. *General Atomic Co. v. Felter*, 436 U.S. 904, 98 S.Ct. 2233, 56 L.Ed.2d 402 (1978).

2. This action was originally filed on August 8, 1975 in Santa Fe District Court. Both GAC and its constituent partners, Gulf and Scallop, were named as defendants in that case. The case was removed to federal district court by gulf. On December 31, 1975, United voluntarily dismissed the case in federal court, and refiled it on the same day in Santa Fe State District Court, naming only the partnership as a defendant. It is this later case that is the subject of this appeal.

mately twenty–seven million pounds of uranium to GAC were void and unenforceable. The complaint alleged that GAC and Gulf committed fraud and economic coercion, breached their fiduciary duties to United, and violated the New Mexico Antitrust Act. United also contended that its performance under the contracts had been rendered commercially impracticable. GAC counterclaimed for actual and punitive damages for United's alleged violations of the New Mexico Antitrust Act, and for specific performance of the two contracts, or alternatively, for damages of almost eight hundred million dollars.

GAC impleaded Indiana and Michigan Electric Company (I&M), a public utility company which provides electrical service to customers in the states of Indiana and Michigan. GAC contended that if United's obligations to supply uranium to GAC were excused, GAC's obligations to supply uranium to I&M from the supplies United was to deliver should also be excused.[3] I&M counterclaimed against GAC for specific performance and for other relief.

The trial of this case began on October 31, 1977. It was terminated on March 2, 1978, when the trial judge entered a sanctions order and default judgment against GAC. The court found that GAC had exercised "the utmost bad faith in all stages of the discovery process." The court entered forty–eight recitals relating to GAC's discovery failures, twelve findings of fact as sanctions pursuant to N.M.R. Civ. P. 37 (b)(2)(i), N.M.S.A. 1978, and a default judgment under N.M.R. Civ. P. 37(b)(2)(iii), N.M.S.A. 1978.[4] The judgment invalidated United's uranium supply contracts with GAC, declared that United had no other obligations to deliver uranium to GAC, and struck GAC's defenses, counterclaims and cross–claims.

A hearing on damages followed, after which the court entered a final judgment, amended final judgment, and second amended final judgment. In addition to invalidating the United–GAC contracts, the court awarded damages to United of $8,264,723 (reduced by an offset for prepayments that had been made) and to I&M of $15,950,752. The court also granted specific performance of I&M's contract for the supply of five million pounds of uranium from GAC.

GAC appeals from the default judgment, arguing ten main grounds for reversal. We have consolidated these points in this opinion into the following five sections: (1) The propriety of the court's discovery orders; (2) GAC's non–compliance with those orders and the propriety of the sanctions entered for noncompliance; (3) the court's failure to disqualify United's counsel; (4) the trial judge's refusal to disqualify himself; and (5) the propriety of the remedies.

Before turning to the examination of the issues on appeal, we think it appropriate to comment on the conduct of all parties in these appellate proceedings. We have been faced with the difficult task of wading through an avalanche of motions and papers, much of which has done little to add to our understanding of this case or to expedite the ultimate resolution of it. Perhaps because of the longevity of this litigation, the acrimony which marked the proceedings in the trial court, or the monetary value of the judgment at stake, the over six hundred pages of appellate briefs filed, as well as the arguments of the attorneys in the hearings in this Court, have been filled with unnecessary "invectives, maledictions, and denunciations which we ignore." *State of Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370, 1372 (10th Cir. 1978), *cert. denied*, 439 U.S. 833, 99 S.Ct. 114, 58 L.Ed.2d 129 (1978).

3. Detroit Edison Company, another electric utility company, was also impleaded by GAC, but was dismissed as a party in March 1978 after it reached a settlement with GAC.

4. In 1979, most of the specific New Mexico Rules of Civil Procedure with which we are concerned were amended (e.g., Rules 26, 33, 34, 37). Because this case was decided in the court below prior to the adoption of these amendments, all citations in this opinion are to the former rules.

After having received the permission of this Court to file briefs which exceed by several times the length generally permitted by the Rules of Appellate Procedure, N.M.R. Civ. App. 9(k)(4), N.M.S.A. 1978, GAC and United resorted to the practice of adding additional argumentative material in a device called an appendix, without requesting or receiving permission from this Court. N.M.R. Civ. App. 9(b) and (k)(4). In addition to argument, the parties inserted other material from outside the record in these appendices, including a newspaper article and correspondence, contrary to the rules, N.M.R. Civ. App. 9(b), and to prior decisions of the Court. *General Services Corp. v. Board of Com'rs*, 75 N.M. 550, 552, 408 P.2d 51, 53 (1965); *Porter v. Robert Porter & Sons, Inc.*, 68 N.M. 97, 101, 359 P.2d 134, 137 (1961). These we have also ignored.

Although the briefs of all three parties are articulate forensic efforts, each, in one form or another, has failed to fully comply with the rules of this Court. Neither the significance of the issues involved nor the magnitude of the dollars at stake excuses noncompliance with those rules. We take this opportunity to serve warning on the bar that this Court fully expects compliance with its rules of procedure in general and its specific orders in particular, and will not hesitate to impose the sanctions provided for in N.M.R. Civ. App. 31, N.M.S.A. 1978, in order to secure adherence to the rules and to our orders.

I.

FACTUAL BACKGROUND

To understand the issues in this appeal we must begin with a more detailed factual summary than is usual. Many entities have interacted to create the conditions from which this case arose.

A.

THE GULF URANIUM ORGANIZATION

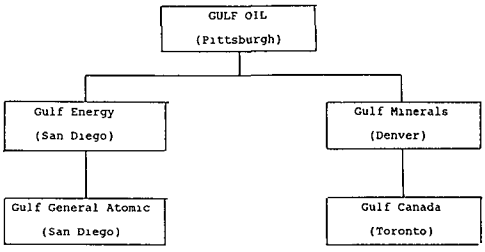
The principal contract at issue here was entered into by Gulf and United. GAC's predecessor was at one time a wholly-owned subsidiary of Gulf. Most of United's allegations against GAC involve alleged wrongdoing by Gulf. Therefore, an understanding of the issues on appeal must begin with a background of Gulf's activities in the uranium market.

In 1967, Gulf entered the uranium business by purchasing a subsidiary of General Dynamics known as General Atomic. General Atomic, which was a manufacturer of nuclear reactors, was renamed Gulf General Atomic and was operated as a subsidiary of Gulf located in San Diego, California.

In 1970, Gulf formed a new division, called Gulf Energy and Environmental Systems (Gulf Energy). Gulf General Atomic became a part of Gulf Energy. Gulf Energy was the Gulf entity involved in the marketing of uranium and the manufacture of nuclear reactors. Gulf was the only manufacturer in the United States of high temperature gas cooled reactors.

Beginning in 1967, Gulf undertook the exploration and development of uranium ore bearing properties. A Gulf division located in Denver, Gulf Minerals Resources Company (Gulf Minerals), was charged with this, the production end, of Gulf's uranium business. One of Gulf's first substantial uranium discoveries was made in 1967 in the Rabbit Lake area of Canada. Another wholly-owned Gulf subsidiary, Gulf Minerals Canada Limited (Gulf Canada), was responsible for the development of the Rabbit Lake uranium project. Gulf Minerals had administrative responsibility in the Gulf organization for Gulf Canada's operations.

The following chart outlines the organization, as of 1971, of those aspects of Gulf's uranium business operations which are essential to an understanding of this case.



In addition to its Canadian uranium reserves, Gulf, through Gulf Minerals, began to acquire substantial uranium reserves in the United States. By 1971, it had acquired the Mt. Taylor reserves in New Mexico, which contain the largest body of uranium ore in the United States. Through Gulf Energy, Gulf also began to purchase substantial quantities of uranium on the open market from other uranium producers. Two of such purchase agreements, those Gulf and GAC entered into with United, are the principal subjects of this litigation.

B.

THE CONTRACTUAL RELATIONSHIPS OF THE PARTIES

United is a major New Mexico uranium producer. Much of the uranium it produces is used in the nuclear reactors of public utilities. In the 1960's, United entered into the fuel fabrication market. Fuel fabrication is the process by which enriched uranium is manufactured into fuel clusters to power nuclear reactors.

In 1966, United entered into a contract to sell nuclear fuel to Commonwealth Edison, a commercial utility. It later contracted to sell fuel to I&M, and signed letters of intent to deliver fuel to Detroit Edison, Duke Power, Yankee Atomic and Consolidated Edison, all of which are also commercial utility companies. United also signed a letter of intent with Commonwealth Edison to supply it with additional fuel.[5]

By 1970, United's commercial nuclear fuels business required more capital than United had or could obtain on its own. In that year, United entered into negotiations with Gulf, through Gulf Energy, to form a joint commercial light water reactor fuel fabrication business. For its part, Gulf was interested in such a business as an outlet for its uranium supply and as an opportunity to enter the fuel market for such reactors, which might provide a hedge for its high temperature reactor business.

The negotiations between Gulf and United culminated in July 1971, with the formation of a jointly owned corporation called Gulf United Nuclear Fuels Corporation (Gulf–United). The purpose of Gulf–United was to manufacture and sell nuclear fuel for commercial power reactors. United contributed its expertise in the business and some of its facilities and employees. Gulf was to contribute capital. United assigned its rights under the utility contracts to Gulf–United, thereby obligating the new corporation to supply the utilities with uranium. United in turn agreed to supply the new corporation with the uranium needed to fulfill the utility contracts. This latter agreement will be referred to as the 1971 Supply Agreement. Gulf was to supply Gulf–United with one–half of the uranium required for each existing order and letter of intent, but, upon the advice of United's counsel, this obligation was made an option. Gulf owned fifty–seven percent of the capital stock of Gulf–United, and United owned the remainder.

From 1971 to 1973, Gulf–United was jointly operated by Gulf and United. During this period Gulf–United formalized two of the letters of intent. For reasons that are disputed, Gulf–United's business did not prosper. In the summer of 1973, United agreed to sell its interest in Gulf–United to Gulf (the Buyout Agreement). United and Gulf then entered into a new contract, the 1973 Supply Agreement. Pursuant to this contract, which cancelled and rescinded the 1971 Supply Agreement, United agreed to sell Gulf–United the uranium needed to supply the utilities. Gulf–United continued to be obligated to supply the utilities with uranium. Thus, the 1973 Supply Agreement basically replaced the 1971 Agreement, with an upward adjustment in the price.

In November 1973, Gulf–United was merged into Gulf. Gulf then entered into a

5. One issue in this case is whether United's so–called letters of intent with the utilities were actually non–binding letters of intent, or rather, binding contracts. We will refer to them here as letters of intent, and discuss the legal nature of them in Section II B, *infra*, of this opinion. However, collectively, the formal contracts and the letters of intent will be referred to as the utility contracts.

partnership with Scallop. That partnership, known as General Atomic Company (GAC), is the defendant here. Gulf transferred Gulf Energy, including Gulf General Atomic to the new partnership. In the spring of 1974, Gulf transferred the Gulf–United business operation, including the utility contracts and the 1973 Supply Agreement, to GAC. GAC thus became obligated to perform the utility contracts and acquired the right to receive uranium from United. In essence, GAC simply took over the operations of Gulf Energy and Gulf–United.

Later in 1974, the new partnership, GAC, entered into another contract with United, the 1974 Supply Agreement, whereby United became obligated to supply GAC with an additional three million pounds of uranium.

United contends that Gulf entered into the formation of Gulf–United and the 1971 Supply Agreement as part of an attempt to monopolize the uranium market, and with the specific intent of eliminating United as a competitor in the fuel fabrication and uranium mining industries. United contends that Gulf fraudulently promised to supply Gulf–United with capital and one–half of the uranium needed for the utility contracts. United alleges that as part of this monopolistic scheme, Gulf refused to honor its obligations, refused to permit Gulf–United to buy uranium on the open market, and forced United to supply all of the uranium necessary to meet Gulf–United's needs. United argues that by deliberately mismanaging Gulf–United and withholding capital and uranium, Gulf successfully forced United to sell its interest in Gulf–United to Gulf at terms Gulf dictated and to execute the 1973 Supply Agreement. United also alleges that Gulf, acting through GAC, planned and attempted to negotiate out of its obligations to the utilities, and to then resell the uranium which United was obligated to supply at prices that Gulf had fixed. Knowing that United was in desperate financial straits, Gulf and GAC are alleged to have sought to secure a security interest on United's Churchrock, New Mexico mine–the largest underground uranium mine in the United States–and the right to control production from that mine. GAC allegedly refused to give United any price relief. This impasse led to the filing of this case.

All of the foregoing alleged actions are asserted to have been part of a larger conspiracy to control uranium reserves in the United States. United contends that Gulf sought to accomplish this feat by tying up vast quantities of uranium through the contracts it entered into between 1972 and 1974 with other American uranium producers, in addition to the 1973 and 1974 Supply Agreements with United, and by acquiring, and then delaying the production of, uranium from Gulf's enormous Mt. Taylor reserves.

C.

THE INTERNATIONAL URANIUM CARTEL

Several months after this case was filed, United raised a new allegation—that Gulf's and GAC's monopolistic efforts were part of a worldwide conspiracy of certain international uranium producers to fix the prices, allocate the markets, and control the production of uranium. United's efforts to secure discovery of records relating to this international uranium cartel became the major focus of this litigation, and GAC's failure to supply cartel–related information was the principal basis for the sanctions order and default judgment entered by the trial court.

The precise facts regarding the development and operation of the cartel are not completely clear, largely because full cartel–related discovery was not made in this case. However, several matters are well established.

First, as GAC concedes, there was a uranium cartel made up of various international uranium producers, which operated from at least 1972 to 1975. Foreign governments, including those of Canada, South Africa, France and Australia, played some role in the formation and operation of the cartel. The nature of the roles played by

those governments, particularly by the Canadian Government, is a disputed question in this case, the resolution of which is critical to the disposition of one of the major issues raised by GAC on appeal. We will examine this question in Section II C, *infra*, of this opinion.

Second, it is established that Gulf, acting through Gulf Canada, was a member of the cartel no later than June 1972. It is also clear that the top executives of Gulf Energy, the immediate predecessor of GAC, were aware of the cartel and received information concerning its activities. At least two high–level officials of Gulf Energy attended one or more cartel meetings. All of these executives later became key personnel of GAC.

Third, the basic purposes of the cartel are unquestionably clear. GAC's counsel stated to the trial court:

> The purpose of [the cartel] was to set terms and conditions of sale. It was to set floor prices. And it was to set quotas and divide up who could produce how much. They were going to restrict supply. *It was in its intention a cartel in every sense of the word.* (Emphasis added.)

One of the Gulf attorneys who had advised Gulf that it was legal for it to join the cartel later told a Congressional subcommittee impaneled to investigate cartel activities: "There, of course, was never any doubt about what the 'cartel' intended to accomplish. It was to completely frustrate free competition." *International Uranium Cartel: Hearings Before the Subcomm. on Oversight and Investigation of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess., Serial No. 95–95, p. 89 (1977) [hereinafter cited as *Hearings on International Uranium Cartel*].

Fourth, between 1972, when the cartel apparently began, and 1975, when this suit was filed, the price of uranium in the United States increased from approximately $6.00 per pound to approximately $40.00 per pound.

Beyond these four established facts–the existence of the cartel, Gulf's active participation therein, the cartel's anticompetitive purposes, and the dramatic increase in uranium prices during the cartel's existence—there is little about the cartel that is not disputed by the parties. One of the principal disputes is whether the cartel has any relevance to the contracts at issue in this litigation, which will be discussed in Section II B, *infra*, of this opinion.

D.

HISTORY OF THE PROCEEDINGS IN THE TRIAL COURT

In Section III A, *infra*, of this opinion we will discuss in detail the chronology of the proceedings in the court below in the context of analyzing GAC's efforts to comply with the court's discovery orders. At this point, however, it is necessary to provide a brief outline of those proceedings in order to facilitate an understanding of the overall posture of the case and the various issues on appeal.

On December 31, 1975, United filed this action in Sante Fe District Court. On the same day, United served lengthy interrogatories on GAC. This set of interrogatories will be referred to as the First Set of Interrogatories. The interrogatories called for detailed information concerning the uranium and fuel fabrication businesses of Gulf, Scallop and GAC. Many of the interrogatories specifically asked for information from "the partnership and the partners." Neither the complaint nor the interrogatories specifically mentioned the international uranium cartel.

On April 5, 1976, GAC filed the first of two sets of answers to the First Set of Interrogatories. The answers provided no information on the cartel and virtually no information on the separate uranium business activities of Gulf and Scallop. The trial court eventually found these answers to have been "wholly inadequate and evasive."

During the summer of 1976, extensive discovery efforts were conducted by United. GAC produced its business records, but it did not produce documents which were in

the separate possession of Gulf or Scallop. On September 23, 1976, the Canadian Government promulgated the Canadian Uranium Information Security Regulations, which prohibited the release of cartel information from Canada.[6] One week later, United pointed out for the first time that GAC had failed to produce documents from Gulf and Scallop. GAC then contended that it was not obligated to produce records which were in the separate possession of the partners. *See* Section II A, *infra*. The trial court rejected this argument on November 30, 1976. The court held that both the partnership and the partners were subject to its discovery orders, and it warned that sanctions would be imposed if either the partnership or the partners failed to comply with those orders.

United then moved to compel production of partner documents and supplemental answers to the First Set of Interrogatories. GAC continued to assert that partner documents were not discoverable, and the court again rejected this argument at three different hearings in January 1977. It ordered GAC to provide supplemental answers and to produce partner documents by April 15, 1977.

In February 1977, United moved to compel production of cartel–related documents Gulf had produced in other litigation. GAC resisted production of these documents, once again rearguing the question of partner discovery. GAC also suggested for the first time that United's counsel, who had represented Gulf until November 1976 on its operations at Mt. Taylor, might have to be disqualified in this case. *See* Section IV, *infra*. On March 1, 1977, for the first time GAC specifically asserted that the Uranium Information Security Regulations were a bar to the discovery of cartel information. At a hearing on March 7, the court reiterated its previous rulings that Gulf was subject to its discovery orders, granted United's motion to produce the cartel records, and again warned that sanctions, including a default judgment, would be imposed if good faith discovery efforts were not made. GAC then formally moved to disqualify United's counsel. The court denied this motion. In March 1977, I&M, which had been joined as a party in January 1977, filed claims against GAC, specifically asserting Gulf's cartel activities as a basis for the relief it sought. GAC's supplemental answers were filed on April 15. They made no mention of the cartel.

In August 1977, United filed its Second Set of Interrogatories. This set was specifically addressed to the activities of the cartel. GAC filed objections to these interrogatories. The objections made no mention of the Uranium Information Security Regulations or any other Canadian secrecy laws. The court overruled most of the objections. GAC then filed answers to these interrogatories, which included the assertion that Canadian laws barred production of cartel documents.

United moved to compel further answers to the interrogatories and the production of cartel documents, and to have sanctions imposed. The trial court granted the request for further answers. The court found that GAC had not acted in good faith regarding the production of cartel documents up to that time. It ordered GAC to produce cartel records to the extent lawful, and to the extent that it was unlawful, to seek a waiver of Canadian nondisclosure laws. The court again warned that sanctions would be imposed if its order was not complied with.

GAC unsuccessfully sought permission from the Canadian Government to produce cartel documents located in Canada. GAC then submitted its second set of answers, which did not identify any cartel documents located in Canada or contain information from such documents.

Five days after the trial began, United again moved to compel the production of cartel documents and for sanctions for GAC's alleged discovery failures. At a hearing on November 8, 1977, the trial judge accused GAC of "stonewalling" infor-

6. Can.Stat.O. & R. 76–644 (1976). The Regulations were promulgated pursuant to the Canadian Atomic Energy Control Act, 1970, Can. Rev.Stat. c. A–19. Pertinent portions of the original Regulations are set forth in n. 41, *infra*.

mation. The following day, GAC moved to disqualify the judge. The motion was denied. *See* Section V, *infra*. The trial court, after a hearing, found that GAC had deliberately housed cartel documents in Canada in an attempt "to court legal impediments" to their production. It also found that GAC had violated its prior order to identify cartel documents, and it again ordered such identification.

In December 1977, United and I&M filed objections to GAC's second set of answers to the Second Set of Interrogatories and moved to compel further answers. The trial court granted this request. On February 1, 1978, GAC filed its third set of answers. Thereafter, United filed its fourth motion for a default judgment, in which I&M joined. The trial court granted the motion, and entered the sanctions order and default judgment which is the subject of this appeal. The trial court found all issues of liability against GAC and in favor of I&M and United. The court found that GAC had acted in bad faith throughout the discovery process, and had "willfully, intentionally and in bad faith covered up" "highly relevant" information concerning the cartel and Gulf's role therein. The court said that GAC's answers to the First Set of Interrogatories were "wholly inadequate and evasive," and that its series of answers to the Second Set of Interrogatories amounted to a willful, intentional, deliberate and bad faith failure and refusal to answer. *See* Section III, *infra*.

A lengthy trial on the question of damages was conducted following entry of the sanctions order and default judgment. *See* Section VI, *infra*. On May 16, 1978, the court entered a final judgment against GAC.

II.

PROPRIETY OF DISCOVERY ORDERS

The first area we examine is whether the trial court's discovery orders, which the court found GAC had willfully failed to comply with, were within the court's authority to enter. If, as GAC contends, the court's orders were invalid from the outset, then GAC could not have been sanctioned for its failure to comply with them.[7]

The orders involve the production of documents or the furnishing of information regarding the international uranium cartel. GAC contends that they were invalid for four reasons: (1) information and documents in the possession of the partners cannot be the subject of discovery orders in a case in which only the partnership, and not the individual partners, is a party; (2) the cartel documents and information are not relevant to any issue in this case; (3) adjudication of any issues regarding the cartel, and therefore, discovery orders directed at cartel–related information and documents, are barred by the act of state doctrine and the exclusive federal power over the conduct of foreign relations; and (4) the New Mexico Antitrust Act cannot be applied to the 1973 and 1974 uranium supply agreements, and therefore, the court was without jurisdiction to enter discovery orders based on appellees' allegations of violations of that Act. Each of these contentions will be separately discussed in the sections that follow.

A.

DISCOVERY OF PARTNER DOCUMENTS

GAC contends that a partner, who is not itself a party in a case brought against the partnership, may not be ordered to answer interrogatories under N.M.R. Civ.P. 33, N.M.S.A. 1978, or to produce documents under N.M.R. Civ.P. 34, N.M.S.A. 1978.

This issue arose when United served its First Set of Interrogatories on GAC. The

7. "If sanctions are imposed under Rule 37(b), . . . on appeal from the order imposing sanctions the appellate court will consider the propriety of the prior order for discovery." C. Wright and A. Miller, *Federal Practice and Procedure: Civil* § 2289, at 791 (1970) (footnote omitted). *See also Familias Unidas v. Briscoe*, 544 F.2d 182, 191 (5th Cir. 1976); *Gordon v. Federal Deposit Insurance Corporation*, 138 U.S.App.D.C. 308, 427 F.2d 578, 581 (D.C. Cir. 1970); *Hanley v. James McHugh Construction Company*, 419 F.2d 955, 957 (7th Cir. 1969).

interrogatories clearly called for information from "the partnership or partners." *See* Section III A, *infra*, and n. 80, *infra*. None of these interrogatories was objected to within the time provided by Rule 33.[8] GAC provided only limited information from the partners in its original answers to those interrogatories. During several months of document production that followed the filing of those answers, it did not produce any records from the partners' files. In September 1976, United brought GAC's failure to provide information from the partners to the attention of the trial court. In November 1976, the court ruled that the right to discovery extends to "a party partnership and the individual partners comprising the partnership, and the agents, servants, employees, directors and officers of a party or partner," and the court warned that sanctions would be imposed "for the failure of the defendant partnership *or either partner thereof* to comply with specific orders of the Court directing discovery." (Emphasis added.)

The court reiterated this ruling on at least five separate occasions in early 1977. It held that the partners "have the same obligation in relationship to discovery as the partnership," because "[t]he partnership is not an entity in and of the cognizable law." The court stated: "GAC has no substantive separate existence in law. It is not a separate legal entity." GAC then argued that even if the court could order production of partnership–related documents in the possession of the partners, it could not require the partners to produce "non–partnership documents." The court rejected this contention on at least two occasions.[9] Finally, in early March 1977, GAC began to produce documents which were in the possession of the partners. A year later, the default judgment was entered after GAC failed to produce all of Gulf's cartel records.

GAC's argument is based on the principle that discovery under Rules 33 and 34 is limited to parties to the case. GAC argues that a partnership is a separate legal entity, and as such, only it, the named defendant in this suit, rather than the non–party constituent partners, is subject to discovery under Rules 33 and 34.

We find it unnecessary to consider the extent to which a partnership is a separate legal entity as a matter of substantive partnership law, because we conclude that under Rules 33 and 34 the trial court properly ordered GAC to produce partner documents and to furnish information from the partners.

■ In construing Rules 33 and 34, we must begin with the notion that discovery is designed to "make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Procter & Gamble*, 356 U.S. 677, 682, 78 S.Ct. 983, 986–87, 2 L.Ed.2d 1077 (1958) (citation omitted). In light of that

8. As we discuss in Section III, *infra*, the failure to raise a timely objection to an interrogatory operates as a waiver of any objection a party might have. However, we address GAC's objection to the production of partner documents notwithstanding its failure to raise a timely objection both because the trial court did not rely on the principle of waiver and because it is a question that has apparently never before been specifically decided by any court in the United States. Our decision to decide the question on its merits in no way detracts from the significance to the issues discussed in Section III, *infra*, of GAC's failure to comply with the express provisions of Rule 33.

9. The distinction between partnership and non–partnership documents confuses the relevancy of the information under Rule 26(b) with its availability under Rules 33 and 34. It is one thing to say that non–partnership–related documents are not relevant, but quite another to say that they are incapable of being obtained. The trial court repeatedly made this crucial distinction. If the partnership business was conducted as part of a coordinated Gulf effort to monopolize the uranium market, as United contends it was, then various Gulf documents pertaining to production and marketing of uranium might be relevant, even though they did not directly pertain to what was ostensibly the partnership business. To permit the parties to determine what is related to the partnership business is to allow that party to make its own unilateral determination of the scope of discovery, which, of course, it may not do. *See United States v. Board of Trade of the City of Chicago, Inc.*, 18 F.R.Serv.2d 318, 319 (N.D. Ill. 1973).

policy, Rules 33 and 34 must be liberally construed in order to insure that a litigant's right to discovery is "broad and flexible." *Davis v. Westland Development Company*, 81 N.M. 296, 299–300, 466 P.2d 862, 865–66 (1970). *See also Goldman v. Checker Taxi Company*, 325 F.2d 853, 855 (7th Cir. 1963); *In Re Folding Carton Antitrust Litigation*, 76 F.R.D. 420, 423 (N.D. Ill. 1977); *Hart v. Wolff*, 489 P.2d 114, 117 (Alaska 1971).

Rule 33 provides that interrogatories may be served only on a party, but it states that the interrogatories must be answered by the party served, or "*if the party served is . . . a partnership, . . .* by any officer *or agent*, who shall furnish such information as is *available to the party*." (Emphasis added.) In an earlier opinion concerning this litigation, we noted that Gulf is a general agent of the GAC partnership. We stated: "The agency of a partner is the hallmark of that particular form of business or professional association." *United Nuclear Corp. v. General Atomic Co., supra*, 90 N.M. at 100, 560 P.2d at 164. *See* § 54–1–9A, N.M.S.A. 1978. If, under Rule 33, Gulf is obliged as an agent of GAC, to furnish answers to interrogatories directed at the partnership, it would be incongruous to hold that information in the possession of Gulf is not "available" to GAC for the purpose of giving complete and accurate answers to those interrogatories. Indeed, the rule that "all information available to the interrogated party must be supplied . . includes information possessed by, or within the knowledge of, . . . agents or representatives of the party." *Wycoff v. Nichols*, 32 F.R.D. 370, 372 (W.D. Mo. 1963) (citations omitted).

Although Rule 34 requires production of documents in the "possession, custody or control" of a party, and, unlike Rule 33, it does not specifically refer to the discovery obligations of the agents of a partnership, the principle is well established that Rules 33 and 34 are "equally inclusive in their scope." *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 513 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020, 98 S.Ct. 744, 54 L.Ed.2d 768 (1978). *See also Davis v. Westland Development Company, supra*, 81 N.M. at 299, 466 P.2d at 865.[10]

GAC concedes that the two rules should be similarly construed, but it argues that the focus should be on the concept of "control" under Rule 34, rather than on the phrase "available" in Rule 33. However, the proper focus is not so much on one phrase or on the other, as it is on the purposes underlying each limitation on the scope of discovery under those rules. In each instance, the purposes are relatively apparent and very pragmatic. Each phrase embodies only two limitations. First, a party obviously cannot be required to produce materials which he is incapable of procuring. Second, in general a party should not be required to obtain, collect or turn over materials which the opposing party is equally capable of obtaining on its own. *Konczakowski v. Paramount Pictures*, 20 F.R.D. 588, 593 (S.D.N.Y. 1957); *Cinema Amusements v. Loew's, Inc.*, 7 F.R.D. 318, 321 (D. Del. 1947).

It is undisputed that neither United nor I&M was capable of procuring on its own the information and documents sought from the partners. Thus, the critical inquiry concerns only the first of the above mentioned principles—whether the party from whom the materials are sought has the practical ability to obtain those materials. Because the inquiry is a pragmatic one, the phrases "available" and "possession, custody or control" should not be subjected to formalistic strictures which ignore the policy of liberal discovery and the practical realities of the particular situation at issue. *See Hart v. Wolff, supra*, 489 P.2d at 117. Thus, it is immaterial under Rules 33 and 34 that the party subject to the discovery orders does not own the docu-

10. For cases construing the term "control" to be synonymous with the term "available," *see Sol S. Turnoff Drug Dist. v. N.V. Nederlandsche C.V.C. Ind.*, 55 F.R.D. 347, 349 (E.D. Pa. 1972); *Erone Corporation v. Skouras Theatres Corporation*, 22 F.R.D. 494, 498 (S.D.N.Y. 1958).

ments,[11] or that it did not prepare or direct the production of the documents,[12] or that it does not have actual physical possession of them.[13] It is also clear that the mere fact that the documents are in the possession of an individual or entity which is different or separate from that of the named party is not determinative of the question of availability or control.[14]

In light of the fact that partner documents were ultimately produced in this case, there can be little doubt that, as a practical matter, those documents were "available" to GAC.[15] Therefore, they were subject to discovery orders entered under Rules 33 and 34.

Our holding in this regard is not only supported by the language and underlying purposes of Rules 33 and 34, but also, it is mandated by two practical considerations. The first concerns the nature of a partnership; the second involves the business relationships of the entities involved in this case.

A partnership is composed of and can only act through its constituent partners. As the trial judge pointed out in this case, if the discovery obligations of a partnership do not extend to the individual partners, then the partners could avoid all meaningful discovery by the simple expedient of maintaining the information and documents related to the partnership business in the separately located files of the partners, rather than in the partnership offices. *Cf.* C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2208, at 616 (1970) ("[A] party cannot immunize a document from inspection by turning it over to a nonparty so long as it remains in the party's control." (Footnote omitted.))

The second practical consideration which compels the conclusion that documents in the separate possession of the partners should be subject to production concerns the nature of Gulf uranium activities and the history of the General Atomic business operation as they relate to the issues raised in this case.

Although GAC is a partnership rather than a subsidiary of Gulf, it simply took over the business of Gulf Energy including that of Gulf General Atomic. Gulf Energy was planned to be and was operated by Gulf as one part of a coordinated, comprehensive uranium business. Thus, through Gulf Minerals, Gulf Canada and Gulf Energy, Gulf was involved in the production of

11. *See Ghandi v. Police Department of the City of Detroit*, 23 F.R.Serv.2d 35 (E.D. Mich. 1977); *United States v. National Broadcasting Company, Inc.*, 65 F.R.D. 415, 419–20 (C.D. Cal. 1974), *appeal dismissed*, 421 U.S. 940, 95 S.Ct. 1668, 44 L.Ed.2d 97 (1975); *Advance Labor Serv., Inc. v. Hartford Accident & Ind. Co.*, 60 F.R.D. 632, 633–34 (N.D. Ill. 1973).

12. *See Herbst v. Able*, 63 F.R.D. 135, 138 (S.D. N.Y. 1972).

13. *See e. g., In Re Folding Carton Antitrust Litigation, supra*, 76 F.R.D. at 423; *Buckley v. Vidal*, 50 F.R.D. 271, 274 (S.D.N.Y. 1970); *Smith v. Maryland Casualty Company*, 42 F.R.D. 587, 589 (E.D. La. 1967); *Schwartz v. Travelers Insurance Company*, 17 F.R.D. 330 (S.D.N.Y. 1954); *Tollefsen v. Phillips*, 16 F.R.D. 348 (D. Mass. 1954); *Reeves v. Pennsylvania R. Co.*, 80 F.Supp. 107, 108–09 (D. Del. 1948); *Williams v. Consolidated Investors, Inc.*, 205 Kan. 728, 472 P.2d 248, 252 (1970).

14. *See e. g., Pennwalt Corp. v. Plough, Inc.*, 85 F.R.D. 257, 263 (D. Del. 1979); *Advance Labor Serv., Inc. v. Hartford Accident & Ind. Co., supra*, 60 F.R.D. at 633–34; *Sol S. Turnoff Drug Dist. v. N.V. Nederlandsche C.V.C. Ind., supra*, 55 F.R.D. at 349; *Erone Corporation v. Skouras Theatres Corporation, supra*, 22 F.R.D. at 498 (S.D.N.Y. 1958).

15. Indeed, in its Reply Brief in this appeal, GAC conceded that Gulf's records were "available" to it. GAC stated:

> *GAC did not contend in the trial court that it would be unable to persuade Gulf to produce its domestic records* if they came within a judicial order to produce. Obviously, Gulf had—and continues to have—a very significant interest in this litigation. As one of GAC's constituent partners, it stands to gain or lose immediately from any decision.
>
> . . . . .
>
> . . . *GAC did not represent to the trial court that Gulf would refuse to produce its documents if an order directing it to do so were entered.* (Emphasis added.)

However, GAC *had* stated to the trial court that it had "no obligation *or ability* to furnish . . . documents from Gulf Oil Corporation or Scallop Nuclear, Inc." (Emphasis added.)

uranium, the purchase and sale of uranium supplies, the fabrication of uranium fuel and the manufacture of nuclear reactors. Prior to the creation of GAC, these various Gulf divisions or subsidiaries were clearly not operationally divorced from one another.[16]

The transformation of Gulf Energy from a Gulf division to a partnership with Scallop changed the form of the business organization, but not the nature of the business it conducted. There was a substantial continuity of identity in the top levels of management.[17] GAC succeeded to the business records of Gulf General Atomic, Gulf Energy and Gulf–United. The evidence does not indicate that when GAC took over Gulf Energy—operating an identical business, in identical offices, with the same records, and with largely the same personnel in essentially unchanged reporting relationships—it suddenly became totally divorced from the uranium activities of the partners comprising it.[18] The flow of information and the transfer of key personnel from one entity to

16. The record is replete with evidence of the interconnection of the various aspects of Gulf's uranium business. In addition to other examples discussed elsewhere in this opinion with respect to other issues raised on appeal, are the following examples, which should suffice to illustrate the point made here: When the cartel was formed, Gulf Canada informed Gulf's executives in Pittsburgh and Gulf Energy officials in San Diego. Over the next six months, officials from Gulf Oil in Pittsburgh (O'Hara, Jackson, Ramsey), Gulf Minerals in Denver (Zagnoli, Allen) and Gulf Energy in San Diego (Hunter, Hoffman) were sent to Canada, Europe and Africa for cartel meetings. Gregg of Gulf Energy was transferred to Gulf Canada, but remained in contact with officials of Gulf Energy (Hunter, Fowler) for at least several months. Officials in Gulf Oil, Gulf Minerals and Gulf Energy participated in the decision to transfer Gregg. In March 1972, Hoffman of Gulf Energy briefed the Gulf Minerals board on Gulf Energy's marketing activities. In August 1972, Hunter briefed Gulf Oil executives in New York City. Rolander of Gulf General Atomic, Gulf Energy, and later GAC, also sat on the boards of Gulf Canada and Gulf Minerals and was chairman of the board of Gulf–United. Gulf Minerals had administrative responsibility for Gulf Canada, and Gulf Minerals' uranium marketing function was handled by Gulf General Atomic. Gulf Energy's larger supply contracts were approved by Gulf's Pittsburgh executives. Gulf Energy and Gulf Minerals worked together on plans for the development of Gulf's Mt. Taylor uranium reserves. In March 1973, Hunter stated that Gulf Energy would "work with GMCL [Gulf Canada] . . . to block" a Westinghouse effort to secure uranium from Australia.

17. The president of Gulf Energy, Mr. Rolander, became the president of GAC pursuant to the terms of the partnership agreement. Mr. Gallaway, the executive vice–president of Gulf Energy, Mr. Johnston, Gulf General Atomic's vice–president for marketing, and Mr. Dieter, Gulf Energy's chief legal adviser, all continued to perform the same duties for GAC. Mr. Hunter, who had attended the cartel's May 1972 meeting in Johannesburg as an executive of Gulf Energy, worked in a similar capacity for GAC, as did Mr. Fowler. As executives of GAC, Gallaway and Dieter remained on the payroll of Gulf, not GAC.

Most of these individuals played some role in the formation and operation of Gulf–United and in the acquisition of uranium by Gulf Energy and GAC. (Rolander, Gallaway and Hunter negotiated the formation of Gulf–United and the execution of the 1971 Supply Agreement with United. All three were members of the Gulf–United board.) All of these individuals at one time or another were either involved in or aware of Gulf's participation in the cartel.

Four months after the formation of GAC, Rolander rejoined the Gulf organization in Pittsburgh, where he remained until after this case was filed. Mr. Gregg, the Gulf Energy employee who was transferred to Gulf Canada in Toronto and became a member of the cartel operating committee, returned to the United States in 1974 to work for GAC, where he remained until the month this case was filed.

18. One of the more extreme examples of the extent to which GAC has sought to differentiate into distinct compartments the interrelated activities of the various aspects of Gulf's uranium activities is the following: When Hunter and Hoffman flew from Gulf Energy's San Diego headquarters to the cartel meeting in Johannesburg in May 1972, they went, according to GAC, as representatives of Gulf Canada in Canada, and not Gulf Energy, despite the fact that immediately prior to and after their week–long trip they were top officials with Gulf Energy, and despite the fact that they apparently continued to receive cartel information in their San Diego offices for several more months in order to coordinate Gulf's foreign and domestic uranium marketing efforts. The absurdity of GAC's position is highlighted by Hoffman's deposition in the *Westinghouse* litigation, where he testified that he went to Johannesburg "as an advisor to–I don't recall the name of the Canadian company. What was it? GMCL? Was that their initials?"

another; the past history of close coordination of activities between GAC's predecessor and other Gulf companies; and the continuity of business purpose—all substantially refute any such implication. We fail to see how what was apparently interrelated for purposes of corporate profit became totally separate and distinct when it became the subject of discovery in litigation.

Other decisions involving discovery from distinct, though related, corporations in cases in which only one corporation is named as a party, support our conclusion that the coordinated nature of the business enterprises of separate entities may justify the imposition of discovery obligations on those entities which are not parties to the action.

In *Societe Internationale, Etc. v. McGranery,* 111 F.Supp. 435 (D.D.C. 1953), *modified on other grounds sub nom., Societe Internationale, Etc. v. Brownell,* 96 U.S.App.D.C. 232, 225 F.2d 532 (D.C. Cir. 1955), *rev'd on other grounds sub nom., Societe Internationale v. Rogers,* 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958), the court ordered production of documents in the possession of a corporation, which, although related to the corporate–plaintiff, was not itself a party. The court said:

> Certain it is that the court can pierce the corporate veil to determine the true character of the interests making up its composition. Subtle relationships are necessarily to be contemplated. Through the interlocked web of corporate organization, management and finance there runs the thread of a fundamental identity of individuals in the pattern of control.

111 F.Supp. at 441–42 (citations omitted). *See also In Re Uranium Antitrust Litigation,* 480 F.Supp. 1138, 1153 (N.D. Ill. 1979) ("The formalities separating the two corporations cannot be used as a screen to disguise the coordinated nature of their uranium enterprise").

These two decisions are consistent with our own in recognizing not only the practical managerial connections between the various entities, but also, the identity of financial interest in the outcome of the litigation. As GAC pointed out on this appeal, Gulf has "a very significant interest in this litigation," and "stands to gain or lose immediately from any decision." It should not be very startling then that we demand as the price of possible legal victory full participation in the disclosure of relevant information by those who stand to profit from the ultimate outcome. Therefore, we hold that the trial court properly concluded that documents and information in the separate possession of the partners were subject to production in a suit in which only the partnership was named as a party.[19]

B.

RELEVANCY OF THE INTERNATIONAL URANIUM CARTEL

The trial court found that information concerning the international uranium cartel was "highly relevant" to United's antitrust, fraud, and breach of fiduciary duty allegations against GAC. GAC contests this finding, asserting that the cartel, which became the principal focus of discovery, is completely unrelated to the injury allegedly suffered by United. Therefore, GAC urges that its failure to produce documents and other information regarding the cartel could not be the basis for sanctions under N.M.R.Civ.P. 37(b)(2), N.M.S.A. 1978. *See Roberson v. Christoferson,* 65 F.R.D. 615, 620 (D.N.D. 1975); Annot., 6 A.L.R.3d 713, § 6 (1966). We analyze this question in light of the scope of discovery as defined by N.M.R. Civ.P. 26(b), N.M.S.A. 1978, the nature of United's and I&M's allegations against GAC, and the light shed on those allega-

19. The fact that Gulf and Scallop were named as parties in the original suit, which United voluntarily dismissed after its removal to federal court (*see* n. 2, *supra*), is completely immaterial to the question of the proper scope of Rules 33 and 34. The scope of discovery under those rules does not expand or contract depending on whether or not the individual partners once were or now could be named as parties.

tions by the presently available cartel evidence.

1. *The Legal Standard of Relevancy*

Rule 26(b) states, in pertinent part, that a deponent

> may be examined regarding any matter, not privileged, *which is relevant to the subject matter involved in the pending action*, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party . . . It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears *reasonably calculated to lead to the discovery of admissible evidence.* (Emphasis added.)[20]

This language is subject to a broad interpretation. *Fort v. Neal*, 79 N.M. 479, 481, 444 P.2d 990, 992 (1968). "Objections based on alleged irrelevancy must, therefore, be viewed in light of the broad and liberal discovery principle consciously built into" the rules of civil procedure. *Independent Productions Corp. v. Loew's, Incorporated*, 22 F.R.D. 266, 271 (S.D.N.Y. 1958). "The boundaries defining information relevant to the subject matter involved in an action are necessarily vague, making it practically impossible to formulate a general rule by which they can be drawn." *La Chemise Lacoste v. Alligator Company, Inc.*, 60 F.R.D. 164, 170 (D.Del.1973).[21] Because courts "are not shackled with strict interpretations of relevancy," *Cox v. E. I. Du Pont de Nemours and Company*, 38 F.R.D. 396, 398 (D.S.C.1965), discovery is permitted as to matters that "are or may become relevant"[22] or "might conceivably have a bearing" on the subject matter of the action,[23] or where there is "any possibility" or "some possibility" that the matters inquired into will contain relevant information.[24] Conversely, courts have said that discovery will be permitted unless the matters inquired into can have "no possible bearing upon,"[25] or are "clearly irrelevant" to the subject matter of the action.[26] Not only is the term "relevant" subject to a broad interpretation as it is generally used in the discovery context, but also it is given a particularly liberal interpretation for purposes of discovery in antitrust cases.[27]

20. Although Rule 26(b) refers only to depositions, the scope of discovery permitted under Rules 33 (interrogatories) and 34 (production of documents) is defined in terms of the relevancy standard established in Rule 26(b). *See Davis v. Westland Development Company, supra*, 81 N.M. at 299–300, 466 P.2d at 865–66.

21. *See also Mallinckrodt Chemical Works v. Goldman, Sachs & Co.*, 58 F.R.D. 348, 353 (S.D.N.Y.1973); C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2008, at 45 (1970); J. Moore, *Federal Practice*, ¶26.56[1], at 26–131 (2d ed. 1979).

22. *Payer Hewitt & Company v. Bellanca Corporation*, 26 F.R.D. 219, 221 (D.Del.1960).

23. *Triangle Mfg. Co. v. Paramount Bag Mfg. Co.*, 35 F.R.D. 540, 542 (E.D.N.Y.1964); *Bloomer v. Sirian Lamp Co.*, 4 F.R.D. 167, 169 (D.Del. 1944).

24. *In Re Wheat Farmers Antitrust Class Action*, 440 F.Supp. 1022, 1025 (D.D.C.1977); *In Re Folding Carton Antitrust Litigation, supra*, 76 F.R.D at 431 (N.D.Ill.1977); *Detweiler Bros., Inc. v. John Graham & Co.*, 412 F.Supp. 416, 422 (E.D.Wash.1976); *Nichols v. Philadelphia Tribune Company*, 22 F.R.D. 89, 90 (E.D.Pa. 1958); C. Wright, *Law of Federal Courts* § 81, at 403 n. 47 (3d ed. 1976).

25. *E. I. duPont de Nemours v. Deering Milliken Res.*, 72 F.R.D. 440, 443 (D.Del.1976); *Marshall v. Electric Hose and Rubber Company*, 68 F.R.D. 287, 295 (D.Del.1975); *LaChemise Lacoste v. Alligator Company, Inc., supra*, 60 F.R.D. at 171; *Dart Industries, Inc. v. Liquid Nitrogen Proc. Corp. of Cal.*, 50 F.R.D. 286, 292 (D.Del.1970.)

26. *Bailey v. Meister Brau, Inc.*, 55 F.R.D. 211, 214 (N.D.Ill.1972); *Independent Productions Corp. v. Loew's, Incorporated, supra*, 22 F.R.D. at 271; *Steamship Co. of 1949 v. China Union Lines, Hong Kong*, 123 F.Supp. 802, 805 (S.D.N.Y.1954); *Bloomer v. Sirian Lamp Co., supra*, 4 F.R.D. at 169.

27. *Cf. United States v. International Business Machines, Corp.*, 66 F.R.D. 186, 189 (S.D.N.Y. 1974) ("discovery in antitrust litigation is most broadly permitted"). *See also Bass v. Gulf Oil Corporation*, 304 F.Supp. 1041, 1046–47 (S.D. Miss.1969); *Alexander's Department Stores, Inc. v. E. J. Korvette, Inc*, 198 F.Supp. 28, 29 (S.D.N.Y.1961); *Leonia Amusement Corporation v. Loew's, Incorporated*, 16 F.R.D. 583, 584 (S.D.N.Y.1954).

2. *Summary of Evidence on the Gulf Uranium Business and the Cartel*

The allegations of appellees give great weight to the claim that the cartel is relevant to the subject matter of this litigation. As amended, United's complaint named a number of distinct legal bases for the relief it sought—the invalidation of the 1973 and 1974 Supply Agreements. The complaint alleged that (1) in violation of their fiduciary duties, Gulf and GAC withheld material facts which, if disclosed, would have had a bearing on United's decision to enter into Gulf–United and the 1971, 1973 and 1974 Supply Agreements; (2) the 1971, 1973 and 1974 Agreements were illegal and void because they had been procured through Gulf's and GAC's fraud; (3) Gulf mismanaged Gulf–United, refused to provide Gulf–United with uranium and capital, and economically coerced United into a position where it had no viable alternative to accepting Gulf's requirement of the 1973 Supply Agreement; (4) Gulf tried to eliminate United as a competitor in the nuclear fuels industry and to restrict its ability to compete in the uranium business; (5) the sudden increase in the cost of producing uranium, unforeseen to all but GAC and Gulf, rendered United's performance under the 1973 and 1974 Agreements commercially impracticable; and (6) the 1971, 1973 and 1974 Supply Agreements were void because they were in violation of New Mexico's antitrust laws prohibiting price–fixing attempts and conspiracies to monopolize, and actual monopolization of, trade and commerce.

I&M's counterclaim specifically alleged that by their participation in the cartel, GAC and Gulf had violated the New Mexico Antitrust Act, thereby injuring I&M. I&M also defended against GAC's claim that performance of its obligation to supply I&M with uranium had been rendered commercially impracticable by contending that the cartel was responsible for increases in the price of uranium, and therefore, such price increases were not unforeseen by GAC and Gulf.

The evidence which has been produced in this case demonstrates that information on the cartel could be crucial to the proper resolution of this litigation. The following review of some of that evidence should not be considered to reflect a view as to the merits of appellees' substantive claims, but rather, as support for their contention that the cartel is relevant to those claims.

In 1967, Gulf entered the uranium market by purchasing the General Atomic business. Over the next five years, Gulf purchased and began to develop various uranium ore bearing properties in the United States and Canada, including the large Mt. Taylor reserves in New Mexico. Thus, by the early 1970's Gulf was in a position to be a leading producer of uranium, nuclear fuel fabricator, and manufacturer of nuclear reactors. *See* Section I A, *supra.* It was therefore directly in competition with United.

However, in 1971 Gulf and United formed the jointly owned company, Gulf–United, to fabricate fuel for commercial nuclear reactors, and executed the 1971 Supply Agreement. Independently of Gulf–United, Gulf also began to purchase large quantities of uranium from other American producers.

Contemporaneously with these activities, Gulf began to participate in early meetings of the cartel. Top officials of Gulf Energy (Rolander, Gallaway, Gregg, Hunter and Hoffman) were informed of the cartel's creation and Gulf's participation in it. Hunter, Gallaway and Rolander were the Gulf officials who negotiated the formation of Gulf–United and the execution of the 1971 Supply Agreement with United. All of these individuals later held key positions in GAC. *See* Section II A, *supra,* especially n. 16 and 17, *supra.* All but Gregg served on the Gulf-United board.

One document reflects that Hoffman, along with Zagnoli of Gulf Minerals in Denver, was participating in cartel discussions in Canada as early as February 1972. The same month Hunter informed Hoffman that Gulf Energy would "proceed to tie up" an additional ten million pounds of ura-

nium. Within weeks, Gulf Energy signed agreements with two American producers to purchase in excess of that amount of uranium. In March, according to Hunter's account, Hoffman informed the board of directors of Gulf Minerals: "We've taken low cost supplies now on market. . . . We've cleaned out cheap material available now." Another document dated in the spring of 1972, which reviewed Gulf–United's financial condition, stated that Gulf's objective was to "minimize UNC's [United's] book income."

Throughout the spring of 1972, various Gulf officials from the United States attended meetings of the cartel. In late May, Hoffman and Hunter from Gulf Energy, Allen from Gulf Minerals, and Ediger from Gulf Canada, flew to Johannesburg, South Africa for a meeting of the cartel. The available cartel evidence shows that in Johannesburg, the cartelists adopted a set of rules to govern their organization. The rules allocated markets among the participating nations, set minimum prices for uranium, and established a rigged bidding system with a lead bidder and a runner-up bidder. Under a heading labeled "Attitude Towards Competitors," the Rules stated:

> It was agreed that if a supplier not associated with the organization should quote under the minimum price, the leader will not match that quotation and the [cartel's] Operating Committee will review the situation and decide on a course of action as soon as possible.

The Rules also provided that all quotations to fuel fabricators and nuclear reactor manufacturers "should be made on the basis of the minimum prices."

Although the Johannesburg Rules provided for the exclusion of the United States domestic uranium market, one week after the Johannesburg meeting, Hunter, in referring to "the agreements which we have reached in the last couple of days with respect to action which we will be taking," told Hoffman that Gulf's "overall strategy must reflect the interrelationship existing between foreign and domestic markets." He went on to say that "foreign and domestic marketing activities are inseparable and indeed should be treated integrally if we are to optimize the company position." In the following paragraph, Hunter stated: "Based on input provided by Gulf Minerals, we conclude that corporation profit is greater if New Mexican production begins in 1978 rather than 1976." Hunter then noted that "[i]n order for us to realistically appraise our U_3O_8 competitive position as well as to effectively sell foreign uranium, it is necessary for us to sell uranium directly to the U.S. utilities."

The minutes of a September 5, 1972 cartel meeting indicate that the cartel was considering the prospect of taking anticompetitive actions against the foreign uranium operations of American corporations. The minutes reported:

> There followed a general discussion of the impact of Westinghouse bidding in Europe. . . . Some members thought that Westinghouse should be approached directly, whereas other views were that it would be a dangerous move. *The consensus finally reached was that if the club was to survive as a viable entity, it would be necessary to delineate where the competition was and the nature of its strength, as a prelude to eliminating it once and for all.* (Emphasis added.)

In September 1972, a Gulf attorney observed that "it is improbable that either the cartel structure or operation will remain static," and warned that "the instinctive reaction of the cartel's Operating Committee will likely be to exert pressure to suppress the new competition one way or another." He said:

> It could well be that the governments involved would tacitly approve (or effectively direct) predatory actions by the cartel producer members *to suppress outside competition from any source.* . . . (Emphasis added.)

In March 1973, Hunter, of Gulf Energy, reported that Westinghouse was trying to buy uranium to cover its "substantial foreign shortage." Hunter stated that, if successful, the purchase "would provide Westinghouse with a potential source for U.S.

reactor sales." He said that Gulf Energy would "work with GMCL [Gulf Canada] to try to put pressure on the Australians to block the proposed arrangement." [28]

Gregg, the Gulf Energy employee who became Gulf's representative on the cartel's Operating Committee, testified in a deposition taken in the *Westinghouse* uranium litigation that

> Westinghouse was not necessarily singled out for discussion each and every time. There were others who were discussed from time to time, also; GE [General Electric], KWU in Germany, ASEA in Sweden, other reactor manufacturers, Exxon as a fuel fabricator, *Gulf–United as a fuel fabricator*, so perhaps Westinghouse was discussed more than any of the others. (Emphasis added.) [29]

Beginning in early 1973, United and Gulf entered into negotiations concerning the disposition of Gulf–United. On January 23, 1973, Mr. Henry, the executive vice–president of Gulf Oil in Pittsburgh, informed the president of United:

> It is our intention that any sale of the shares of Gulf [in Gulf–United], of course, will be done entirely in good faith, on a fair basis, and free of any secret or undisclosed arrangements.

GAC alleges that United had independent knowledge of the cartel, but it does not contend that in the negotiations that followed Gulf informed United of its role in the cartel.

In June 1973, Gulf executed the 1973 Supply Agreement with United; and in September it bought United's interest in Gulf–United. In November 1973, the GAC partnership was formed, and along with the operations of Gulf Energy, the Gulf–United business was transferred to GAC.

Within nine months of the execution of the 1973 Supply Agreement and the buyout of United's interest in Gulf–United, Gulf also purchased several million pounds of uranium from two other American producers. During the same period, it signed definitive contracts with two utilities to formalize the letters of intent United had previously signed and assigned to Gulf–United.

By March 1974, Mr. Fowler, a GAC employee reported:

> What appears to be happening is that the international producers are in effect setting the world price via
>
> a) establishing a "floor" that is higher than the U.S. offers to buy.
>
> b) the U.S. producers refuse to sell at any price that doesn't give them a substantial margin above the "floor" being quoted by the non–U.S. producers.
>
> c) Thus, in essence, the international producers can stop any transactions by constantly nudging the floor upward.
>
> In the interim, the U.S. buyer becomes increasingly frustrated, offers a higher price in order to get some response and the cycle starts over again.

28. Both Westinghouse and General Electric were major manufacturers in the United States of nuclear reactors; as such they were competitors of Gulf Energy.

29. In his deposition in this case, Gregg first testified that United and Gulf–United were never discussed at any cartel meetings. He later qualified that answer by stating that he could not recall those companies being discussed at meetings at which he was present. When specifically questioned regarding the foregoing passage from his *Westinghouse* deposition, Gregg conceded that he had made the statement, but he said he could not recall "who or who was not discussed other than Westinghouse." He stated that Gulf–United and General Electric were "representative of who might have been discussed"; but he could not remember whether or not Gulf–United was ever discussed.

Hunter testified in his deposition in this case that Gulf–United was discussed by Gulf officials at the cartel meeting he attended in Johannesburg in 1972. He stated:

> I raised the point that from my standpoint and understanding in what we were trying to do in the uranium supply, the [cartel's] middleman restriction would affect our ability to buy uranium to serve Gulf–United and HTGR [high temperature gas cooled reactors].

He went on to say that by virtue of the cartel's rules, Gulf–United "would have to pay the same higher price that . . . Westinghouse would have to pay." But he said that this matter "wasn't of concern" to the other Gulf participants.

> It seems likely that at some point, the mechanism will break down and if it does, there will again be price competition. However, it doesn't appear likely the break will come in the immediate future.

Three months later, GAC signed the 1974 Supply Agreement, committing United to supply an additional three million pounds of uranium.

We accept none of the available cartel evidence as conclusive. However, where business records such as these are produced from the files of GAC and Gulf, and where it is undisputed that a uranium cartel existed and that Gulf was a member of it, we are satisfied that cartel information is relevant to the subject matter of this litigation in general, and to the specific allegations of the parties. We look with a jaundiced eye upon any claim of irrelevancy made in the background of (1) the common identity of the individuals who negotiated the contracts at issue here and the information of Gulf–United; who participated in meetings of the cartel on behalf of Gulf or were privy to cartel information; and who later formed the top level of management of GAC; (2) the temporal proximity of cartel activities to the purchase by Gulf and GAC of substantial quantities of uranium from several major American producers—including the 1971, 1973 and 1974 Supply Agreements with United; to the formation, the buyout and the dissolution of Gulf–United; and to the creation of GAC; and (3) references to "cleaning out" and "tying up" "cheap material"; to objectives of "minimizing UNC's [United's] book income"; to the "inseparability of domestic and foreign uranium marketing"; to Gulf's need to sell uranium "directly to the U.S. utilities"; to working with Gulf Canada to "block" a Westinghouse uranium purchase; to the likely need to suppress new competition "one way or another"; and most striking of all, to "the consensus," reached by the cartel in the context of discussing an American corporation, "to delineate where the competition was and the nature of its strength as a prelude to eliminating it once and for all." These things are not the stuff of which antitrust irrelevancy is made.

Finally, we cannot accept GAC's argument that the cartel is irrelevant to the commercial impracticability issues in this case.[30] We cannot say that such evidence has no possible bearing on United's claim that the cartel itself was responsible for the enormous price increases in uranium that took place contemporaneously with the operation of the cartel. If the cartel is relevant to that claim, it is no less relevant to I&M's defense that GAC is in no position to claim commercial impracticability because, along with Gulf and the other cartelists, it was responsible for, and thus foresaw, those price increases.

3. *GAC's Arguments as to the Cartel's Irrelevance*

GAC argues that the cartel was irrelevant because United "has been unable to adduce any evidence whatsoever that the 1973 and 1974 contracts were in any way connected with the activities of the cartel." Obviously this proposition is untenable. United sought cartel evidence in order to establish that the 1973 and 1974 Supply Agreements were connected to cartel activi-

30. GAC asserts that United's commercial impracticability claim is a "patent make-weight" because United's forty page trial brief on the subject contained only six sentences concerning the cartel. Relevancy for purposes of discovery is not measured by such a sentence–to–page ratio. As to I&M's defense to GAC's claim of commercial impracticability, GAC's counsel told the trial court at a hearing on August 26, 1977:

> We can understand the people like Indiana–Michigan or Detroit–Edison feeling some sort of misery caused by the present prices of uranium, and we suspect that they will be completely unable to establish anything to do with the cartel leading to the existence of the price levels. . . .

Obviously, the cartel is not made irrelevant to I&M's claims simply because GAC's counsel "suspects" that those claims would ultimately not be proved. *Cf. American Mfrs. M. I. Co. v. American Broadcasting—Para. Th.*, 388 F.2d 272, 279 n.9 (2d Cir. 1967) ("'[T]hat it might be surmised that the adverse party is unlikely to prevail at the trial is not sufficient to authorize summary judgment against him'") (citation omitted).

ties in one manner or another. It makes no sense whatsoever to say that the cartel is not relevant, and therefore cartel information will not be produced, because the plaintiff who seeks such discovery has failed to produce, from what has been withheld from it, evidence to conclusively establish its case. As the court said in *Beler v. Savarona Ship Corporation*, 26 F.Supp. 599 (E.D.N.Y.1939):

> The requirement of materiality does not . . . compel the person seeking discovery definitely to prove materiality before being entitled to a discovery. Such an interpretation of the rule would place upon it a narrow construction which would severely limit the bounds of the discovery procedure. It might compel a party to know what was in the documents before he had seen them. One of the basic purposes of the new Rules is to enable a full disclosure of the facts so that justice might not move blindly.

See also Radio Corporation of America v. Rauland Corporation, 18 F.R.D. 440, 444–45 (N.D.Ill.1955).

GAC further argues that the cartel cannot conceivably be relevant because by May 1971, United had "locked up" the uranium covered by the 1973 Supply Agreement through supply contracts it had directly entered into with the utilities; and second, that the cartel came into existence in 1972. Because United allegedly had committed the uranium previous to the formation of the cartel, GAC concludes that cartel activities could not possibly have been the cause of any competitive injury United might have suffered.

There are a number of reasons why this argument must be rejected. In the first place, there is a dispute in this case over the question of whether the uranium covered by the 1973 Supply Agreement was in fact "locked up" prior to the formation of the cartel, or even prior to the execution of the 1971 Supply Agreement. Over one–half of the uranium at issue here involves the utility agreements with Detroit Edison and Duke Power. Originally, this uranium was covered by letters of intent United signed with the two utilities in 1969 and 1970, respectively. United's contention that these were merely non–binding agreements finds some support in the record.[31] But even if we were to assume that they were binding contracts at the time of the formation of Gulf–United in 1971, and that the cartel was not formed prior to 1972, it would not necessarily follow that cartel evidence has no bearing on the issues in this case.

United contends that Gulf did not disclose a slippage in the construction of a Commonwealth Edison reactor which allegedly would have waived Gulf–United's obligation to supply the utility with fuel, and that Gulf signed a secret "side–letter" with Duke waiving conditions which also allegedly would have denied Duke uranium. These actions were allegedly taken in order that GAC could resell the uranium covered by the 1971 and 1973 Supply Agreements at higher prices. Other allegations which would have a bearing on the case, even if the uranium had all been previously committed by United, are that Gulf wrongfully

31. The Detroit Edison letter of intent, which is dated September 25, 1969, reads in part:

> Please be advised that The Detroit Edison Company has determined and *intends to enter into a contract* with the United Nuclear Corporation for the nuclear materials, fabrication, and services therein defined.
>
> United Nuclear Corporation and Detroit Edison *will proceed reasonably toward the negotiation, drafting, and execution of a formal written contract* which will reflect the pertinent rights and obligations of each party *as generally set forth* in the referenced documents *and as discussed and to be discussed* during the various meetings of representatives of our two companies. *It is also subject to the receipt of all necessary approvals of regulatory authorities.* (Emphasis added.)

Formal definitive contracts were signed on the basis of this letter of intent and a letter of intent of December 30, 1970 with Duke Power, on March 19, 1973 by Gulf–United, and on November 7, 1973 by Gulf, respectively. United signed two additional letters of intent with Yankee Atomic and Consolidated Edison. The latter two letters were also assigned to Gulf–United in 1971, but formal contracts were never signed, and the uranium covered by these letters is not included in the 1973 Supply Agreement.

refused to supply Gulf–United with the uranium needed to fulfill the requirements of the utility contracts, wrongfully blocked Gulf–United's efforts to purchase uranium on the open market, and wrongfully interfered with United's efforts to independently negotiate directly with the utilities for price relief and other conditions of sale. Cartel information is relevant to United's claim that Gulf tied up the cheap material on the market, thus denying United alternative sources of uranium to fulfill its commitments to Gulf–United and driving up uranium prices. United argues that the price increases encouraged new exploration and mining, which increased the competition for limited mining supplies and labor, and in turn caused United to incur far greater uranium production costs than it otherwise would have.

We also consider it material to GAC's relevancy argument that Gulf apparently considered it necessary "to sell uranium directly to the U.S. utilities" in order to maintain its competitive position; and that GAC now contends that although it is not obligated to supply uranium to I&M or the other utilities,[32] United nonetheless remains obligated to supply GAC with at least a substantial portion of the uranium covered by the 1973 Supply Agreement.

Finally, even were GAC's position sound as to United's allegations of fraud, breach of fiduciary duty, economic coercion and antitrust violations concerning the 1973 Supply Agreement, it would have no bearing on United's allegations concerning the 1974 Supply Agreement, or on United's and I&M's claims based on commercial impracticability. As to the former, GAC contends that it involved a blind transaction, and since it therefore did not know the seller, neither GAC nor Gulf could have entered into that agreement with illicit intentions towards United. However, that fact does not alone dispose of United's claims, for even such a blind agreement could conceivably have been part of a scheme to achieve monopoly control over United States uranium reserves. As to the commercial impracticability questions, we have previously noted that even GAC does not advance a persuasive argument of irrelevancy. *See* n. 30, *supra*.

GAC vehemently contests the merits of each of the foregoing allegations, contending that all are unsubstantiated.[33] But in the discovery context, it is not the function of the trial court or of this Court to try every issue prior to the full disclosure of all relevant information.[34] Nor is it

> the function of . . . counsel to rule with finality on the relevancy or irrelevancy of documents in their exclusive possession and thereby to deprive both Court and opposing counsel of an opportunity to evaluate their contentions.

Radio Corporation of America v. Rauland Corporation, supra, 18 F.R.D. at 444. The rules call for something quite different:

32. Notes of a GAC–Gulf litigation strategy meeting held on January 13, 1976 in San Diego, which were inadvertently produced to United in this case, reflect a GAC "plan to welch on *all* utility contracts." (Emphasis in original.)

33. GAC's arguments are contained in a forty-six page appendix entitled "Review of Historical Facts." This appendix was filed along with GAC's reply brief. It apparently was not included in that brief because GAC had already met the 150 page limit on that brief which this Court had specifically set at GAC's request. We note that GAC did not seek leave of the Court to exceed that page limitation in order to include these additional arguments in its reply brief, nor did it seek or receive permission from the Court to file such an argument in an appendix, rather than in a brief. "[W]e disapprove of and will in the future disregard attempts by counsel to supplement their briefs in a manner not authorized by the rules." *Lance v. New Mexico Military Institute*, 70 N.M. 158, 164, 371 P.2d 995, 999 (1962).

34. "Ordinarily, in ruling on a discovery motion, the Court will not determine whether a claim in the complaint, if proved, would have a bearing on the ultimate outcome of the action, it being sufficient that the matter to be explored is relevant to the issues made by the pleading." *Apel v. Murphy*, 70 F.R.D. 651, 654 (D.R.I.1976) (citation omitted). *See also Humphreys Exterminating Company, Inc. v. Poulter*, 62 F.R.D. 392, 393 (D.Md.1974); *V. D. Anderson Co. v. Helena Cotton Oil Co.*, 117 F.Supp. 932, 945 n. 9 (E.D.Ark.1953).

> Unless it is palpable that the evidence sought can have no possible bearing upon the issues, the spirit of the new rules calls for every relevant fact, however, remote, to be brought out for the inspection not only of the opposing party but for the benefit of the court which in due course can eliminate those facts which are not to be considered in determining the ultimate issues.

Hercules Powder Co. v. Rohm & Haas Co., 3 F.R.D. 302, 304 (D.Del.1943). *See also La Chemise Lacoste v. Alligator Company, Inc., supra*, 60 F.R.D. at 171.

At the present stage of the litigation, we are unable to say that information concerning an international uranium cartel, which had as its avowed purpose the fixing of prices for and the allocation of markets in uranium, and which counted a constituent partner of GAC as one of its members, palpably can have no possible bearing upon the subject matter of this action. Therefore, cartel information satisfies the test of relevancy for purposes of discovery under Rule 26(b).

C.

ACT OF STATE DOCTRINE AND EXCLUSIVE FEDERAL POWER OVER FOREIGN RELATIONS

GAC's second basis for challenging the validity of the trial court's discovery orders involves two distinct legal principles–the act of state doctrine and the exclusive power of the federal government over the conduct of foreign relations. Although distinct, each principle is alleged to be applicable to this case because of two actions of the Canadian Government–first, the role that Government played in the international uranium cartel; and second, the Canadian Uranium Information Security Regulations. GAC contends that both principles, as applied to these actions of Canada, precluded the trial court from considering any claims concerning the cartel or Gulf's role therein, and therefore, from entering discovery orders directed at cartel documents or information. The applicability of each of these principles will be separately examined.

1. *The Canadian Government's Role in the Cartel* a.*The Act of State Doctrine*

The classic definition of the act of state doctrine is found in *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

The act of state doctrine, which has "'constitutional' underpinnings," reflects "the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 427–28, 84 S.Ct. 923, 940, 11 L.Ed.2d 804 (1964). The doctrine "derives from the judiciary's concern for its possible interference with the conduct of foreign affairs by the political branches of the government." *Timberlane Lbr. Co. v. Bank of America, N. T. & S. A.*, 549 F.2d 597, 605 (9th Cir. 1976). The doctrine is a matter of federal law which is binding on state courts. *Banco Nacional de Cuba v. Sabbatino, supra*, 376 U.S. at 427, 84 S.Ct. at 939; *Republic of Iraq v. First National City Bank*, 353 F.2d 47, 50–51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027, 86 S.Ct. 648, 15 L.Ed.2d 540 (1966).

GAC contends that the act of state doctrine is applicable because the Canadian Government participated in the cartel and effectively compelled Gulf, through its Canadian subsidiary, Gulf Canada, to join the cartel, transforming the cartel itself and all actions Gulf or Gulf Canada may have taken pursuant to it into the acts of a foreign state.[35] GAC asserts that judicial inquiry

35. In the findings it entered as sanctions against GAC for GAC's failure to comply with its discovery orders, the trial court found that the cartel was made up of uranium producers. Although the court did not mention government participation in the cartel, it did find that

into the cartel and Gulf's role therein is precluded by the act of state doctrine because such an inquiry would necessarily place in question the legitimacy of the Canadian Government's actions.

The Canadian Government has repeatedly stated that it "initiated" the discussions which led to the formation of the cartel, and that it thereafter "participated" in that organization. It has also stated that it "approved" of the participation of Canadian uranium producers in the cartel and that Gulf participated at the Government's "specific written request." [36]

We accept these representations of the Canadian Government. However, the initiation of the cartel and the participation therein by that Government are not sufficient alone to transform the cartel–related activities of a wholly–owned subsidiary of a corporation based in the United States into the sovereign acts of a foreign nation, and thus to immunize those activities from challenge in American courts.

It is well settled that the mere fact that a foreign government approved, authorized, tolerated, encouraged, aided, or participated in the anti–competitive actions of a private individual or corporation does not necessarily provide an act of state defense. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592–93, 96 S.Ct. 3110, 3118, 49 L.Ed.2d 1141 (1976); [37] *Continental Co. v. Union Carbide*, 370 U.S. 690, 706–07, 82 S.Ct. 1404, 1414, 8 L.Ed.2d 777 (1962); *U. S. v. Sisal Sales Corp.*, 274 U.S. 268, 276, 47 S.Ct. 592, 593, 71 L.Ed. 1042 (1927); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979); *Timberlane Lbr. Co. v. Bank of America, N. T. & S. A., supra*, 549 F.2d at 606; *Linseman v. World Hockey Ass'n, supra*, 439 F.Supp. at 1324; *United States v. The Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cas. ¶ 70,600 (S.D.N.Y.1963), *order modified*, 1965 Trade Cas. ¶ 70,352 (S.D.N.Y.1965); Annot., 40 A.L.R. Fed. 343, 379–80, § 15 (1978); Baker, *Antitrust Conflicts Between Friends: Canada and the United States in the Mid–1970's*, 11 Cornell Int'l L. J. 165, 177–78 (1978). In the recent case of *Industrial Inv. Development v. Mitsui & Co., Ltd.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 963, 100 S.Ct. 1078, 63 L.Ed.2d 318 (1980), the court said that "the instigation of foreign governmental involvement does not mechanically protect conduct otherwise illegal in this country from scrutiny by the American courts." *Id.* at 52.

It is not sufficient merely to say the Government of Canada played a role in the cartel. The critical inquiry is into the nature of the role played by the foreign government, for "the very assertion of an act of state defense requires the court to examine into the nature of the conduct complained of and its relationship to the foreign sovereign." *Hunt v. Mobil Oil Corp., supra*, 550 F.2d at 79 (citations omitted) (Van Graafeiland, J., dissenting). Unless a court can examine this initial issue–"whether the acts complained of are in reality the acts of the defendants or the acts of a foreign government" [38]–it cannot deter-

the Canadian Government had "encouraged," but neither "required," "mandated," nor "compelled" Gulf or Gulf Canada to participate in the cartel.

36. According to that Government, the cartel was created in order to protect the uranium mining industries of the participating nations from the adverse consequences of an embargo the United States Government had established in 1964 on the importation of foreign uranium into this country. *See* Act of August 26, 1964, P.L. 88–489, 78 Stat. 602.

37. Although this case dealt with the doctrine as it applies to an act of one of the states of the United States, the Court's ruling in *Cantor* applies to acts of foreign governments as well. *See Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 80 (2d Cir. 1977) (Van Graafeiland, J., dissenting), *cert. denied*, 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977); *Linseman v. World Hockey Ass'n*, 439 F.Supp. 1315, 1324 (D.Conn.1977).

38. W. Fugate, *Foreign Commerce and the Antitrust Laws* 49–50 (1958). *See also* Fugate, *Antitrust Jurisdiction and Foreign Sovereignty*, 49 Va.L.Rev. 925, 932 (1963):

> The real question is *whose* acts are the subject of inquiry. If the acts are those of the foreign government within its own jurisdiction, then the antitrust exception applies. The situation is the same if the foreign

mine whether the act of state doctrine applies, for that doctrine requires the act in question to be "the public act of those with authority to exercise sovereign powers." *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 694, 96 S.Ct. 1854, 1861, 48 L.Ed.2d 301 (1976).

In each of the act of state decisions cited above, there appeared to be little doubt as to the nature of the role played by the foreign government. However, in this case, the absence of cartel discovery has made it impossible for our courts to determine the preliminary question–whether the *challenged* acts involve *any* action by the Government of Canada. There are two aspects to this dilemma.

First, neither the official statements of the Canadian Government nor the available cartel evidence fully describes the acts of the cartel or the situs of those acts. More specifically, without the cartel records, it is impossible to determine precisely what cartel–inspired actions Gulf Canada, Gulf or GAC may have taken, at whom such actions may have been directed, or where they occurred.

Second, the absence of cartel information has made it impossible to fully delineate the precise role played by the Government of Canada in the cartel; and more importantly, what specific actions, if any, Gulf was "compelled" by that Government to perform, or where those activities took place.

Without this vital information we cannot determine if the act of state doctrine is applicable, as the following hypotheticals demonstrate. First, if we assume that the cartel, as the Canadian Government has described it, was not intended to, and did not have, an adverse impact on the domestic market of the United States, then cartel activities might well be beyond the scope of American antitrust laws,[39] and shielded by the act of state doctrine.

However, we could also assume–because the absence of cartel records makes it impossible to negate the possibility–that Gulf, with the knowledge of such anti–competitive, non–United States activities and of the potential business opportunities such activities presented, went beyond the scope of the cartel as the Canadian Government defined it, and took predatory actions in the United States designed to eliminate competitors and to monopolize uranium reserves.[40] If this were the case, GAC and Gulf would not be shielded by the act of state doctrine, since the Canadian Government would have played no role in the *specific* anti–competitive conduct challenged in our courts. *See Continental Co. v. Union Carbide, supra*, 370 U.S. at 706–07, 82 S.Ct. at 1414; W. Fugate, *supra*, at 148.

The Canadian Government has repeatedly stated that the United States was excluded from the cartel's operations. However, Prime Minister Trudeau stated in October 1977 that although the exclusion of the domestic markets of the United States and Canada was his government's policy, he did not rule out the possibility that some producers may have gone beyond that policy. He stated: "We have no knowledge what some companies may have done under the pretext or cover of government policy." *Official Report of House of Commons Debates*, Vol. 121, No. 6, p. 224, 3rd Sess., 30th Parliament (Oct. 25, 1977).

government through its laws, regulations, or orders, *requires* private parties to perform the anticompetitive acts. If, on the other hand, the acts complained of are in reality those of private parties who seek to hide behind the cloak of foreign law, the courts will attach antitrust liability.

39. "Sherman Act jurisdiction now depends upon a showing of anticompetitive effects within the United States." *Industrial Inv. Development v. Mitsui & Company, Ltd., supra*, 594 F.2d at 52 (citations omitted). *See also* K. Brewster, Jr., Antitrust and American Business Abroad 65–75 (1958); W. Fugate, *supra*, at 29–34.

40. GAC itself made this very distinction to the court below. In its opening statement at the trial, GAC's counsel stated:

> [T]he 1973 and 1974 supply agreements were not the part, product, or in any way connected with an agreement of the cartel.
>
> *Now, it may be that Gulf was motivated to go into the agreements because of the cartel, or its knowledge of the cartel.* There may be a lot of things. And all of those "maybes" may come out at trial. (Emphasis added.)

Without the withheld cartel documents it is impossible to determine whether the limited territorial scope of that policy was adhered to by the cartel or by Gulf. Although the Canadian Government has said that the cartel did not include the United States market, the broad proscriptions of the Canadian Uranium Information Security Regulations are not similarly limited. The language of those Regulations is broad enough to encompass *any* documents or information concerning the uranium activities of an American corporation in the United States.[41] Thus, the breadth of the regulations effectively precludes our courts from determining whether GAC or Gulf took predatory actions against their competitors in the United States, either as part of the cartel conspiracy or completely independently of it.

It is clear that the Canadian Government does not wish to permit the courts of this country to inquire into whether Gulf exceeded the original scope of the cartel. However, whether Gulf adhered to the limited territorial scope of the cartel as Canada defined it is an inquiry that the act of state doctrine cannot preclude an American court from making. It is for the courts of this country, and not for the government of a foreign state, to determine whether *our* nationals took actions in *our* nation in violation of *our* laws.[42] The existence of cartel evidence indicating that the cartel might have exceeded its original non–United States scope makes it imperative that our courts be free to conduct such an inquiry in this case.[43]

GAC argues on appeal that United has "failed to show that the cartel either sought to or did harm United"; has "failed to show that the cartel even considered uranium producers"; and has not cited "any competent evidence that the cartel engaged in any predatory activity against anyone." These assertions are entirely beside the point. It is inconsistent for a party to fail to produce records and to then contend that the opposing party has failed to point to any records to support its allegations. We will not accept the proposition that the broad and vague outlines of a foreign government's activities automatically activate a doctrine which provides a total eclipse of the judicial search for the truth.

The absence of cartel records makes the second aspect of Canada's alleged involve-

41. The Regulations read in pertinent part:

> No person who has in his possession or under his control any note, document or other written or printed material in any way related to conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975 involving that person or any other person or any government, crown corporation, agency or other organization in respect of the production, import, export, transportation, refining, possession, ownership, use or sale of uranium or its derivatives or compounds shall (a) release any such note, document or material, or disclose or communicate the contents thereof to any person, government, crown corporation, agency or other organization unless (i) he is required to do so by or under a law of Canada, or (ii) he does so with the consent of the Minister of Energy, Mines and Resources; or (b) fail to guard against or take reasonable care to prevent the unauthorized release of any such note, document or material or the disclosure or communication of the contents thereof.

The Regulations were amended in October 1977, but the amendments are not pertinent to the issues in this case.

42. On appeal, GAC has contended that a court cannot, without violating the act of state doctrine, "inquire into what was the real scope of the Canadian policy," nor "judge what was the entire contour of the Canadian policy and was anything done outside the contours of that policy."

That that proposition is untenable should be evident. *See* Baker, *supra*, 11 Cornell Int'l L. J. at 177 n. 67. If GAC's position was adopted, then an act of state or sovereign compulsion defense could be irrefutably established by the mere assertion of it by the party seeking its protection.

43. The chairman of the Congressional subcommittee which investigated cartel activities concluded that there could not be "any serious doubt . . . that cartel activities did in fact affect domestic American commerce." *Hearings on International Uranium Cartel, supra*, Vol. 1, Serial No. 95–39, p. 247. *See also* the evidence reviewed in Section II B, *supra*, and *Duquesne Light Co., et al. v. Westinghouse Electric Corporation*, (No. G. D. 75–23978) (Pa. Ct. of Comm. Pleas, March 30, 1977) (approving settlement).

ment in the cartel–its compulsion of Gulf Canada–equally unavailing to GAC under the rubric of the act of state doctrine.

In *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F.Supp. 1291, 1297–98 (D.Del.1970), the court held that where an American corporation is compelled by a foreign government to commit anti–competitive practices, such compulsion constitutes a complete defense to an antitrust action based on those practices. *See also United States v. The Watchmakers of Switzerland Information Center, Inc., supra*; K. Brewster, *supra*, at 92–94; W. Fugate, *supra*, at 148–49; Annot., 12 A.L.R. Fed. 329, 340–43, § 4 (1972); Annot., 40 A.L.R. Fed. 343, 377–79, § 14 (1978). However, "[o]ne asserting the [sovereign compulsion] defense must establish that the foreign decree was basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall illegal course of conduct." *Mannington Mills, Inc. v. Congoleum Corp., supra*, 595 F.2d at 1293.

The reason why the sovereign compulsion defense cannot be invoked here is because the absence of cartel records makes it impossible to determine precisely what acts, if any, were compelled, and where those acts were performed.[44]

The available cartel evidence bearing on the question of government compulsion is ambiguous and conflicting. The Canadian Government has stated that the participation of all Canadian uranium producers in the cartel was "a matter of Canadian Government policy," which was "implemented through the [Canadian] Atomic Energy Control Act and Regulations." The Government also stated it had "secured compliance with the terms of the [cartel] arrangement." However, Prime Minister Pierre Trudeau stated in response to a question in the Canadian Parliament that the contention "about the government forcing companies into [the cartel] . . . is obviously a spurious argument." He said that "the government had a policy which authorized" the cartel and that the Government had "requested" Canadian uranium producers to act within that policy. *Official Report of House of Commons Debates*, Vol. 121, No. 6, p. 224, 3rd Sess., 30th Parliament (Oct. 25, 1977).

The cartel records that have been produced do not substantially clarify this issue. Initially, Gulf described its attendance at early cartel meetings as a response to "a very strong invitation" from the Government to participate in the cartel; Gulf Canada had been "forcefully invited" to attend. From the outset, however, Gulf apparently conditioned its participation upon a determination that it would not result in violations of the United States antitrust laws.

In April 1972, an associate general counsel for Gulf wrote to Gulf's general counsel in Pittsburgh concerning "an agreement" in the making "among producers of uranium." He stated that the producers would present their agreement to the Canadian Cabinet "for approval," and that the Cabinet would thereafter direct the producers to participate in the agreement.[45] He concluded that

44. In his opinion in *In Re Uranium Antitrust Litigation, supra*, 480 F.Supp. at 1154, Judge Marshall indicated that cartel records could have a vital bearing on the defendants' defenses of sovereign compulsion. Thus, he indicated that merely by raising the sovereign compulsion defense, a defendant could not preclude a court from seeking documents located in a foreign country which might be relevant to the merits of that defense. *Compare* GAC's position at n. 42, *supra*.

45. On August 17, 1972, the Canadian Minister of Energy, Mines and Resources wrote to the President of the Canadian Atomic Energy Control Board, informing him that the Canadian Government had approved a regulation governing the export of uranium from Canada "[i]n order to enforce compliance with the terms of the marketing arrangements." The letter began by stating that "[o]n June 29, 1972, [the Canadian] Cabinet approved the terms of a uranium export marketing arrangement [the cartel] *proposed by producers* in Canada and several other countries." (Emphasis added.) One writer suggested that "this document reveals an approval by government of a privately proposed arrangement, which was in turn implemented by government orders." Baker, *supra*, 11 Cornell Int'l L.J. at 183 n. 94. *Compare* W. Fugate, *supra*, at 148 ("[I]f private parties . . . influence foreign government legislation as part of a conspiracy to restrain United States foreign trade, the foreign government

a decision by Gulf to participate in the cartel was necessary before the cartel's Paris meeting on April 20–21, because "there is no point in our attending the meeting unless we have decided to go along."

Gulf apparently decided "to go along." Roger Allen, an attorney for Gulf Minerals in Denver, attended the cartel's Paris meeting, along with Gulf Minerals' president, S. A. Zagnoli. However, Gulf was nevertheless still concerned about its possible liability under United States antitrust laws. Allen told the other cartel members that "Gulf management was unwilling to take such a risk and, consequently, any participation by Gulf in the arrangement was conditioned upon receiving an expression from the U. S. Department of Justice satisfactory to Gulf."

The following month, Gulf indicated that although it remained concerned about United States antitrust laws, it otherwise agreed "in principle with the desirability of establishing a marketing arrangement." By June 1972, Allen was reporting that Gulf had decided that it "should not even file a White Paper with the Department of Justice. Gulf Minerals *had agreed to take a business risk.* . . ." (Emphasis added.)

Although by early June 1972, Gulf had established "compulsion" as the "fountainhead" of its antitrust defense, in July 1972, Gulf officials were nevertheless describing "the nature of the Canadian Government activity in fostering the Organization" as "still a bit fuzzy." As late as September 1972, a Gulf attorney stated that Gulf's antitrust problem was aggravated by the "ambiguous role played by the cartel governments." The following month, the same attorney referred to the "interchanging and ambiguous capacities in which the Canadian Government had acted." Thus, six months after the government "compulsion" allegedly occurred, Gulf officials were still having difficulty delineating the role played by the Government.

The evidence suggests that Gulf officials took steps designed to bolster the sovereign compulsion defense by encouraging Canada to take a more explicit and less flexible position. As early as May 1972, Mr. Ediger, Gulf Canada's president, advised Mr. Hoffman, a member of the Gulf–United board of directors and a vice–president of Gulf Energy, the predecessor of GAC, that Gulf intended

> to suggest amendments [to the proposed producers' agreement] which will emphasize the fact that our participation is a result of direction from the Canadian government. Therefore, we will likely suggest [adding language] to indicate that Gulf and UCL [Uranez Canada Limited, a German corporation] are complying at the request of the Canadian government. . . .

In September 1972, a Gulf attorney complimented Mr. Ediger for telling the other cartel members that "it was very important for continuity to reside in the [Canadian] Department of E.M.& R. [Energy, Mines, and Resources]." The attorney went on to say:

> Whatever the occasion for expression of this position, Gulf representatives should take advantage of the occasion *and recognize it as the party line.* The more intricately involved the Canadian Government and any of its agencies or Departments becomes and remains in this uranium matter, the better the degree of protection for Gulf. (Emphasis added.)

One reasonable inference that can be drawn from this evidence is that Gulf wanted to be compelled by the Government of Canada; it is not particularly consistent with the notion that Gulf reacted, "in innocence and good faith, to governmental threats and pressures." Graziano, *Foreign Governmental Compulsion as a Defense in*

sanction of some of their activities will not justify their conspiracy" (Footnotes omitted)) *with Cal. Retail Liquor Dealers Ass'n v. Midcal Alum.*, 445 U.S. 97, 104–108, 100 S.Ct. 937, 943–44, 63 L.Ed.2d 233 (1980) ("The State simply authorizes price–setting and enforces the prices established by private parties. . . . The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price–fixing arrangement.")

United States Antitrust Law, 7 Va.J.Int'l L. 100, 117 (1967). The evidence does not establish to our satisfaction that Gulf–acting without the intent to restrain competition–innocently responded to foreign governmental pressure. Rather, it would appear that Gulf simply decided "to take a business risk," and thereafter did all it could to minimize that risk by establishing "the effective Canadian Government direction" that it join the cartel as "the fountainhead" of its antitrust defense.

Even if we were to assume, however, that Gulf had been effectively compelled to join and participate in the cartel operations, such compulsion might not provide an all–encompassing defense in this case, for the critical questions upon which application of the act of state doctrine turns would remain unresolved–what *specific* acts were compelled and where did they take place.[46]

United has alleged that GAC and Gulf sought to eliminate it as a competitor in the United States and to monopolize American uranium reserves. It further contends that the 1973 and 1974 Supply Agreements were part of that anti–competitive effort. Even if such actions were "compelled" by a foreign government, the act of state doctrine would provide no protection to Gulf or GAC. By definition, the act of state doctrine applies only to the acts of a foreign state "done within its own territory." *Underhill v. Hernandez, supra*, 168 U.S. at 252, 18 S.Ct. at 84. *See also Republic of Iraq v. First National City Bank, supra*, 353 F.2d at 51. "The doctrine cannot be used to excuse the commission of illegal acts within the territorial boundaries of the United States." *Linseman v. World Hockey Ass'n, supra*, 439 F.Supp. at 1324 (citations omitted). Although the "compulsion" may have occurred in Canada, it is the acts that are compelled, rather than the compulsion itself, that are at issue in the present litigation. The act of state doctrine must apply to those acts if it is to apply at all.

We cannot agree with the proposition that if a foreign state compels an American corporation to take actions in the United States which are intended to and do have severe adverse consequences to free and fair trade in the United States, the American corporation is thereby immunized from the full force of the laws of its own sovereign.[47] To hold otherwise would render asunder the "cornerstones of this nation's economic policies"–the antitrust laws. *United States v. First National City Bank*, 396 F.2d 897, 903 (2d Cir. 1968).

Our conclusion that the act of state doctrine is inapplicable is supported by the position taken towards the cartel by those branches of the federal government that are responsible for the formulation and execution of foreign policy.

The Proposition that the act of state doctrine should not be applied where the executive or legislative branches of the federal government have indicated that the act of a foreign state is not entitled to recognition under that doctrine was first set forth in *Bernstein v. N.V. Nederlandsche–Amerikaansche, Etc.*, 210 F.2d 375, 376 (2d Cir. 1954). *See generally* Annot., 12 A.L.R.Fed. 707, § 2[b] (1972). The Bernstein exception to the act of state doctrine was subsequently adopted by three members of the United States Supreme Court in *First Nat. City Bk. v. Banco Nacional de Cuba*, 406 U.S. 759, 767–70, 92 S.Ct. 1808, 1813, 32 L.Ed.2d 466 (1972). Although the Bernstein exception has never gained the support of a majority of the Supreme Court,[48] neither in *First*

46. "Today it is clear that a businessman may do no more than what is required by foreign legislative mandate if he is to claim antitrust immunity." 7 Va.J.Int'l L. at 133. *See also* W. Fugate, *supra*, at 148.

47. For authorities supporting the position that the sovereign compulsion defense should be limited to activities conducted solely within the foreign sovereign's territory, *see* Fugate, 49 Va. L.Rev. at 934; Note, *Development of the Defense of Sovereign Compulsion*, 69 Mich.L. Rev. 888, 901–02 (1971); 7 Va.J.Int'l L. at 140–42; *United States Department of Justice Antitrust Guide for International Operations*, T.Reg. Rep. (CCH) No. 266, Part II (Feb. 1, 1977).

48. Six members of the Supreme Court in *First Nat. City Bk.* rejected the notion that the position of the executive branch is dispositive of the question of the applicability of the act of state doctrine in a particular case.

Nat. City Bk. nor in any other case has the Court held that the position taken by the executive and legislative branches regarding the subject matter of the particular litigation in which the doctrine is sought to be invoked is irrelevant. The fact that those branches of the federal government which are responsible for the formulation and execution of foreign policy do not consider a certain subject to involve act of state implications is relevant to, but not dispositive of, the question of the applicability of that doctrine.

Both the executive and legislative branches have taken actions with respect to the uranium cartel which are clearly inconsistent with the notion that judicial examination of Gulf's participation in the cartel is precluded by the act of state doctrine.

The United States Government declined to state that this litigation involves "a breach of friendly relations" between the United States and Canada. In a letter transmitting communications from the Canadian Government to the trial court, the State Department stated that it was taking "no position with regard to any of the issues raised" by those letters, and that transmittal of the letters "should not be understood as having implications with respect to the foreign affairs of the United States." [49]

More significantly, the federal government has affirmatively sought to apply the

49. GAC has brought to our attention two letters written by the Justice Department to the Seventh Circuit Court of Appeals and to Judge Marshall in the *Westinghouse* uranium litigation now pending before those courts. *See In Re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980) and D.C., 480 F.Supp. 1138, *supra*. On March 18, 1980, the Justice Department sent the Seventh Circuit a letter from the State Department which referred to criticism of foreign governments in a recent decision of that court (*see* 617 F.2d at 1256). The State Department said that this criticism had "caused serious embarrassment to the United States in its relations with some of our closest allies." It stated that "the foreign governments concerned have substantial interest not only in [the *Westinghouse*] litigation, but also in certain broader issues which it raises." It said that although "the United States Government does not share some of the views presented by the foreign governments," it recognized "the genuineness of their concerns," and believed that their views should be considered by the courts because they "may assist the judiciary . . . in making the necessary accommodations between the laws and policies of various sovereign nations."

In May of this year, Associate Attorney General John Shennefield asked Judge Marshall to give "appropriate deference and weight" to the views and representations of the foreign governments. He stated that because the *Westinghouse* case "implicates foreign policy concerns of both the United States and foreign governments," "it would be inappropriate, *in the absence of bad faith*, to inflict punishment against a defendant . . . for inability to comply with the discovery order of the court because of a contrary foreign criminal law." (Emphasis added.) He urged the court to consider "the consequences of the absence of complete discovery" by reference to the factors identified in *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958).

Unlike the Seventh Circuit's recent decision, nothing either this Court or the trial court below has said in this case was critical of the Government of Canada. In May of this year, the Government of Canada sought leave of this Court to file an amicus curiae brief in this appeal. The motion was filed over two years after entry of the sanctions order and default judgment, and one year after the case had been argued to this Court. No reason was given for the delay in filing the motion, and accordingly, it was denied. In any case, the views of the Canadian Government were presented to the trial court, and are part of the record on appeal. We have fully considered them in reaching our decision. Like the State Department, however, we do not share some of the Canadian Government's views, though we have given full credence to their representations. The State Department's statement that the views of the foreign governments involved "may assist the judiciary . . . in making the necessary accommodations between the laws and policies of the various sovereign nations," is inconsistent with the notion that judicial examination of the matters at issue is precluded by the act of state doctrine. It is worth noting that neither the State nor the Justice Department has communicated similar concerns either to the court below or to this Court over the course of this litigation. Finally, the default judgment imposed in this case was based on findings that GAC acted in bad faith. Those findings are supported by the record; and they are consistent with the requirements of *Societe Internationale* (*see* Section III A, *infra*), and the concerns the Justice Department expressed in its most recent letter concerning the *Westinghouse* litigation.

laws of this country to Gulf's cartel activities. A Congressional subcommittee held hearings on the cartel. *See Hearings on International Uranium Cartel, supra.* A federal grand jury was impaneled to investigate the cartel. *In Re Grand Jury Investigation of Uranium Industry,* Misc. 78–0173, F.S. 78–0166 (D.D.C.1978). In May 1978 the Justice Department filed a criminal information against Gulf, charging it with violations of the Sherman Antitrust Act, to which Gulf pled *nolo contendere. United States v. Gulf Oil Corp.,* Cr.No. 78–123 (W.D.Pa.1978).[50]

The actions taken by both the legislative and executive branches regarding the cartel, and the detailed position the Justice Department has adopted in the general area of the extraterritorial application of United States antitrust laws (*see* n. 50, *supra*), are persuasive evidence that the branches of the federal government having responsibility for the conduct of foreign affairs do not consider the cartel activities of a major United States corporation to be immune from examination by the courts of this country.

These actions are more than a simple statement that the United States Government does not consider the act of state doctrine to be applicable to specific litigation involving private parties. The Government's position is also not merely an isolated instance involving a single corporation and a specific cartel. *See* n. 50, *supra.* Therefore, there is little danger that judicial deference to the executive branch's position will make the judiciary "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others." *First Nat. City Bk. v. Banco Nacional de Cuba, supra,* 406 U.S. at 773, 92 S.Ct. at 1816 (footnote omitted) (Douglas, J., concurring).

The fact that these actions involved the public enforcement of the antitrust laws, rather than a civil antitrust action by a private litigant, is immaterial. Recognition of such a distinction would further no national interest. As one commentator noted:

> It would seem that where the branches responsible for formulation of foreign policy have subordinated the sensitivity of foreign governments to having their acts of a particular sort explored in American courts that, at least after a successful prosecution of the American concern, the act of state doctrine should not stand in the way of the injured competitor's antitrust claim. In such a case, the act of state doctrine would thwart antitrust enforcement policies without furthering any separation of powers (judicial non–interference with foreign policy) values. . . . [T]he decision to review a foreign sovereign's act has already been contemplated by the statute and . . . already occurred in a prosecution.

Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns,* 77 Colum.L. Rev. 1247, 1261 (1977) (footnote omitted).

The antitrust laws of this State and nation contemplate both public and private actions against those who may have violated them.[51] They do not envision, nor should they be applied in such a way as to bring about, the anomalous situation in which the

50. The Antitrust Division of the Justice Department has an established policy regarding the application of American antitrust laws to the international activities of American corporations which is consistent with the actions taken by the Division regarding this cartel and with the discovery orders entered in this case. In the *Antitrust Guide for International Operations,* (*see* n. 47, *supra*), the Justice Department discusses its position concerning the application of the act of state doctrine to two hypothetical situations (cases "K" and "L") that have a direct bearing on the allegations against GAC and Gulf in this case.

51. *United States v. Borden Co.,* 347 U.S. 514, 518, 74 S.Ct. 703, 706, 98 L.Ed. 903 (1954); *Battle v. Liberty National Life Insurance Company,* 493 F.2d 39, 52 (5th Cir. 1974), *cert. denied,* 419 U.S. 1110, 95 S.Ct. 784, 42 L.Ed.2d 807 (1975); *In Re Uranium Antitrust Litigation, supra,* 480 F.Supp. at 1154.

Sections 57–1–1 and 57–1–2, N.M.S.A.1978, make certain anti–competitive trade practices a crime in New Mexico. Section 57–1–3, N.M.S.A.1978, provides a private party with a cause of action for damages it suffers by reason of the same practices.

public interest is vindicated by the imposition of a fine of several thousand dollars, but in which the private interest is frustrated by enforcement of a multi–million dollar judgment against what may have been a harmed competitor. To permit such a situation to exist could further the very anticompetitive and monopolistic goals which the multi–national corporation is alleged to have sought to achieve and which the antitrust laws were designed to prevent.[52]

b. *Exclusive Federal Power Over Foreign Relations*

GAC claims that even if the act of state doctrines does not bar an American court from examining Gulf's cartel–related actions, the principle of exclusive federal power over the conduct of foreign relations nevertheless precludes an American *state* court from conducting such an examination.[53]

GAC relies on *Zschernig v. Miller*, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968), in which the United States Supreme Court struck down an Oregon intestacy statute as it had been applied by the Oregon Supreme Court. 243 Or. 567, 412 P.2d 781 (1966). The Oregon statute required that, in order to take property belonging to an Oregon resident by succession or testamentary disposition, a non–resident alien had to prove that (1) American residents had a reciprocal right to inherit in the alien's country; and (2) the non–resident alien would be able to receive "the benefit, use or control" of the proceeds of the Oregon estate "without confiscation" by his government.

In *Zschernig*, the Court held that, as applied, the statute constituted an impermissible intrusion by the state into foreign affairs, an area which the Court said was entrusted by the United States Constitution solely to the President and Congress. The Court said that the statute required local probate courts to launch "minute inquiries" into the nature of foreign governments, the quality of rights which those governments accorded to both American citizens and their own citizens, the credibility of the representations of officials of foreign governments, and the actual administration of foreign legal systems. 389 U.S. at 433–35, 88 S.Ct. at 666–667.

GAC contends that the *Zschernig* decision precludes state courts from exercising jurisdiction over issues relating to the foreign cartel because of the Canadian Government's relationship to the cartel. GAC argues that because the trial court was without jurisdiction to consider the cartel–related issues, it could not enter discovery orders directing the production of cartel documents.

The *Zschernig* decision, which has not been applied by the United States Supreme Court outside of the limited context of the alien inheritance statutes at issue in that case, has nothing to do with this case. Unlike the statute at issue in *Zschernig*, the causes of action involved in this case are universally accepted by American jurisdictions–fraud, breach of fiduciary duty, commercial impracticability, economic coercion and antitrust. The effective enforcement of the antitrust laws is essential to the maintenance of free and fair business competition.[54] Unlike the alien inheritance

52. "Private litigation under the antitrust laws plays an important role in the enforcement of antitrust violations. It supplements public enforcement, 'increases the likelihood that a violator will be found out, greatly enlarges his penalties, and thereby helps discourage illegal conduct.'" Wechsler, *New Mexico Restraint of Trade Statutes–A Legislative Proposal*, 9 N.M.L.Rev. 1, 20 (1979) (footnote omitted).

53. Although similar to the act of state doctrine, this second principle is distinct in that the former looks to the power of American courts in general, whereas the latter is concerned with the power of an American *state* court. The act of state doctrine rests on the principle of separation of powers between branches of the federal government; the principle of exclusive federal power over the conduct of foreign relations is based on the concept of federalism.

54. "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates*, 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972).

statutes in *Zschernig*,[55] the causes of action in this case do not involve questionable attempts by states to directly affect the rights of citizens in foreign nations, nor are they related to the foreign policy attitudes of this or any other state court.

In this litigation the courts of this State have not undertaken the type of analysis that *Zschernig* prohibits. No pejorative criticism has been directed at Canada or any other foreign government. No minute inquiry has been made into the actual administration of foreign law by a foreign government, or into the rights that such a government affords to its own citizens. The veracity of the representations of its diplomats has not been questioned. This case involves nothing more than an inquiry into what an *American* corporation has done *in America*, a situation which finds no appropriate analogy in *Zschernig* or its exceedingly limited progeny.

The states of this country have little interest in how a foreign government treats its own citizens, but they have every conceivable interest in anti–competitive conduct by American corporations occurring within their own borders. Likewise, foreign governments have a legitimate interest in the rights they choose to afford their own citizens; but they have no legitimate interest in whether a state court in this country will lend its judicial processes to the enforcement of contracts entered into in the United States by corporations based in this country for the supply of a resource to be mined and milled in the United States. Our courts have done no more than seek to enforce state laws which are consistent with federal laws, and with actions of the United States Congress [56] and the United States Justice Department concerning Gulf's cartel activities. We therefore hold that neither *Zschernig* nor the act of state doctrine precludes the courts of New Mexico from litigating the cartel–related issues present in this case, or from seeking the production of documents which will facilitate the resolution of such litigation.

2. *Canada's Uranium Information Security Regulations*

GAC also contends that the trial court's discovery orders commanded conduct in violation of the Canadian Uranium Information Security Regulations, and were therefore prohibited by the act of state doctrine and the *Zschernig* decision.

a. *Act of State Doctrine*

Clearly, the Uranium Information Security Regulations were an act of state. They were promulgated by the Canadian Government pursuant to the Canadian Atomic Energy Control Act. They have been upheld by Canadian courts. The Regulations have been considered by both the Canadian executive and judicial branches to be in the public interest of Canada. However, it does not follow that because the Regulations were an act of state, the discovery orders were precluded by the act of state doctrine.

"So crucial are antitrust laws to the economy of the state that the New Mexico Constitution [Art. IV, § 38] mandates the enactment of laws 'to prevent trusts, monopolies and combinations in restraint of trade.' " Wechsler, 9 N.M. L.Rev. at 22.

55. These statutes had largely been applied to communist countries. In the years following their passage, the statutes were subject to widespread criticism by legal scholars for being unsound legislation which had been both ineffective and prejudicially applied. *See e.g.*, the authorities cited in 32 Alb.L.Rev. 646, 649 n.15 (1968). In applying these statutes, state courts had on occasion criticized foreign governments in strong and intemperate language. *See* examples cited in *Zschernig, supra*, 389 U.S. at 437–39 n.8, 88 S.Ct. at 669 n.8 and in 82 Harv.L.Rev. at 239, n.8. Commentators were virtually unanimous in condemning these statutes and in applauding the *Zschernig* decision. One said: "[C]learly the state has no interest in inquiries of the sort which [*Zschernig*] condemned." 82 Harv.L.Rev. at 245. *See also* 32 Alb.L.Rev. at 653–54.

56. It is worth noting that the Congressional subcommittee investigating the cartel held several of its hearings in unprecedented joint sessions with a committee of the New York State Assembly in order to assist that state's independent investigation of the cartel. *Hearings on International Uranium Cartel, supra*, Vol. I, Serial Nos. 95–39, p. 130 and No. 95–95, p. 1.

The trial court never ordered GAC, Gulf, or Gulf Canada to violate the Regulations, and never questioned the validity of those Regulations. In October 1977, the court ordered GAC to produce all non–privileged cartel records, "*[i]nsofar as it is lawful so to do.*" (Emphasis added.) The court went on to say that "to the extent that it might be a violation of Canadian law to produce . . [cartel] documents housed in Canada," GAC had an obligation to "make an immediate diligent and good faith effort to obtain a *lawful* waiver of or dispensation from such Canadian prohibitions and to the extent thereafter *lawful* at the earliest possible date, actually produce for inspection and copying of such documents." (Emphasis added.) In subsequent orders the trial court expressly refused to order identification or production of cartel documents in violation of Canadian law. Instead, it relied on Rule 37 sanctions to redress the dilemma resulting from the absence of the documents or the identification thereof.[57]

Further, the act of state doctrine is inapplicable insofar as the Regulations are concerned under the decision of the United States Supreme Court in *Societe Internationale v. Rogers,* 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958). In that case the plaintiff, a Swiss holding company, had assets seized by the Alien Property Custodian during the Second World War pursuant to the Trading With The Enemy Act. After the War, the plaintiff filed suit against the Attorney General of the United States seeking to recover the property on the ground that it had not been an enemy within the meaning of the Act. The Government sought production of records which were in the possession of a Swiss banking company controlled by the plaintiff, which it claimed were relevant to the issue of the plaintiff's alleged "enemy taint." The plaintiff failed to produce the documents because Swiss law prohibited production of the records. The district court dismissed the plaintiff's complaint, *Societe Internationale, Etc. v. McGranery,* 111 F.Supp. 435 (D.D.C.1953). The Court of Appeals affirmed. *Societe Internationale v. Brownell,* 95 U.S.App.D.C. 232, 225 F.2d 532 (D.C.Cir. 1955). The Supreme Court unanimously reversed the two lower courts.

Two aspects of the Supreme Court's decision are pertinent to this case–first, the propriety of a court's order to produce records located in a foreign country whose laws prohibit disclosure of the records; and second, the appropriateness of the sanctions imposed for a party's failure to comply with such an order where the failure is due to the proscriptions of foreign law. In this section of the opinion we are concerned only with the first question; the latter aspect is considered in Section III A, *infra.*

In *Societe Internationale,* the Court stated:

> Whatever its reasons, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can hardly affect the fact of noncompliance and are relevant *only* to the path which the District Court might follow in dealing with petitioner's failure to comply.

357 U.S. at 208, 78 S.Ct. at 1094 (emphasis added). This passage implies that foreign nondisclosure laws are not relevant to the propriety of production orders. Rather, it states that the reason for nonproduction is relevant *only* to the question of appropriate sanctions for noncompliance with the order. This distinction is significant. *In Re Westinghouse Elec. Corp. Uranium, Etc.,* 563 F.2d 992, 997, 999 (10th Cir. 1977); *Arthur Andersen & Co. v. Finesilver,* 546 F.2d 338, 341 (10th Cir. 1976), *cert. denied,* 429 U.S. 1096, 97 S.Ct. 1113, 51 L.Ed.2d 543 (1977); *In Re Uranium Antitrust Litigation, supra,*

57. In ordering production of Gulf's Canadian cartel documents in the Westinghouse litigation, Judge Marshall rejected the very same act of state argument GAC advances here. He stated:

> Plaintiffs have not challenged the validity of any of the foreign nondisclosure laws which are relied on by defendants. The issue is not whether those laws are valid, but rather, conceding their validity, whether they excuse defendants from complying with a production order.

In Re Uranium Antitrust Litigation, supra, 480 F.Supp. at 1149.

480 F.Supp. at 1144–48; Wright, "Discovery," 35 F.R.D. 39, 81 (1963); Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non–production,* 14 Va.J.Int.L. 747, 753 (1974).

In *Societe Internationale* the Court did not refer to the act of state doctrine or to principles of international comity. The reason for that lack of reference to these principles is simple. Neither in *Societe* nor in this case did the trial court order a litigant to violate the nondisclosure laws of the foreign sovereign. Neither court criticized the foreign sovereign or its laws, or engaged in an examination of such laws or the motivations which gave rise to them. Both courts sought only to maintain the integrity of the judicial process and the efficacy of the laws upon which the cause of action in each case was based. In both cases, those laws reflected very significant policies of this country.[58]

b. *Exclusive Federal Power Over Foreign Relations*

The principles set forth in *Zschernig v. Miller, supra,* are inapplicable to the Uranium Information Security Regulations for largely the same reasons that the act of state doctrine does not apply. The discovery orders in this case which sought cartel document production involved none of the problems the Supreme Court was confronted with in *Zschernig. See e. g.,* n.55, *supra,* and accompanying text.

D.

APPLICABILITY OF NEW MEXICO ANTITRUST ACT

The last issue we consider concerning the propriety of the trial court's discovery orders involves the applicability of the New Mexico Antitrust Act, Sections 57–1–1 to 57–1–3, N.M.S.A.1978.[59] Although GAC filed a counterclaim alleging that United had violated the New Mexico Antitrust Act, it now contends that that Act may not be applied to the specific commerce at issue in this case (the 1973 and 1974 Supply Agreements and the I&M contract) and to the activities of the international uranium cartel. GAC argues that if the Act does not apply, discovery orders pertaining to allegations of violations of the Act could not be

58. In his recent decision ordering Gulf and other parties in the *Westinghouse* litigation to produce cartel records located in Canada and elsewhere, United States District Judge Marshall stated that "the policies supporting an inquiry into corporate activities and structure are at least as weighty, and probably stronger, with the antitrust statutes here than they were with the Trading with the Enemy Act in *Societe Internationale.*" *In Re Uranium Antitrust Litigation, supra,* 480 F.Supp. at 1154 (citation omitted).

In a decision rendered on March 18 of this year, the Supreme Court of Canada denied an application of Gulf Oil for letters rogatory to secure cartel documents located in Canada. *Gulf Oil Corp. v. Gulf Canada Ltd.* (Slip Op. March 18, 1980). Gulf sought the letters in order to comply with discovery orders entered by Judge Marshall in the *Westinghouse* litigation. *See In Re Uranium Antitrust Litigation, supra,* 480 F.Supp. 1138. The Canadian high court stated that the Canadian Government's "resistance to disclosure was not so much a matter of the maintenance of secrecy as it was of an assertion of Canadian sovereignty to resist the extra–territorial application of United States anti–trust laws." The court stated that it failed to see how such a policy "can be ignored in the interests of comity towards a foreign court, as if the policy was essentially a reflection of private considerations without any public, governmental interest." But it stated: "It may be that different considerations will operate where a Canadian court is concerned with Canadian litigation arising out of issues turning on Canadian law."

The antitrust issues in this litigation reflect more than "private considerations without any public, governmental interest." *See* n.54, *supra.* We cannot subscribe to the idea that the fundamental public policy which the antitrust laws embody must be ignored in the interests of comity towards the policy of a foreign state, particularly where the highest court of that state intimates that it would not necessarily be bound by the same policy of its own government in litigation "turning on Canadian law."

59. In 1979, the New Mexico Legislature substantially revised the Antitrust Act. *See* N.M. Laws 1979, ch. 374, §§ 1–18 (codified as Sections 57–1–1 to 57–1–15, N.M.S.A.1978 (Supp. 1979)). In this case, we are concerned with the prior act, Sections 57–1–1 to 57–1–3, N.M.S.A. 1978.

entered, and therefore, sanctions could not be imposed for a failure to comply with such orders.[60]

1. *The Commerce Clause*

GAC's first contention is that the Commerce Clause of the United States Constitution[61] bars the application of state antitrust laws to activities which occur exclusively or overwhelmingly in interstate and foreign commerce. GAC argues that the supply and utility contracts in this case have no immediate relationship to the State of New Mexico, and therefore, that they involve only interstate commerce. Further, GAC argues that the cartel's operations were concerned solely with foreign commerce.

It is well settled that the federal power to regulate commerce is not exclusive, and that states have the inherent police power to regulate commerce within their borders, even though such activities may include or affect interstate and foreign commerce. *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 140, 94 S.Ct. 383, 396, 38 L.Ed.2d 348 (1973); *Cities Service Co. v. Peerless Co.*, 340 U.S. 179, 186, 71 S.Ct. 215, 219, 95 L.Ed. 190 (1950); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 766–67, 65 S.Ct. 1515, 1518–19, 89 L.Ed. 1915 (1945); *K. S. B. Tech. Sales v. North Jersey, Etc.*, 75 N.J. 272, 381 A.2d 774, 784 (1977). Specifically, a state may exercise its power by removing restraints on the trade and commerce of that state even though interstate commerce may thereby be affected. *Giboney v. Empire Storage Co.*, 336 U.S. 490, 495, 69 S.Ct. 684, 687, 93 L.Ed. 834 (1949); *Watson v. Buck*, 313 U.S. 387, 403–04, 61 S.Ct. 962, 967, 85 L.Ed. 1416 (1941); J. Flynn, Federalism and State Antitrust Regulation 63 (1964).

The following standards for the states' power to regulate commerce were established in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970):

> Where the [state] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

See also Philadelphia v. New Jersey, 437 U.S. 617, 624, 98 S.Ct. 2531, 2536, 57 L.Ed.2d 475 (1978).

Thus, the first inquiry is whether the state regulation effectuates "a legitimate local public interest." There are two aspects to this requirement. First, the type of regulation–here antitrust–must be one within the state's inherent police powers. Second, the specific activity to which the state regulation is applied in a particular case must involve a matter of local concern which is "local in character and effect." *Southern Pacific Co. v. Arizona, supra*, 325 U.S. at 767, 65 S.Ct. at 1519.

It has consistently been held that the type of regulation at issue here–the prevention of anti–competitive, monopolistic and predatory trade practices–is a legitimate exercise of the state's inherent police powers. *See United Nuclear Corp. v. General Atomic Co., supra*, 93 N.M. at 124–27, 597 P.2d at 309–12; *Giboney v. Empire Stor-*

60. GAC's argument as to the inapplicability of the New Mexico Antitrust Act relates only to the antitrust issues in this case. However, as we have already held, the information and documents sought were also relevant to United's claims of fraud, breach of fiduciary duty, economic coercion and commercial impracticability. The judgment for I&M was based on commercial impracticability under Section 55–2–615, N.M.S.A.1978. GAC makes no claim that trial of these issues was precluded by the Commerce Clause or the Sherman Antitrust Act.

61. U.S.Const., Art. I, § 8, cl. 3 provides:

> "The Congress shall have Power . . . to regulate Commerce with the foreign Nations, and among the several States, and with the Indian Tribes. . . ."

age Co., supra; German Alliance Ins. Co. v. Hale, 219 U.S. 307, 316–17, 31 S.Ct. 246, 55 L.Ed. 229 (1911); J. Flynn, *supra,* at 76–77.

GAC's principal argument is that the second element of "a legitimate local public interest" is not present in this case because the specific contracts at issue and the uranium cartel are not "local in character and effect." GAC relies on four points to support its position. First, the cartel had "no immediate relationship" to New Mexico and never conducted meetings in this state. GAC contends that cartel operations were "plainly in foreign commerce outside the United States." Second, none of the entities involved in this case are incorporated in New Mexico. Third, the 1973 Supply Agreement was not executed in and does not require the performance of any act in New Mexico. Fourth, the uranium market is national in scope.

We are not persuaded that the matters at issue in this case occurred exclusively in interstate and foreign commerce and had no significant local aspects. It has been recognized that state antitrust laws may reach up to include the regulation of interstate commerce. *See R. E. Spriggs Co. v. Adolph Coors Company,* 37 Cal.App.3d 653, 112 Cal. Rptr. 585, 589 (1974); J. Flynn, *supra,* at 71, and cases cited therein at n. 251; Wechsler, *supra,* 9 N.M.L.Rev. at 3. As the Massachusetts Supreme Judicial Court stated:

> If State laws have no force as soon as interstate commerce begins to be affected, a very large area will be fenced off in which the States will be practically helpless to protect their citizens without, so far as we can perceive, any corresponding contribution to the national welfare.

Commonwealth v. McHugh, 326 Mass. 249, 93 N.E.2d 751, 762 (1950) (citation omitted).[62]

We cannot agree that the outer limit of the exercise of that power–activity of a wholly interstate nature–has been exceeded in this case. The contracts at issue may be regarded as having no immediate relationship to New Mexico only by relying upon the formalities–the domicile of the parties to the contracts, the place of performance, and the place the contracts were entered into–and ignoring the practical realities.

United alleges that the 1973 and 1974 Supply Agreements were part of a conspiracy to monopolize uranium reserves in the United States and to eliminate it as a competitor in the uranium market. As of 1975, over one–half of the uranium reserves of the United States were located in New Mexico. In all but one year from 1966 to 1976, in excess of forty percent of the annual production of uranium in the United States came from New Mexico mines. As of 1976, over fifty percent of the uranium mining work force in this country and nearly forty percent of the uranium milling work force were located in New Mexico. Nearly one–half of the capacity of American uranium production mills is in this State. Gulf's New Mexico Mt. Taylor uranium reserves constitute the largest uranium ore body in the United States. United's mine at Churchrock, New Mexico, which GAC is alleged to have attempted to

62. GAC relies on the case of *Kosuga v. Kelly,* 257 F.2d 48 (7th Cir. 1958), *aff'd on other grounds,* 358 U.S. 516, 79 S.Ct. 429, 3 L.Ed.2d 475 (1959), in which the court held that the Illinois Antitrust Act did not apply to a contract for the sale of onions in interstate commerce. That decision indicated that the scope of the Illinois Act extended solely to intrastate commerce. *See Henry G. Meigs, Inc. v. Empire Petroleum Company,* 273 F.2d 424, 430 (7th Cir. 1960); *R. E. Spriggs Co. v. Adolph Coors Company, supra,* 112 Cal.Rptr. at 591. To the extent that *Kosuga* held state antitrust laws to be generally inapplicable to transactions involving interstate commerce, we decline to follow it. The language in *Kosuga* which supports such a holding has been criticized for its lack of authority and reasoning. *See R. E. Spriggs Co. v. Adolph Coors Company, supra,* 112 Cal.Rptr. at 591; J. Flynn, *supra,* at 74–75; Pollack, *Federal Preemption and State Antitrust Enforcement,* 43 Chi. Bar Record 145 (1961). *Kosuga* relied on a reference to *Corpus Juris Secundum,* but the cases cited by *C.J.S.* do not stand for the proposition stated in the text. Two years after *Kosuga,* the Seventh Circuit applied a Wisconsin antitrust law to a transaction involving interstate commerce. *Henry G. Meigs, Inc. v. Empire Petroleum Company, supra.*

gain control of as part of the monopolistic conspiracy, is the largest underground uranium mine in the United States. Therefore, it would be impossible to monopolize the American uranium market without having an immediate relationship to, and a substantial effect on, the trade and commerce of this State.

Although the 1973 Supply Agreement does not formally require any activity to take place here, almost all of United's uranium production is from New Mexico mines. New Mexico is also the site of its only uranium mill, which is the place of delivery under the terms of the 1974 Supply Agreement. In its brief on appeal, GAC conceded that New Mexico is "the state in which [United's] operation is located." The uranium sales efforts of GAC and its predecessors were based on Gulf production in New Mexico, foreign uranium imports, and purchases on the open market. Those purchases also included substantial amounts of New Mexico uranium. *See* Section II B, *supra*.

It is simply not the case that this litigation involves exclusively interstate commerce and that this State has no interest in its adjudication. *United Nuclear Corp. v. General Atomic Co., supra*, 90 N.M. at 101–02, 560 P.2d at 165–66. Therefore, we hold that the State of New Mexico has "a legitimate local public interest" in the application of its antitrust laws to this case.

The remaining inquiries are whether the state law as applied here (1) "regulates evenhandedly" and (2) has only "incidental" effects on interstate commerce. There is clearly nothing in the New Mexico Antitrust Act or in its application to this case which entails any discrimination against interstate goods or which favors local commerce over the commerce of sister states. *Compare Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125–26, 98 S.Ct. 2207, 2213–14, 57 L.Ed.2d 91 (1978) *with Dean Milk Co. v. Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951). GAC makes no contention to the contrary.[63] Further, GAC has made no showing whatsoever that the application of state antitrust laws to this case will have *any* adverse effects on "the free flow of commerce across state lines." *Southern Pacific Co. v. Arizona, supra*, 325 U.S. at 770, 65 S.Ct. at 1521. The very purpose of these laws is to remove privately created restraints on free trade.

> Consequently, it would be difficult to prove that a policy which removes privately instituted interferences, delays, interruptions, and inconveniences with interstate commerce, is itself a delay, interference, interruption, and inconvenience to interstate commerce when enforced at the local level by the states.

J. Flynn, *supra*, at 84.

GAC nevertheless contends that because the uranium market is "national in scope," and because uranium is "vital to the military posture of the United States" and to federal energy policy, "legal and policy questions involving uranium and the uranium industry must be addressed uniformly by the federal government." GAC argues that application of state antitrust laws to such matters "is too fraught with a potential for inconsistent results, lack of uniformity, and consequent burdens upon interstate commerce."

GAC places principal reliance on *Flood v. Kuhn*, 407 U.S. 258, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972), *aff'g*, 443 F.2d 264 (2d Cir. 1971), *aff'g* 316 F.Supp. 271 (S.D.N.Y. 1970), in which the Supreme Court upheld lower court rulings that the reserve clause

63. GAC does suggest New Mexico will be benefited by invalidation of the contracts because United will be permitted to sell the uranium at higher prices, thus increasing local tax revenues and forcing out-of-state consumers to pay higher utility rates. However, any such consequences are entirely indirect results of the application of laws which, on their face, have no discriminatory aspects. GAC, of course, seeks to avoid its obligations to I&M, which, if successful, would have precisely the same effect on I&M's customers. Furthermore, if United were to sell any of this uranium for use inside New Mexico, New Mexico consumers would pay the same higher price. It is also interesting to note that GAC's argument that higher uranium prices will result in higher tax revenues in this State is based on GAC's recognition that the uranium would have been supplied from New Mexico sources.

in professional baseball contracts was not subject to challenge under state antitrust laws. Previous decisions of the Supreme Court had held that professional baseball was not subject to federal antitrust laws. *Toolson v. New York Yankees*, 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64 (1953); *Federal Club v. National League*, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (1922). In *Flood* the lower courts had held that "the nationwide character of organized baseball combined with the necessary interdependence of the teams requires that there be uniformity in any regulation of baseball and its reserve system." 316 F.Supp. at 279–80. *See* 443 F.2d at 267–68.

In affirming the lower courts' decisions, the Supreme Court did not adopt any broad or rigid limitations on the applicability of state antitrust laws to transactions involving interstate commerce. The Court upheld those holdings "[a]s applied to organized baseball, and in the light of this Court's observations and holdings in *Federal Baseball*, [and] in *Toolson* . . . ." 407 U.S. at 284, 92 S.Ct. at 2113.

We believe that *Flood* is readily distinguishable from this case. First, the time honored, though unusual, exemption from federal antitrust laws which professional baseball enjoys would be meaningless if state antitrust laws were not also inapplicable. Thus, in *Flood* there was a clear conflict between federal and state antitrust enforcement policies.

Second, professional baseball is significantly different from the uranium market. Baseball involves "[a] complex web of franchises, farm teams and recruiters . . ." 443 F.2d at 267. Baseball clubs are organized into leagues and

> are dependent on the league playing schedule . . . . Therefore, it is the league structure at which any state antitrust regulation must be aimed . . . [E]ach league extends over many states, and . . . , if state regulation were permissible, the internal structure of the leagues would require compliance with the strictest state antitrust standard.

Id. at 267–68.

No single state has a particularly significant interest in the operation of nationwide professional sports. However, this State has a very substantial relationship to uranium production, and therefore, a significant interest in preventing anti–competitive practices in the uranium industry. Moreover, in energy–related matters, unlike professional baseball, there is uniformity of treatment of anti–competitive practices under both federal and state law. Challenging such activities is federal policy. Challenging the uranium cartel and Gulf's role therein was the federal practice.[64]

The fact that the uranium market is nationwide in scope does not require a different result. In *Flood*, state antitrust regulations would have directly affected the entire "complex web" of professional baseball, and would have been aimed at league structure. In this case, the state law has been applied solely to private contracts for the sale of specific goods. In *Flood*, the reserve clause being challenged was a recognized practice in the sport. Here, the alleged conspiracy was a secret attempt to dominate an industry, a practice condemned by the Congress, the Justice Department, and the courts. If the fact that the commerce at issue involved a national market was enough to render state law invalid, the states' power to regulate anti–competitive practices would be effectively destroyed.

In *Exxon Corp. v. Governor of Maryland*, *supra*, the United States Supreme Court rejected a similar argument advanced by Gulf and other oil companies regarding the

64. *See* n. 50, *supra*, and accompanying text. In addition to the hearings held on the anti–competitive practices of the cartel (*see Hearings on International Uranium Cartel, supra*), in 1975 another subcommittee of the U. S. House of Representatives held extensive hearings on competition in the energy industry. *Energy Industry Investigation: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., Serial No. 48–49, Parts 1–2 (1975). (Gulf submitted a report on its uranium business as part of those hearings. The report did not, however, reveal Gulf's role in the uranium cartel.)

national scope of the petroleum industry and a state statute that regulated aspects of that industry in Maryland. The Court said:

> [W]e cannot adopt appellants' novel suggestion that because the economic market for petroleum products is nationwide, no State has the power to regulate the retail marketing of gas. Appellants point out that . . . the cumulative effect of this sort of legislation may have serious implications for their national marketing operations. While this concern is a significant one, we do not find that the Commerce Clause, by its own force, pre-empts the field of retail gas marketing. . . . [T]his Court has only rarely held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede the flow of interstate goods. . . . In the absence of a relevant congressional declaration of policy, or a showing of a specific discrimination against, or burdening of, interstate commerce, we cannot conclude that the States are without power to regulate in this area.

437 U.S. at 128–29, 98 S.Ct. at 2215. (citations and footnote omitted).

No showing has been made that application of New Mexico law entails "a specific discrimination against, or burdening of, interstate commerce." No embargo has been placed on interstate shipments of uranium. *Compare Penna. v. West Virginia*, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117 (1923) *and West v. Kansas Natural Gas Co.*, 221 U.S. 229, 31 S.Ct. 564, 55 L.Ed. 716 (1911). Unlike other situations in which state regulations have been invalidated under the Commerce Clause,[65] there is little likelihood that in the area of state antitrust laws an excessive cost of compliance will be imposed by piecemeal state regulation. The cost of compliance is nothing more than refraining from the kind of anti-competitive, predatory trade practices which federal law and the laws of virtually all states condemn. The pervasiveness of antitrust regulation in the economy demonstrates a uniformity between state and federal laws which was not present in *Exxon Corp. v. Governor of Maryland, supra.* Therefore, the New Mexico Antitrust Act was applied consistently with the Commerce Clause of the federal constitution.

2. *Preemption by Sherman Antitrust Act*

GAC's second claim is that the New Mexico Antitrust Act is preempted by the Sherman Antitrust Act in the context of this case.

Congress has the unquestioned power to preempt state regulations in the field of interstate and foreign commerce.[66] Preemption may be ascertained from the express language of the federal statute,[67] by reference to the statute's legislative history,[68] or from a clear inconsistency, repugnancy, or serious danger of conflict between the state and federal regulations.[69] However, none of these sources evidence a Congressional intent to preempt state antitrust laws in the circumstances present in this case.

We begin with the well-established principle that "in a field which the States have traditionally occupied," "the historic police

65. *See e. g., Bibb v. Navajo Freight Lines*, 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959) (state law required change of mudguards on interstate carriers at state line); *Southern Pacific Co. v. Arizona, supra*, (state law required change in length of trains at state line).

66. *De Canas v. Bica*, 424 U.S. 351, 357, 96 S.Ct. 933, 937, 47 L.Ed.2d 43 (1976); *Southern Pacific Co. v. Arizona, supra*, 325 U.S. at 769, 65 S.Ct. at 1520.

67. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 146–47, 83 S.Ct. 1210, 1219, 10 L.Ed.2d 248 (1963); *Campbell v. Hussey*, 368 U.S. 297, 300–01, 82 S.Ct. 327, 328–29, 7 L.Ed.2d 299 (1961); J. Flynn, *supra*, at 119.

68. *De Canas v. Bica, supra*, 424 U.S. at 358, 96 S.Ct. at 937; *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 634–37, 93 S.Ct. 1854, 1860–1861, 36 L.Ed.2d 547 (1973); J. Flynn, *supra*, at 125.

69. *Florida Avocado Growers v. Paul, supra*, 373 U.S. at 146, 83 S.Ct. at 1219; *Pennsylvania v. Nelson*, 350 U.S. 497, 505, 76 S.Ct. 477, 481, 100 L.Ed. 640 (1956).

powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. (Citations omitted.)" *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). *See also Florida Avocado Growers v. Paul, supra*, 373 U.S. at 146, 83 S.Ct. at 1219.

Nothing in the language of the Sherman Act expresses any intent to preempt state antitrust laws, many of which were enacted prior to the Sherman Act. *See United Nuclear Corp. v. General Atomic Co., supra*, 93 N.M. at 125, 597 P.2d at 310; J. Flynn, *supra*, at 90–91. The legislative history of the Sherman Act indicates that, rather than intending to supersede state antitrust laws, Congress was seeking to supplement the enforcement of those laws. *See* remarks of Senator Sherman quoted in *United Nuclear Corp. v. General Atomic Co., supra*, 93 N.M. at 125, 597 P.2d at 310. *See also* H.R.Rep. No. 1707, 51st Cong., 1st Sess. 1 (1890). This legislative history has been interpreted as evidence of a lack of an intent to preempt state antitrust laws. *United Nuclear Corp. v. General Atomic Co., supra*, 93 N.M. at 125, 597 P.2d at 310; *R. E. Spriggs Co. v. Adolph Coors Company, supra*, 112 Cal.Rptr. at 589.

Preemption may also be inferred where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to regulate,[70] or where the state act touches a field in which the federal interest is so dominate that state regulation might interfere with the federal purposes,[71] or where there is a "direct and positive" conflict or repugnancy between the state and federal laws.[72]

GAC points to no "direct and positive" conflict between state and federal antitrust laws in general, or as the state law has been applied in this case. However, it suggests that if state antitrust laws are applied to interstate commerce of the nature involved in this case, "intolerable burdens" would be imposed on that commerce because of "differing limitations upon competition in each jurisdiction where goods might be produced, transported or sold."

In *Exxon v. Governor of Maryland, supra*, the Supreme Court rejected a similar argument, stating that the existence of such potential conflicts is " 'entirely too speculative' . . . to warrant preemption." 437 U.S. at 131, 98 S.Ct. at 2216. The Court went on to say that it is not only "generally reluctant to infer pre–emption," but also, that it would be "particularly inappropriate to do so" where "the basic purposes" of the state and federal statutes are similar. *Id.* at 132, 98 S.Ct. at 2217.

The basic purposes of the state and federal antitrust laws in question here are not merely similar; they are identical–"to establish a 'public policy of first magnitude'; that is, promoting the national interest in a competitive economy." *United Nuclear Corp. v. General Atomic Co., supra*, 93 N.M. at 125, 597 P.2d at 310 (citation omitted). *See also* J. Flynn, *supra*, at 138. The state act in question uses substantially the same language as the Sherman Act. J. Flynn, *supra*, at 139. The state act has been applied consistently with federal actions regarding the cartel and Gulf's role therein. *See* n. 50, *supra*, and accompanying text. There is thus no "clash of competing fundamental policies." *United Nuclear Corp. v. General Atomic Co., supra*, 93 N.M. at 125, 597 P.2d at 310.

GAC suggests that even in the absence of "direct and positive" conflicts between state and federal antitrust laws, the dominate federal interest in foreign commerce precludes application of state antitrust laws to

70. *See e. g., Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978); *City of Burbank v. Lockheed Air Terminal, supra*, 411 U.S. at 633, 93 S.Ct. at 1859; *Rice v. Santa Fe Elevator Corp., supra*, 331 U.S. at 230, 67 S.Ct. at 1152. Note, *The Commerce Clause and State Antitrust Regulation*, 61 Colum.L.Rev. 1469, 1477–78 (1961).

71. *Id.*

72. *Kelly v. Washington*, 302 U.S. 1, 10–11, 58 S.Ct. 87, 92, 82 L.Ed. 3 (1937). *See also R. E. Spriggs Co. v. Adolph Coors Company, supra*, 112 Cal.Rptr. at 593.

cartel activities. However, we are not interested in this case in regulating foreign commerce; we are concerned with practices that allegedly were aimed at restraining trade in this State. Without full cartel disclosure, we cannot determine to what commerce the cartel's activities extended. We will not cast aside laws designed to protect the trade of this State without the necessary factual predicate upon which to base a finding that they have been preempted by federal law, particularly where the bad faith conduct of the party charged with violations of those laws has been found to be largely responsible for the missing factual material. *See* Section III, *infra.*

GAC also argues that the dominate federal interest in energy matters warrants a finding that state antitrust laws are preempted insofar as they may be applied to anti–competitive practices in the field of energy. However, the concept of preemption based on federal dominance of a subject matter rests on the likelihood that state regulations in the area will interfere with the federal purposes. *See City of Burbank v. Lockheed Air Terminal, supra*; *Head v. New Mexico Board*, 374 U.S. 424, 429–30, 83 S.Ct. 1759, 1762–63, 10 L.Ed.2d 983 (1963). The promotion of anti–competitive trade practices in uranium marketing is not part of any federal energy program. *See* n. 50, *supra*, and accompanying text, and n. 64, *supra*. Thus, the prevention of such practices by the states poses no significant possibility of conflict with federal policy.

Therefore, we find no basis upon which to hold that the New Mexico antitrust laws, as applied to the contracts for the sale of uranium at issue in this case, have been preempted by the federal antitrust laws.

3. *Scope of the New Mexico Antitrust Act*

GAC's third argument as to the inapplicability of the New Mexico Antitrust Act is that the Act only applies to contracts which are illegal on their face. GAC contends that ordinary purchase and sale contracts–such as the Supply Agreements at issue here–which are fair and enforceable on their face, are valid even if they are related in some peripheral way to an antitrust violation.

GAC relies on *State v. Electric City Supply Company*, 74 N.M. 295, 393 P.2d 325 (1964) and *Kelly v. Kosuga*, 358 U.S. 516, 79 S.Ct. 429, 3 L.Ed.2d 475 (1959). We find both cases distinguishable from this case. First, unlike the Sherman Antitrust Act at issue in *Kelly v. Kosuga*, the New Mexico Act *does* contain an explicit provision voiding contracts which have as their object or operate to restrict or monopolize any part of the trade or commerce of New Mexico. Section 57–1–3, N.M.S.A.1978 (current version at § 57–1–3, N.M.S.A.1978 (Supp. 1979)) states:

> All contracts and agreements in violation of the foregoing two sections [57–1–1, 57–1–2, N.M.S.A.1978] shall be void, and the person or persons, corporation or corporations, association or associations who shall violate the provisions of either of said sections shall be civilly liable to the party injured for any and all damage occasioned by such violation, and any purchaser of any commodity from any individual, corporation or association transacting business in violation of such sections shall not be liable for the payment for such commodity.

By recognizing the defense of contract illegality in this case, we are, rather than creating a new remedy, merely giving effect to the express provisions of the antitrust laws of this State.[73]

Second, in both *Kelly v. Kosuga* and *Electric City Supply Company*, the contracts sued upon had been fully performed, and the courts refused to permit one party to avoid its obligation to pay for the goods it received.[74] Thus, in those cases the courts

73. Because the New Mexico Antitrust Act "does not provide for treble damages as available to federal litigants, the ability to have a contract declared void is the most effective tool provided by New Mexico law." Weschler, *supra*, 9 N.M.L.Rev. at 9 n. 70.

74. In *Electric City Supply Company*, the contract sued upon was not even alleged to have violated the antitrust laws. There, a contractor sold equipment to a municipality which he had purchased from a materialman. After the contractor was paid by the city, he sought to avoid

furthered the general policy, as Justice Holmes put it, "of preventing people from getting other people's property for nothing when they purport to be buying it." *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 271, 29 S.Ct. 280, 296, 53 L.Ed. 486 (1909) (dissenting). *See Kelly v. Kosuga*, 358 U.S. at 520–21, 79 S.Ct. at 431–432. This policy controlled the *Kelly* case. *See Viacom Intern. Inc. v. Tandeum Productions, Inc.*, 526 F.2d 593, 599 (2d Cir. 1975); Comment, *The Defense of Antitrust Illegality in Contract Actions*, 27 U.Chi.L.Rev. 758, 769 (1960).

No such policy is involved here, for United is not seeking to avoid its obligation to deliver the uranium and yet at the same time recover the contract price for it. In the case of executory contracts, such as those at issue here, the policy of avoiding the unjust enrichment which would result from recognition of an antitrust defense simply is not relevant. *See* 27 U.Chi.L.Rev. at 769–71; Lockhart, *Violation of the Antitrust Laws as a Defense in Civil Actions*, 31 Minn.L.Rev. 507, 573 (1947). *Compare Atlantic Richfield Co. v. Malco Petroleum, Inc.*, 471 F.2d 1258, 1260–61 (6th Cir. 1972) *with Associated Press v. Taft–Ingalls Corporation*, 340 F.2d 753, 769 (6th Cir.), *cert. denied*, 382 U.S. 820, 86 S.Ct. 47, 15 L.Ed.2d 66 (1965).

Third, the Supply Agreements at issue here are alleged to be one of the means by which GAC and Gulf sought to monopolize the uranium market of the United States. If proven, United's allegations would establish that the Supply Agreements, rather than being collateral to or independent of the alleged monopolistic conspiracy, were essential parts of a general plan or scheme which the law condemns. *Compare Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 546–49, 22 S.Ct. 431, 434–35, 46 L.Ed. 679 (1902) *with Continental Wall Paper Co. v. Louis Voight & Sons Co., supra*, 212 U.S. at 258–62, 29 S.Ct. at 290–292. Under such circumstances, the refusal to recognize an antitrust defense would place the court in the position of "enforcing the precise conduct made unlawful by the [antitrust laws]." *Kelly v. Kosuga, supra*, 358 U.S. at 520, 79 S.Ct. at 432. It would be contrary to the public policy of this State to enforce a sale which was in execution or aid of an illegal price–fixing, anti–competitive, monopolistic conspiracy where recovery would aid the alleged law violator to accomplish the very purpose of his illegal agreement.

Finally, we do not read the words in *Electric City Supply Company* that the contract sued on must "itself [be] tainted with illegality" to mean that the contract must overtly call for some illegal act on its face before the antitrust laws can provide a defense. To the extent that that decision can be so construed, it is inconsistent with the language of Section 57–1–3. *See generally Bruce's Juices v. Amer. Can Co.*, 330 U.S. 743, 763–64, 67 S.Ct. 1015, 1024–25, 91 L.Ed. 1219 (1947) (Murphy, J., dissenting); 31 Minn.L.Rev. at 547 n. 211.[75]

Based on the foregoing reasons, we find that the contracts at issue and United's antitrust allegations are within the scope of the New Mexico Antitrust Act.

III.

GAC'S NONCOMPLIANCE WITH DISCOVERY ORDERS AND THE DISCOVERY SANCTIONS IMPOSED FOR NONCOMPLIANCE

In this section of the opinion we examine GAC's conduct in the discovery process, and

his obligation to pay the materialman on the ground that his contract *with the municipality* violated state and federal antitrust laws. The materialman was not a party to that contract. Thus, since the contractor had been fully paid by the city, this Court refused to permit him to avoid his obligation to pay the materialman.

75. A similar argument was rejected in the unreported decision of *General Atomic Company v. Exxon Nuclear Company, Inc.*, (No. 78–223E) (S.D.Cal., Sept. 6, 1978). Like United here, Exxon sought to have its obligation to supply uranium to GAC declared invalid. The court held that a contract need not call for some overtly illegal act on its face before performance of it is enjoined. The court concluded that it would be enough if it was proved that GAC's contract with Exxon "would have the effect of securing to GAC monopoly control of the relevant uranium market."

analyze both the discovery sanctions and the means by which they were imposed. In light of the complex and lengthy proceedings which led to that judgment, an extensive and detailed examination of the questions presented is imperative. They will be analyzed in the following order:

1. Whether GAC was guilty of a willful failure to comply with the rules of discovery and the discovery orders of the court.
2. Whether findings of willful noncompliance could be made without a hearing.
3. Whether the sanctions entered for such noncompliance were appropriate.

The trial court's sanctions order and default judgment of March 2, 1978 was entered under Rule 37(b)(2)(iii), which provides that if a party or an officer or managing agent of a party refuses to obey an order issued under Rule 37(a) to answer interrogatories, or an order made under Rule 34 to produce documents,

> the court may make such orders in regard to the refusal as are just, and among others the following:
>
> . . . . .
>
> (iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, *or rendering a judgment by default against the disobedient party*[.] (Emphasis added.)

The case law in New Mexico is not clear as to whether Rule 37(b)(2) is applicable only to a willful or bad faith refusal to obey orders entered under Rules 37(a) and 34. *Compare Rio Grande Gas Company v. Gilbert*, 83 N.M. 274, 276–78, 491 P.2d 162, 164–66 (1971) *with Pizza Hut of Santa Fe, Inc. v. Branch*, 89 N.M. 325, 326–27, 552 P.2d 227, 228–29 (Ct.App.1976). We agree with the approach of the United States Supreme Court in *Societe Internationale v. Rogers, supra*, 357 U.S. at 208–12, 78 S.Ct. at 1094–96, where, in construing identical language in Rule 37 of the Federal Rules of Civil Procedure, the Court stated:

> For purposes of subdivision (b)(2) of Rule 37, we think that a party "refuses to obey" simply by failing to comply with an order. So construed the Rule allows a court all the flexibility it might need in framing an order appropriate to a particular situation. Whatever its reasons, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply.

Id. at 208, 78 S.Ct. at 1094. Thus, Rule 37(b)(2) applies to *any* failure to comply with discovery orders of the type specified therein. However, the sanctions provided by Rule 37(b)(2)(iii), entailing the denial of an opportunity for a hearing on the merits, may only be imposed when the failure to comply is due to the willfulness, bad faith or fault of the disobedient party. *See Societe Internationale v. Rogers, supra*, 357 U.S. at 212, 78 S.Ct. at 1096.[76]

We have previously adopted the following test of willfulness:

> [A] willful violation of a provision of a statute or regulation is any conscious or intentional failure to comply therewith, as distinguished from accidental or involuntary non–compliance, and . . . no wrongful intent need be shown to make such a failure willful. (Citations omitted.)

Rio Grande Gas Company v. Gilbert, supra, 83 N.M. at 278, 491 P.2d at 166, quoting from *Brookdale Mill v. Rowley*, 218 F.2d 728, 729 (6th Cir. 1954).

76. Because both *Rio Grande Gas Company v. Gilbert, supra*, and *Pizza Hut of Santa Fe, Inc. v. Branch, supra*, involved such sanctions, the requirement of a willful refusal they applied is consistent with the approach we take here. *Kalosha v. Novick*, 77 N.M. 627, 426 P.2d 598 (1967), is also consistent with the distinction we make based on *Societe Internationale v. Rogers, supra*, because *Kalosha* involved Rule 37(d), which, unlike Rule 37(b)(2), expressly requires a showing of willfulness.

The trial court in this case made the requisite finding that GAC's discovery failures were willful. It was based on forty-eight recitals, in which the court described GAC's discovery failures in detail. The court concluded:

> [T]he defendant, General Atomic Company, has followed a conscious, willful and deliberate policy throughout this litigation, which continues to the present time, in cynical disregard and disdain of the Rules of Procedure relating to discovery and this Court's discovery Orders, of concealing rather than in good faith revealing the true facts concerning the international uranium cartel in which Gulf Oil Corporation was involved and which through its subsidiaries, officers, agents and affiliates, including defendant, GAC, participated . . . ; the aforesaid policy of defendant, GAC, of hiding that information from the Court and opposing counsel, and in consequence thereof, the exercise of the utmost bad faith in all stages of the discovery process up to the present time, leads the Court to the inescapable conclusion that at this late date, the Court's discovery Orders will not be complied with by the defendant, GAC, and that this Court is powerless to secure unto all parties to this case either due process of law or a fair trial based upon equality and parity of right and duty unless sanctions under Rule 37 are imposed by the Court at this time.

The scope of review on appeal from such a judgment is

> "to consider the full record" as well as the reasons assigned by the Trial Court for its judgment, and to reverse the judgment below, if after such review, the appellate court " 'has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.' "

Wilson v. Volkswagen of America, Inc., supra, 561 F.2d at 506 (footnote omitted), quoting from *Finley v. Parvin/Dohrmann Company, Inc.*, 520 F.2d 386, 390 (2d Cir. 1975). *See also Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976). Where the judgment involves the sanctions provided by Rule 37(b)(2)(iii),

> an appellate court's review should be particularly scrupulous lest the district court too lightly resort to this extreme sanction, amounting to judgment against the defendant without an opportunity to be heard on the merits.

Emerick v. Fenick Industries, Inc., 539 F.2d 1379, 1381 (5th Cir. 1976). In making this determination, we must consider the entire record,[77] and "the totality of circumstances surrounding the failure to make discovery." [78]

Before turning to that task, we consider GAC's argument that the judgment is defective because the trial court adopted almost verbatim the proposed recitals submitted by United. The practice of verbatim adoption of proposed findings is not desirable, but it may be acceptable in some instances. *See United Nuclear Corp. v. General Atomic Co., supra*, 93 N.M. at 122, 597 P.2d at 307. Such findings "are not to be rejected out-of-hand." *United States v. El Paso Gas Co.*, 376 U.S. 651, 656, 84 S.Ct. 1044, 1047, 12 L.Ed.2d 12 (1964).

> The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision, and whether they are supported by the evidence.

Schilling v. Schwitzer-Cummins Co., 79 U.S.App.D.C. 20, 142 F.2d 82, 84 (D.C. Cir. 1944) (footnotes omitted). *See also United Nuclear Corp. v. General Atomic Co., supra*, 93 N.M. at 122, 597 P.2d at 307.

77. *See In Re Liquid Carbonic Truck Drivers Chemical, Etc.*, 580 F.2d 819, 823 (5th Cir. 1978), *cert. denied sub nom. Strain v. Turner*, 441 U.S. 945, 99 S.Ct. 2165, 60 L.Ed.2d 1047 (1979); *Affanato v. Merrill Bros.*, 547 F.2d 138, 140 (1st Cir. 1977).

78. *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 57 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973).

The verbatim adoption of proposed findings requires the appellate court to "view the challenged findings and the record as a whole with a more critical eye to insure that the trial court has adequately performed its judicial function." *Ramey Const. Co., Inc. v. Apache Tribe, Etc.*, 616 F.2d 464, 467 (10th Cir. 1980) (citations omitted). *See also In Re Las Colinas, Inc.*, 426 F.2d 1005, 1010 (1st Cir. 1970). This we have done.

GAC did not challenge thirteen of the forty–five recitals of United which the trial court adopted. At least seven others are narrative descriptions of the proceedings which, although challenged by GAC, are uncontradicted by any evidence. Many of the recitals merely described actions the trial court had previously taken or statements it had made in open court; several reiterated rulings the court had made over the course of the preceding two years of proceedings. All of the matters recited were within the personal knowledge of the trial court, and most concerned matters that had been argued before the court in previous hearings. In light of these factors and our conclusion that the findings of bad faith are amply supported by the record, it was not reversible error to adopt the proposed findings of United. *United Nuclear Corp. v. General Atomic Co., supra*, 93 N.M. at 122, 597 P.2d at 307.

A.

GAC WILLFULLY FAILED TO COMPLY WITH THE COURT'S DISCOVERY ORDERS AND THE RULES OF DISCOVERY

As found by the trial court, GAC's bad faith in discovery consisted of four categories of misconduct: (1) Its responses to the First Set of Interrogatories; (2) its responses to the Second Set of Interrogatories; (3) its failure to produce Canadian cartel documents; and (4) its conduct regarding the production of the so–called "Grand Jury Documents" and "Snyder Documents." The first area will be examined in the following section. The remaining three areas, which cover events that transpired in the final year of the proceedings in the trial court, will be examined together in a second section.

1. The First Set of Interrogatories

a. The Trial Court's Recitals on the First Set of Interrogatories

The following is a summary of the contested recitals of the trial court regarding GAC's responses to the First Set of Interrogatories:

1. The definition section and certain questions of those interrogatories (including questions 30–34 and 69) specifically requested information from the constituent partners of GAC. Neither the definitions nor the questions were objected to within the time provided by Rule 33.

2. Gulf was obligated by the terms of the parties' agreement of March 12, 1976 to produce its relevant business records.

3. Cartel documents were subject to production under the First Set of Interrogatories and the March 12 agreement.

4. No law of Canada prohibited the production of cartel documents as of March 1976.

5. GAC's first answers to the interrogatories were "wholly inadequate and evasive," in part, because of the failure to include information on the cartel.

6. GAC agreed in its answer to interrogatory number 69 to produce the business records of Gulf and Scallop.

7. From March 12, 1976, GAC neither identified nor produced cartel documents or information in the possession of Gulf despite its agreement to do so and the court's order of April 30, 1976 that it comply with that agreement.

8. From December 31, 1975 through September 23, 1976–the date of the promulgation of the Canadian Uranium Information Security Regulations–GAC informed neither United nor the trial court about the existence of the cartel, Gulf's participation therein, or about Gulf cartel documents in Canada.

9. A good faith, non–evasive answer to the First Set of Interrogatories would have, in whole or in part, eliminated the necessity for the Second Set of Interrogatories.

10. Cartel documents and records were clearly within the ambit and requirement of a good faith compliance with United's initial discovery demands, and subsequent demands made prior to September 23, 1976.

11. GAC was in default and violation of its obligation to produce cartel documents prior to September 23, 1976.

Before analyzing these recitals, we detail the history of the portion of the proceedings they cover.

b. The Proceedings Through April 1977

On December 31, 1975, United filed its complaint in Santa Fe District Court. On the same day it received leave of the court pursuant to Rule 33 to serve interrogatories on GAC. This, the First Set of Interrogatories, was virtually identical to a set served in September 1975 in the previous action.[79] Certain portions of these interrogatories, which later became a key issue in the case, are set forth below.[80] Although the interrogatories did not specifically refer to the cartel, the definitions and interrogatories were extremely broad. The definitions defined GAC as including "a partnership [and] its general partners." In addition to Interrogatories 30 through 34, numerous other interrogatories called for information from the "partnership and the partners."

Although GAC's counsel stated in October 1976, that the interrogatories were "in the broadest form that I have ever seen in my years of practice"; although GAC was to concede almost two years later that "interrogatories 32, 33 and 34 relate to every conceivable relationship of uranium to the partnership or the partners"; and although GAC now objects on appeal to these interrogatories as being "literally limitless" in scope–GAC did not timely object to their vagueness, to their breadth, or to the fact

79. See n. 2, *supra*. Answers to the interrogatories never became due in the earlier action, and none were ever filed.

80. The interrogatories contain the following definitions:

B. "Gulf" means Gulf Oil Corporation *and person(s)*, as hereafter defined.

. . . . .

D. "General Atomic" means General Atomic Company, a partnership, *its general partners Gulf and Scallop*, and all person(s) as hereafter defined.

. . . . .

F. "Person(s)" means all entities, including, without limiting the generality of the foregoing, all individuals, any and *all business entities, associations, partnerships, limited partnerships, joint ventures or corporations which are owned or controlled by or which are under common control of any corporation* and any person acting on behalf of any of the entities described in this definition. (Emphasis added.)

The interrogatories which are of particular importance to the issues on this appeal are the following:

30. Identify all properties owned or *controlled by the partnership or the partners* directly or indirectly for the exploration, development or mining of uranium bearing ore.

31. Identify all licenses, permits, leases and agreements and all past and pending, contemplated negotiations *of the partnership or the partners* directly or indirectly pertaining to the exploration, development, mining and milling of uranium bearing ores.

32. Identify all agreements and all past, pending or contemplated negotiations *of the partnership or the partners* directly or indirectly pertaining to the processing of uranium bearing ores into U_3O_8 the conversion thereof into UF_6 or any other form and the marketing and sale of all such uranium bearing products.

33. Identify all agreements and all past, pending and contemplated negotiations *of the partnership or the partners* directly or indirectly pertaining to the acquisition of uranium in any form.

34. Identify all studies, evaluations, projections and other data pertaining to uranium ore reserves, the mining and milling thereof, the further processing and conversion of uranium and the marketing and sale of all such uranium products.

. . . . .

69. Specify a date and place where counsel for Plaintiff may examine and reproduce the relevant business records *of the partnership or the partners* and each of them and those records of GUNFC [Gulf–United] *in the custody of the partnership or the partners.* (Emphasis added.)

that they called for information from the partners.

Three days after the time for filing objections had passed, Gulf and GAC held a litigation strategy meeting in San Diego. Notes of that meeting, which were inadvertently produced to United in this case, reflect a discussion on the topic of "how to reduce discovery by Bigbee [United's counsel]." [81]

On the day before answers to the interrogatories were due under Rule 33, GAC sought and received an extension until February 23, 1976, to answer or otherwise plead to the complaint and to answer the interrogatories. The court also extended the time for filing objections to the interrogatories, even though it had already expired.

On February 23, GAC moved to dismiss the case for lack of personal jurisdiction. It also moved for a protective order under Rules 33 and 30(b) to stay its obligation to answer the interrogatories until the motion to dismiss was disposed of.[82] United refused to consent to the protective order, and GAC did not secure an order based on its motion. The time for filing answers or objections to the interrogatories again passed. On March 10, 1976, United filed its first application for a default judgment under Rule 37(d), alleging that GAC had "wilfully failed to answer interrogatories."

GAC now seeks to excuse its failure to comply with the February 23 deadline on two bases: First, it had filed the motion for a protective order on that date; and second, on March 4, 1976, United's counsel agreed that answers would not have to be filed while motions were pending.[83]

Motions for protective orders under Rule 30(b) "do not have the effect of automatically accomplishing what is sought therein." *Wieneke v. Chalmers*, 73 N.M. 8, 14, 385 P.2d 65, 69 (1963). GAC's position was aptly described in *Pioche Mines Consolidated, Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964), *cert. denied*, 380 U.S. 956, 85 S.Ct. 1081, 13 L.Ed.2d 972 (1965):

> Counsel's view seems to be that a party need not appear if a motion under Rule 30(b), F.R.Civ.P. is on file, even though it has not been acted upon. Any such rule would be an intolerable clog upon the discovery process. Rule 30(b) places the burden on the proposed deponent to get an order, not just to make a motion. And if there is not time to have his motion heard, the least that he can be expected to do is to get an order postponing the time of the deposition until his motion can be heard. . . . But unless he has obtained a court order that postpones or dispenses with his duty to appear, that duty remains. Otherwise, . . . a proposed deponent, by merely filing motions under Rule 30(b), could evade giving his deposition indefinitely. Under the Rules, it is for the court, not the deponent or his counsel, to relieve him of the duty to appear.

See also Twardzik v. Sepauley, 286 F.Supp. 346, 350 (E.D.Pa.1968) ("we criticize the filing of a motion for a protective order on the very day on which the depositions were scheduled"); *Jefferson v. Greater Anchorage Area Borough*, 451 P.2d 730, 734 (Alaska 1969).

The alleged agreement between counsel of March 4, 1976, is largely irrelevant since GAC was not defaulted on the basis of this original failure to answer. In any event, any agreement reached on that date to relieve GAC of its obligation to answer the

81. The notes also reflect that the idea of filing a motion to disqualify United's counsel was discussed and rejected. However, the motion was filed fourteen months later. *See* Section IV, *infra*, especially n. 152, *infra*. *See also* n. 32, *supra*.

82. Rule 30(b) provides for protective orders from the taking of depositions. Rule 33 provides that the provisions of Rule 30(b) apply to interrogatories as well.

83. GAC originally contended that on February 13, 1976, United had agreed that answers to the interrogatories did not have to be filed on February 23. At a hearing on October 1, 1976, GAC conceded that although a proposal to that effect was discussed, no such agreement was ever reached.

interrogatories does not alter the fact that ten days *earlier* GAC had failed to meet a deadline set by the court.

United's first motion for a default judgment was not acted upon by the court because the parties signed a written agreement on March 12, 1976, whereby United agreed to withdraw its motion for a default judgment. GAC in turn agreed to "answer in good faith" the interrogatories. Counsel for Gulf also signed the agreement, consenting to an extension of time within which United could answer or otherwise plead to a federal declaratory judgment action Gulf had filed against it the previous month.[84] The agreement provided that documents called for by the interrogatories would be produced at GAC's San Diego headquarters instead of being supplied with the answers, but it made no mention of the fact that the interrogatories specifically requested information from the partners. The agreement specified that if claims of privilege were to be made as to any documents, the grounds for such privilege would be "set forth in the answers to Interrogatories." One section of the agreement stated that certain documents could be only generally identified. It gave as an example "two boxes of correspondence relating to miscellaneous Gulf activities." On the basis of this language, the trial court ultimately found that Gulf had expressly agreed to produce its relevant documents.

On April 5, 1976, GAC filed its first set of answers to the First Set of Interrogatories. The trial court ultimately found these answers to be "wholly inadequate and evasive" because, for the most part, information concerning the uranium business activities of the individual partners was not provided, and no mention of the cartel was made. The answers did not, as specified in the March 12 agreement of the parties, set forth the grounds for any claims of privilege as to unproduced documents. The answers also did not contain objections to any of the interrogatories or definitions.[85]

Despite its agreement to answer the interrogatories in good faith and its promise to produce documents in June, GAC filed a motion on April 16, 1976 to stay all proceedings, including discovery, pending the outcome on appeal of GAC's challenge to the court's jurisdiction. The trial court granted GAC's motion as to any new discovery by either party. However, the court held that since GAC had agreed to answer United's interrogatories and to produce documents responsive to the interrogatories, it was bound by that agreement. United warned that it would file a motion for sanctions "if we do not get the documents and if . . . there has been a failure to make the discovery agreed to."

As scheduled, document discovery began at San Diego. It continued through the first week of August. It resumed in mid–September and finally ended in mid–October. During this period of discovery, several million pages of documents were made available to United, who copied almost two hundred thousand pages. GAC argues that the number of documents it produced during that summer refutes any notion that it was acting in bad faith, but neither cartel documents nor any other documents which were then in the custody of the individual partners were produced. The quantity of material produced does not relieve a party of the obligation to produce what is requested.

84. On January 19, 1976, GAC filed an interpleader action against United, and on the following day, Gulf filed the declaratory judgment action. Both actions were dismissed for lack of subject matter jurisdiction, and appeals were taken from the dismissals. Dismissal of the first action was affirmed. *General Atomic Co. v. Duke Power Co.*, 553 F.2d 53 (10th Cir. 1977). The appeal in the second case was abandoned. *Gulf Oil Corp. v. United Nuclear Corp.*, Civ. No. 76–032–B (D.N.M.1976). In neither case did GAC nor Gulf seek arbitration or the disqualification of United's counsel. *See* n. 152, *infra*.

85. Indeed, GAC answered Interrogatory 69, which asked for a date and place where United could examine "the relevant business records of the partnership *or the partners and each of them* and those records of GUNFC [Gulf–United] in the custody of the partnership *or the partners*" (emphasis added), as follows:

Answer No. 69. June 20, 1976, General Atomic Company, San Diego, California.

In August 1976, United filed its second application for a default judgment, alleging that GAC had failed to comply with the March 12 agreement, had filed answers to the interrogatories which were "so evasive and unresponsive . . . as to constitute a failure to answer," and had failed to properly make claims of privilege as contemplated by the agreement. However, neither this application nor the briefs in support of it mentioned GAC's failure to produce documents in the custody of the partners, or specifically, the failure to produce cartel records.

A hearing on the application for a default judgment was set for October 1, 1976. One week before the hearing, the Canadian Government promulgated the Uranium Information Security Regulations. The Regulations generally prohibit the release of information contained in documents located in Canada concerning discussions taking place between January 1, 1972 and December 31, 1975 relating to various aspects of the uranium business. *See* n. 41, *supra*. The Regulations were adopted for the express purpose of preventing the production of cartel–related information in American courts.[86]

Two days before the October 1 hearing, in a memorandum filed in support of its second application for a default judgment, for the first time, United specifically pointed out that GAC had failed to produce documents in the possession or custody of the individual partners, Gulf and Scallop, as required by the First Set of Interrogatories.

On October 26, 1976, GAC for the first time informed the court that it did not consider itself obligated to supply documents "held individually" by the partners. GAC also argued:

> Whether or not the answers to the interrogatories are true or false involves the ultimate issues of fact in this case. . . . The correctness of defendant's answers to interrogatories is not within the scope of the issues to be determined at this hearing. . . .
>
> . . . . . [T]he issue in question . . . is whether or not defendant wilfully failed to answer the interrogatories. The issue is not whether defendant's answers are factually correct.

This is not a correct statement of the law.[87]

On November 30, 1976, the trial court denied United's second application for a default judgment. But the court stated that the denial was without prejudice to the plaintiff's right to apply to the court to compel "full, detailed and complete discovery responses," or "for appropriate sanctions for the failure of the defendant partnership *or either partner thereof* to comply with specific orders of the Court directing discovery." (Emphasis added.) The court held that the right to discovery "exists against . . . a party partnership *and the individual partners comprising the partnership*, and the agents, servants, employees, directors and officers of a party *or partner*." (Emphasis added.)

United then moved to compel further answers to the First Set of Interrogatories

86. There is no evidence that Gulf or GAC played any role in securing the adoption of the Regulations. To the contrary, the Canadian Government has stated: "These Regulations were not procured by members of the uranium industry. . . ." However, that Government has said that the Regulations were promulgated "when it became clear that documents located in Canada bearing on the [cartel] might be removed to the United States in response to proceedings there." The Canadian Government's immediate concern was apparently several cases involving Westinghouse. *See* n. 88, *infra*.

87. *Cf. Evanson v. Union Oil Co. of California*, 85 F.R.D. 274, 277 (D.Minn.1979) ("Giving a false answer [to an interrogatory] is itself sufficient evidence of bad faith"); *Hunter v. International Systems & Controls Corp.*, 56 F.R.D. 617, 631 (W.D.Mo.1972) ("Parties like witnesses are required to state the truth, the whole truth and nothing but the truth in answering written interrogatories"); *Buehler v. Whalen*, 70 Ill.2d 51, 374 N.E.2d 460, 467 (1977) ("[W]e cannot condemn too severely the conduct of the [defendant]. . . . It gave false answers to interrogatories under oath"). *See also Life Music, Inc. v. Broadcast Music, Inc.*, 41 F.R.D. 16, 24 (S.D.N.Y.1966).

and for the production of documents from GAC and the individual partners. GAC responded by contending that it had "no obligation or ability" to furnish documents in the possession of the partners, a point decided against GAC in the November 30 order. GAC's statement that it had "no ability" to produce partner documents was false, since less than four months later it began to produce those records.

In early January 1977, the court set a deadline of July 1, 1977 for the completion of all discovery, to which GAC made no objection. The court granted United's motion for supplemental answers to its First Set of Interrogatories and for the production of partner documents. It set a deadline of April 15, 1977 for the filing of the answers, stating that it expected "a good faith answer . . ., a complete answer, a non–evasive answer."

GAC informed the court that none of Gulf's or Scallop's documents had been reviewed, although the court had held on two previous occasions that the partners were subject to discovery. The court reaffirmed that ruling at two other hearings in January 1977.

GAC then informed the court that

> there are some problems that Gulf has in getting materials from Canada because there are some regulations and statutes that forbid transportation to the United States. There are a lot of problems that would be involved in some of the Gulf documents. . . .

The court ordered GAC to make "specific objections." However, GAC did not at that time inform the court of the Uranium Information Security Regulations promulgated almost four months earlier.

At another hearing in January, GAC argued that even if the court could order production of "partnership related" documents in the possession of the partners, it could not require the partners to produce "non–partnership" documents. The trial court rejected this distinction. Although GAC's counsel told the judge, "I understand your position," GAC raised the very same objection one month later.

In February 1977, United moved to compel the production of documents Gulf had produced in cartel–related litigation in Pennsylvania (the *Duquesne* documents),[88] and to the federal grand jury in Washington, D. C. (the Grand Jury documents), which was then investigating Gulf's participation in the cartel. In response, GAC reargued the issue of the production of "non–partnership documents," and for the first time suggested that the production of such materials would require the disqualification of United's counsel. Again GAC alluded to "a serious legal problem with respect to the partnership's ability to produce foreign documents," but it did not elaborate on this point. A week later, GAC finally raised the Uranium Information Security Regulations and the Ontario Business Records Protection Act as a bar to the production of Gulf Canada's records. However, it said nothing about the fact that those records included information on the cartel.

United's motions to compel the production of the Grand Jury and *Duquesne* documents were heard on March 7, 1977. Again GAC reargued the question of the production of the partners' "non–partnership documents." It informed the court that it was producing the first of Gulf's records that very day, despite at least four prior orders of the court that the partners were subject to discovery, and despite an earlier court order that production of the partners' documents begin on January 24, 1977 and proceed "diligently and . . . continuously" thereafter.

At the end of the March 7 hearing, the court granted United's motions for the production of the *Duquesne* and Grand Jury

88. *Duquesne Light Co., et al. v. Westinghouse Electric Corporation*, (No. G.D. 75–23978) (Pa. Ct.Comm.Pleas 1975). This was one of several cases brought by utility companies against Westinghouse for the delivery of uranium. Westinghouse defended by alleging that its obligations had been rendered commercially impracticable, in part because of the actions of the cartel. *See also In Re Westinghouse Electric Corporation Uranium Contracts Litigation* (M.D.L. 235) (E.D.Va.).

cartel documents, stating that they were "already covered" by its previous orders. The court again held that any specific documents subject to "good faith" claims of relevancy or privilege had to be made in accordance with its prior orders. Again the court insisted that "there be full and honest, good faith discovery available to all parties." And he warned:

> If that is not done, I assume that some party is going to file a motion for a default judgment, and . . . if I become convinced that there has been any, any invasion of good faith discovery, I would certainly look long and hard at a Motion for Default Judgment. . . .

Eleven days later, GAC finally moved to disqualify United's counsel. *See* Section IV, *infra.*

On April 15, 1977, GAC filed approximately five thousand pages of supplemental answers to the First Set of Interrogatories. However, not a single word was said of the cartel or Gulf's role in it, nor was there any claim that cartel documents were privileged, irrelevant, or protected from disclosure by Canadian law. GAC did file objections to I&M's request for the production of depositions of Gulf cartel participants which had been taken in the *Duquesne* litigation, and any exhibits attached thereto. GAC stated that production of this material, which was located in the United States, "would be violative of Canadian law," despite the fact that six weeks earlier it had informed the trial court that Canadian nondisclosure laws did not apply to documents in the United States. Twelve days later, GAC withdrew these objections.

It is in the context of the foregoing chronology of events that we examine the recitals of the trial court concerning GAC's answers to United's First Set of Interrogatories.

c. *Analysis of the Recitals on the First Set of Interrogatories*

We hold that each of the recitals of the trial court is supported by the record.

The fact that the interrogatories called for information from the constituent partners of GAC is apparent from the plain meaning of the words in which they were written. *See* n. 80, *supra.* GAC did not object to this language, either within the time provided by Rule 33 (January 10, 1976), or within the extension of time granted by the trial court for the filing of objections (February 23, 1976).

The law is well established that the failure to timely file objections to interrogatories operates as a waiver of any objections the party might have.[89] This rule is generally applicable "[r]egardless of how outrageous or how embarrassing the questions may be."[90] When a party fails to file timely objections, the only defense that it has remaining to it is that it gave a sufficient answer to the interrogatories.[91]

GAC's first answers to the interrogatories almost totally failed to include information concerning the uranium activities of the partners despite the wording of the interrogatories. *See* n. 80, *supra.* Under the rules, if the interrogatories do not assign a particular meaning to the phrases they con-

89. *Monogram Models, Inc. v. Industro Motive Corporation,* 492 F.2d 1281, 1287 (6th Cir. 1974); *Perry v. Golub,* 74 F.R.D. 360, 363 (N.D. Ala.1976); *United States v. 58.16 Acres of Land, Etc., Clinton Cty., Ill.,* 66 F.R.D. 570, 572 (E.D.Ill.1975); *Harlem River Con. C., Inc. v. Associated G. of Harlem, Inc.,* 64 F.R.D. 459, 465 (S.D.N.Y.1974); *Zatko v. Rogers Manufacturing Company,* 37 F.R.D. 29, 33 (N.D. Ohio 1964); *Bohlin v. Brass Rail,* 20 F.R.D. 224, 225 (S.D.N.Y.1957).

90. *Davis v. Romney,* 53 F.R.D. 247, 248 (E.D. Pa.1971). *Cf. Bollard v. Volkswagen of America, Inc.,* 56 F.R.D. 569, 579 (W.D.Mo.1971) (the "contention of the vagueness of the interrogatories is not credible . . . when defendant . . . did not file any timely objection to the interrogatories on this ground and sought no pretrial conference to submit its contentions") *and Cephas v. Busch,* 47 F.R.D. 371, 372–73 (E.D.Pa.1969) (answers compelled "notwithstanding that much of the information sought is totally irrelevant . . . and notwithstanding that the interrogatories . . . are harassing and vexatious," and "patently objectionable").

91. *National Transformer Corporation v. France Mfg. Co.,* 9 F.R.D. 606, 607 (N.D.Ohio 1949).

tain, the answering party is obligated to answer the interrogatories in "the ordinary, everyday usage and meaning" of the language in which the questions are asked. *Roesberg v. Johns–Manville Corp.*, 85 F.R.D. 292, 298 (E.D.Pa.1980). These interrogatories did not assign a particular meaning to questions calling for information from the partners which would support the limited construction GAC gave to them. Therefore, the trial court was correct in finding those answers to be "wholly inadequate and evasive."

GAC's explanation for this failure is without merit. It contends that because the partners were dropped as parties when the case was refiled on December 31, 1975 (*see* n. 2, *supra*), discovery could only be had from the partnership itself. However, GAC could have attempted to work out the matter with opposing counsel, or failing that, presented its objection to the trial court; it did neither. GAC simply made its own unilateral legal determination of the propriety of the questions asked. It later informed the court that it had "construed the interrogatories to be consistent with the information to which plaintiff was entitled under the rules," which it defined to be only those documents which were in the custody or control of GAC. This practice is universally condemned. *Cf. United States v. Board of Trade of the City of Chicago, Inc., supra*, 18 F.R.Serv.2d at 319 ("The proposition that an adverse litigant may not unilaterally determine the scope of discovery needs no citation"); *Fond Du Lac Plaza, Inc. v. Reid*, 47 F.R.D. 221, 222 (E.D.Wis. 1969) ("It is inappropriate for the party to determine on his own that the subject matter of the inquiry is 'premature'; thus, it was the plaintiff's responsibility in this case to answer the interrogatories or to seek relief from the court"). *See also Cohn v. Dart Industries, Inc. v. Kavanagh*, 21 F.R. Serv.2d 792, 794 (D.Mass.1976). *Armour & Co. v. Enenco, Inc.*, 17 F.R.Serv.2d 514, 517–18 (W.D.Tenn.1973); *Cardox Corporation v. Olin Mathieson Chemical Corp.*, 23 F.R.D. 27, 31 (S.D.Ill.1958); C. Wright & A. Miller, *Federal Practice and Procedure* § 2173, at 544 (1970).

GAC's unilateral construction of its discovery obligations constituted bad faith. In *Hunter v. International Systems & Controls Corp., supra*, 56 F.R.D. at 622, the court said:

> The refusal to give the information on the ground that the defendant unilaterally and without seeking a ruling of the Court concluded [that the information sought was objectionable] constituted a wilful obstruction of discovery when defendant was possessed of the information (as it now admits). . . . [D]efendant could have objected and sought clarification of its obligation to answer but did not.

The court went on to say, in language applicable to this case:

> [I]t is found that this misconstruction and failure to make discovery was a callous disregard of discovery obligations, and a designing, self–serving unilateral construction of interrogatories 30 and 31. The wording of the interrogatories and answers themselves would not lead to any other reasonable conclusion.

Id. at 625 (footnote omitted). The court concluded:

> [I]t is a dangerous practice which incurs the risk of possible sanctions for a party to limit an interrogatory addressed to it to only a portion of the information which it explicitly requests.

Id. at 631.

The designing, self–serving nature of GAC's construction of the First Set of Interrogatories is particularly apparent in light of the conflicting representations that GAC later made to the trial court. It represented to the court in December 1976 that it had "no ability" to produce information in the separate possession of its constituent partners; a host of GAC attorneys filed affidavits with the court on March 13, 1978, stating their understanding to be that only information and documents in GAC's possession were subject to production; and GAC argued to this Court that the court below committed error in ordering the production of documents in the possession of

the partners. *See* Section II A, *supra*. However, John Ross, the GAC attorney in charge of supervising and coordinating GAC's efforts to provide discovery in response to United's First Set of Interrogatories, stated in an affidavit filed with the court in February 1978:

> Based on the [March 12] discovery agreement, my interpretation of UNC [United] interrogatory number 69 and the history of the case . . . I understood GAC's obligation regarding the production of documents to include . . . [a]ll relevant business records of GUNF [Gulf United], *whether in the custody of GAC, Gulf or Scallop*. . . . (Emphasis added.)

He went on to say that

> [n]o documents in the custody of either Gulf or Scallop were included . . . inasmuch as GAC had concluded that there were no relevant business records of GUNFC [Gulf–United] in the custody of Gulf or Scallop which were not duplicated in the records possessed by GAC.

That determination could not have been made without having examined the records in the custody of the partners.[92]

Indeed, some information concerning partner operations was contained in GAC's first answers to the interrogatories. For the point made here, it is immaterial that this information concerned only matters relating to the business of Gulf–United or GAC, as GAC has defined that relationship. The fact is that *some* information from the partners was produced, contrary to GAC's disavowal of the availability of such information; to the arguments we rejected in Section II A, *supra*, of this opinion; to the March 1978 representations of its attorneys; and to the October 1976 expression of its understanding of the extent of its obligations. GAC's eventual production of thousands of partner documents demonstrates that such materials, were available from the outset.[93] This conduct–which includes contradictory representations and actions and complete reversals of position–is compelling evidence of bad faith and merits the strongest condemnation. *See Diapulse Corporation of America v. Curtis Publishing Co.*, 374 F.2d 442, 446 (2d Cir. 1967); *State of Ohio v. Crofters, Inc.*, 75 F.R.D. 12, 24 (D.Colo.1977), *aff'd sub nom., State of Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370 (10th Cir. 1978), *cert. denied*, 439 U.S. 833, 99 S.Ct. 114, 58 L.Ed.2d 129 (1978); *Armour & Co. v. Enenco, Inc., supra*, 17 F.R.Serv.2d at 518–19; *Furrenes v. Ford Motor Co.*, 79 Wis.2d 260, 255 N.W.2d 511, 516 (1977).

GAC argues that it should not be penalized for its unilateral construction of the interrogatories because United did not complain about GAC's failure to provide information from the partners until September 1976. A similar argument was rejected in *Fond Du Lac Plaza, Inc. v. Reid, supra*, 47 F.R.D. at 222, where the court said:

> [C]ounsel sought to shift the burden to the defendants and require the latter to apply to the court. This is not the format contemplated by the . . . Rules of Civil Procedure. (Citation omitted.)

It was GAC's duty to object to the interrogatories, not United's to object to GAC's failures.

92. In *In Re Folding Carton Antitrust Litigation, supra*, 76 F.R.D. at 423–24, the defendant corporation objected to the definition of an interrogatory served on it to the extent that it required the production of documents in the custody of its parent corporation. An affidavit was later filed by an officer of the defendant subsidiary, in which he swore that he had searched the files of the parent company to determine the existence of any documents called for by the plaintiffs' discovery requests. He also stated that only certain documents in the parent's files were within the ambit of that request. Based on these statements, the court refused to entertain the defendant's objection that it had no "control" over the parent's records. The situation is almost identical here, except that GAC, unlike the defendant in that case, did not present its objection to the court in a timely fashion.

93. *Cf. Bollard v. Volkswagen of America, Inc., supra*, 56 F.R.D. at 575 (defendant's "later unilateral . . . supplying of partial answers constituted an admission that the original disavowals and claims of unavailability of knowledge were false answers made with knowledge of their falsity." (Citation omitted.)).

Although some of GAC's answers revealed its interpretation of the requirements of the interrogatories,[94] others contained information from Gulf, and some stated that documents responsive to the questions would be provided later. GAC's answer to Interrogatory 69 is illustrative in that it failed to disclose the limited scope GAC gave to the questions. *See* n. 85, *supra.* The record is uncontradicted that United never represented to either GAC or the court that it did not desire information and documents from the partners. It will not be faulted for its patience in waiting for GAC to fully comply with its requests.[95]

The court's recital that Gulf was obligated by the terms of the parties' March 12 agreement to produce its relevant business records is also fully supported. The Ross affidavit makes this point clear, regardless of how one construes the reference in that agreement to "correspondence relating to miscellaneous Gulf activities." Although Ross limited it to the "relevant business records of GUNF [Gulf–United]," the language of the interrogatories and the allegations of the complaint are clearly inconsistent with that limited construction.[96]

The trial court's finding that cartel documents were within the scope of the First Set of Interrogatories is also supported by the record. Interrogatory 32 called for the identification of "all agreements and all past, pending or contemplated negotiations of the partnership or the partners directly or indirectly pertaining to . . . the marketing and sale of all . . . uranium bearing products." A cartel consists of a combination of producers of a product who agree to control the production, sale and price of the product, and to obtain a monopoly in any particular industry or commodity. *Black's Law Dictionary* 270 (4th rev. ed. 1968). The uranium cartel consisted of agreements among producers, including Gulf Canada, to set floor prices for and quotas on the marketing of uranium.[97] *See* n. 102, *infra.* The definitions in the interrogatories clearly encompassed Gulf Canada, for GAC was defined to include Gulf, and Gulf was defined as including "all business entities, associations, partnerships, limited partnerships, joint ventures or corporations" under its control, a category into which its wholly–owned Canadian subsidiary clearly fell.

GAC offers five excuses for its failure to provide cartel information and documents in response to the First Set of Interrogatories: (1) The interrogatories were initially understood to be directed only at GAC; (2) the language of the interrogatories and United's complaint did not either explicitly or implicitly refer to the cartel; (3) the cartel was not raised as an issue until March 1977, and then, only as a legal issue; (4) United knew of the cartel before the complaint was filed; and (5) United's inaction and representations manifested its view that the cartel was not covered by the First Set of Interrogatories.

We have previously rejected the first assertion, but whatever its merit might be as to GAC's original answers, it was no excuse whatsoever for GAC's failure to include information on the cartel in its supplemental

94. For example, in answer to Interrogatory 30, which called for the identification of the uranium ore bearing properties of "the partnership or the partners," GAC stated: "Neither of the partners owns or controls any such property for or on behalf of the partnership." United's counsel, of course, knew that Gulf owned massive uranium reserves at Mt. Taylor. *See* Section IV, *infra.*

95. In certain circumstances, a failure to object to insufficient interrogatory answers can constitute a waiver of any right to further answers or sanctions. In *Butler v. Pettigrew,* 409 F.2d 1205, 1207 (7th Cir. 1969), the court found such a waiver where the party complaining of insufficient answers failed to seek sanctions until after a trial on the merits and the entry of a judgment thereon. Such extreme circumstances are not present here.

96. GAC's counsel stated to the court in March 1977 that in United's complaint, "Gulf is the main focal point of the action." *See also* n. 153, *infra.* It could hardly have come as a surprise to GAC then that United sought information from Gulf.

97. In its briefs on appeal, GAC describes the cartel as a marketing agreement, precisely the language used in Interrogatory 32.

answers, after the court had ordered GAC on at least six occasions to provide information from Gulf in those answers.[98]

The second of the excuses–the failure of the complaint or interrogatories to explicitly or implicitly mention the cartel–is immaterial. United's right to information did not turn upon its discovery of a magic formula. The scope of the definitions and questions in the First Set of Interrogatories clearly included the cartel. It was GAC's duty to fully answer the questions according to their terms. Its strained interpretation of the interrogatories to exclude the cartel amounts to "an attempt at gamesmanship, contrary to the principle that the purpose of our rules of discovery is to minimize concealment and surprise in litigation." *Hilmer v. Hezel*, 492 S.W.2d 395, 396 (Mo.Ct.App.1973) (citation omitted). There was no reason for GAC's belief that the cartel was not covered by the interrogatories except its desire to so believe. However, its "ostrichlike attitude of self–delusion" cannot be accepted as establishing a good faith belief on its part. *Mitchell v. Hausman*, 261 F.2d 778, 780 (5th Cir. 1958). Although "a misunderstanding or misapprehension does not import wilfulness," *Kalosha v. Novick, supra*, 77 N.M. at 631, 426 P.2d at 601, " '[g]ood faith' . . . does not include ignoring the obvious." *Wirtz v. Lone Star Steel Company*, 405 F.2d 668, 670 (5th Cir. 1968). It should have come as no surprise to GAC that as part of its antitrust case, United would desire information on an organization whose purpose was, as a Gulf attorney described it, "to completely frustrate free competition," and in which the very officials of Gulf and GAC with whom United had dealt were involved.[99] GAC's understanding that the cartel was not within the scope of the First Set of Interrogatories could be characterized as follows: "If he did not know, it was because he did not look, or looking, did not see, or want to see what was so plainly there." *Mitchell v. Raines*, 238 F.2d 186, 188 (5th Cir. 1956).

Even if this excuse had merit as to the first set of answers, it is no justification for the supplemental answers, for by April 1977, GAC was clearly on notice that the interrogatories encompassed the cartel.

In January 1977, when the court ordered GAC to include information on the partners' uranium activities in its supplemental answers, GAC asked if that ruling would require it to include in its answer to Interrogatory 30, information on "any properties [the partners] might hold in [their] individual capacity, anywhere in the world?" The court answered that such information "may be relevant to the issues in this case. If you make a claim that they are not relevant, the Court will pass upon it." The court proceeded to say that "the same ruling applies to" Interrogatories 31 through 34.

GAC then raised the issue of the Canadian regulations which were promulgated for the express purpose of preventing the disclosure of information on the cartel, thereby manifesting its understanding that such information was called for.

GAC argues that at the hearing on March 7, United disclaimed any interest in cartel discovery. The portion of the transcript it cites does not support this claim. United merely pointed out that it sought the Duquesne and Grand Jury documents "to get Gulf off the dime," and that Canadian law did not shield those records because they were in the United States. GAC conceded the latter point, although it raised the same objection five weeks later.

Nothing United's counsel stated at that or any other hearing could be construed as

98. GAC points out that although the court had ordered it to produce Gulf information and documents, it had not ordered it to produce cartel documents. What "cartel documents" are in the context of this case, if they are not Gulf documents, has never been apparent to this Court. In any case, in March 1977, the court did order GAC to produce the Grand Jury and Duquesne documents, which, as GAC was later to concede, "all had to do with the cartel."

99. The executive vice–president of GAC, Gallaway, whose involvement in cartel discussions was discussed in Sections II A and B, *supra*, of this opinion, verified GAC's first answers to the First Set of Interrogatories, which failed to mention the cartel.

disclaiming an interest in cartel discovery–either from sources in the United States or elsewhere. In fact, at the hearing on March 7, United's counsel stated that the Grand Jury and Duquesne cartel documents "are clearly within the scope of interrogatories." He then referred specifically to Interrogatories 30, 32 and 33. Thus, GAC had been told that information on the cartel was expected in its supplemental answers. It is immaterial that United did not refer to the cartel by name. As GAC later told the trial court: "[T]his whole cartel thing . . was what the whole grand jury thing was about and the whole Duquesne thing, that was what it was all about. It all had to do with the cartel." [100]

At another hearing on March 25, 1977, United's counsel alleged that both Allen and Hoffman were "active participants in the international uranium cartel." GAC's counsel objected on the grounds of relevancy, stating: "I can get up and deny that there is any truth to this." [101] United's counsel then made it abundantly clear that United sought cartel information. He said:

> My only point is this. *I would like for the Court to be alerted to that kind of material, when it reviews the documents.* This kind of anti–trust activity is illegal; it is a crime under the laws of the United States and under the laws of the State of New Mexico. And no privilege attaches to that. (Emphasis added.)

Counsel for GAC responded to what he called "the continual reference to the so–called international uranium cartel," by stating that it was "very difficult to appreciate any possible relevancy of that cartel, if it did in fact exist." [102]

At the end of this hearing, the court again called for GAC to submit by the April 15 deadline all documents it claimed were privileged or irrelevant. Three weeks later, GAC submitted the supplemental answers which were silent on the cartel.[103]

GAC's third excuse–that the cartel was not raised as an issue until March 1977–is also without merit. In October 1976, United had referred to GAC's and Gulf's efforts to inject themselves into the cartel as an example of how they had violated the antitrust laws of New Mexico.[104] In its Janu-

100. The fact that the Duquesne and Grand Jury documents were produced is no excuse for the total failure to mention the cartel in those answers. In January 1977, the court had held that "in addition to providing the documentation, you will have to answer the interrogatories. . . . [United is] entitled to their answers to interrogatories in addition to the right to inspect and copy documents, so that you will pin yourself down and bind yourself by your answers; instead of merely furnishing the document to them." That information on Gulf's participation in the cartel's marketing agreements could have been provided, apart from information in the cartel documents in Canada, is evidenced by the fact that GAC later filed three sets of answers to United's Second Set of Interrogatories on the cartel, and by the presence in the United States of several GAC and Gulf employees who were intimately familiar with the cartel.

101. Seven months later, GAC's counsel informed the trial court: "Mr. Rolander, Mr. Gallaway, Mr. Allen, Mr. Hoffman, Mr. Zagnoli, all of them knew about the cartel." In fact, records GAC produced show that Allen and Hoffman were among Gulf's representatives at the Johannesburg meeting of the cartel in May and June 1972.

102. On October 24, 1977, GAC's counsel stated: "Let's go to the cartel. It's undisputed. . . . It was in its intention a cartel in every sense of the word."

103. By the end of March, United had submitted two proposed pretrial orders which listed GAC's and Gulf's participation in the cartel as a contested issue of law, and a proposed amendment to its complaint which charged that Gulf and GAC were members of a cartel which violated the New Mexico Antitrust Act, and that the 1973 Supply Agreement was obtained in furtherance of the cartel's activities.

I&M filed a counterclaim on March 7 containing allegations concerning the cartel. GAC's reply, filed on March 28, denied these allegations, thus placing the cartel squarely at issue.

104. The document United referred to in support of this allegation was introduced into evidence at a hearing on November 1, 1976, over GAC's objection that the exhibit "has nothing to do with GAC, and has nothing to do with the issues in this case." However, the exhibit contained two documents, both of which were written by and addressed to officials at Gulf Energy (Hunter, Rolander, Gregg and Hoff-

ary 1977 answers to GAC's interrogatories, United had alleged that Gulf ruined the Gulf–United business by "collaborating" with the cartel to control uranium prices. More importantly, it is beside the point when the cartel was raised as an issue. It was GAC's obligation to provide discovery, or to seek guidance from the court as to the scope of its obligation. Any other rule would require the party seeking discovery to know what was in the opposing party's documents before he saw them. Finally, the concession that the cartel was an issue in March highlights the inadequacy of the supplemental answers GAC filed in April.[105]

The fourth excuse is also irrelevant. Although some United officials testified at the trial that they were aware that a group of foreign uranium producers, including Gulf Canada, was discussing uranium marketing, there was no evidence adduced that United knew of the extent of Gulf's involvement, of the participation in the cartel of members of the Gulf–United board, or of cartel discussions involving Gulf competitors in the United States. GAC's argument also ignores the fact that the evidence shows that the cartel took "deliberate and elaborate steps to cloak its activities." *In Re Uranium Antitrust Litigation, supra,* 480 F.Supp. at 1155. In any event, United did seek information on the cartel by virtue of its request for Gulf records in general, and for the Grand Jury and Duquesne cartel documents in particular.

GAC's final excuse for its failure to include information on the cartel in either set of its answers to the First Set of Interrogatories is that United had demonstrated by its inaction and representations that it did not consider the cartel to be covered by the First Set of Interrogatories. There is clearly nothing in the record to support this argument up to the time GAC served its first answers in April 1976. As we have seen, the record establishes that prior to the filing of the supplemental answers, United had made it abundantly clear that it sought information on the cartel, and had specifically informed GAC that cartel documents were within the scope of Interrogatories 30, 32 and 33.

Although United did not object to the failure of the supplemental answers to include information on the cartel until late 1977, this delay does not reflect a lack of desire for cartel information, nor does it constitute a waiver of any claim that GAC's supplemental answers were inadequate. *See* n. 95, *supra.* In *Hunter v. International Systems & Controls Corp., supra,* 56 F.R.D. at 623, the court said:

> [I]t is irrelevant to the question of whether there was a failure to make discovery to consider whether the moving party was later willing to settle for other materials than were originally requested. The purpose of Rule 37, *supra,* is to secure compliance with discovery rules and orders. (Citations omitted.)

Similarly, it is immaterial to the question of the good faith of GAC's supplemental answers that United was later willing to settle for *other means*–the Second Set of Interrogatories–of securing information on the cartel. As United's counsel stated in August 1977: "[T]he necessity for these late interrogatories [the Second Set] was brought about by the difficulty of obtaining information from Gulf."

The trial court's finding that no law of Canada prohibited the production of cartel documents as of March 1976, is also essentially correct. GAC did contend both to the

man), all of whom later occupied key positions in GAC. *See* Section II A, *supra,* especially n. 16–17, *supra.* The documents referred to early cartel meetings in Canada. GAC unsuccessfully sought a protective order in order to keep these records sealed from the public.

105. This concession also contradicts the representation GAC later made to the trial court. In an affidavit filed in March 1978 in support of its motion for reconsideration of the default judgment, a GAC attorney stated that he "did not consider or recognize" that the cartel was an issue in this case until August 1977. However, it was this very same attorney who objected on March 25, 1977 to what he called "the continual reference to the so–called international uranium cartel."

trial court [106] and to this Court that "GMCL [Gulf Canada] was barred at all relevant times by the Ontario Business Records Protection Act [1947, Ont.Rev.Stat. c. 54 (1970)] from producing [cartel] documents." However, at the oral argument of this appeal, GAC abandoned this position. GAC's counsel stated:

> [T]here were no legal impediments until then [September 1976]. There was . . . the Ontario Business Records Act in effect at the time period we are talking about. *But the Ontario Business Records Act is no impediment to discovery.* It prevented documents from being taken out of Canada. But those documents could be inspected in Canada by appellees or by anybody else. They could be used for depositions of GMCL [Gulf Canada] personnel in Canada, notes could be taken on them and notes could be brought back here. (Emphasis added.)

GAC never made the foregoing explanation of the Ontario Act to the trial court,[107] contrary to the well–established rule that "[o]bjections to interrogatories must be specific and be supported by a detailed explanation as to why interrogatories or a class of interrogatories is objectionable." [108] The "bald assertion that production of the requested information would violate a privilege [provided by law] is not enough." [109] The party resisting discovery has the burden "to clarify and explain its objections and to provide support therefor." [110] "General objections without specific support may result in waiver of the objections." [111] These principles are equally applicable to objections based on foreign nondisclosure laws.[112] Instead of explaining the operation of the Ontario Act to the trial court as it did to this Court, GAC simply insisted that the Act was a complete bar to all discovery of cartel records. "[S]uch complete reversal of position . . . show[s] 'callous disregard of responsibilities' owed" by GAC and its counsel to the court and to the adversary parties. *Furrenes v. Ford Motor Co., supra,* 255 N.W.2d at 516. *See also State of Ohio v. Crofters, Inc., supra,* 75 F.R.D. at 19–20.

Had GAC been more assiduous in its responsibility in discovery prior to September 23, 1976, Canadian cartel discovery could have been made without any serious foreign law entanglements. *Accord State of Ohio v. Crofters, Inc., supra,* 75 F.R.D. at 23. By failing to provide cartel information prior to the passage of the Canadian Uranium Information Security Regulations, and then relying on these Regulations as an excuse for nonproduction, GAC is "in the position of having slain [its] parents and then pleading for mercy on the ground that [it] is an orphan." *Life Music, Inc. v. Broadcast Music, Inc., supra,* 41 F.R.D. at 26. *Accord Shepard v. General Motors Corporation,* 42 F.R.D. 425, 427 (D.N.H.1967).

Finally, the court's finding that from December 31, 1975 to the date of the promulgation of the Uranium Information Security Regulations, GAC did not inform either United or the trial court about the existence of the cartel, Gulf's participation therein, or about Gulf cartel documents located in Canada, is fully supported by the

106. GAC first raised the Ontario Business Records Protection Act as a bar to discovery on March 1, 1977. It again relied on it in October 1977, and thereafter.

107. Other courts have held the Ontario Business Records Protection Act to be inapplicable in similar situations. *See In Re Uranium Antitrust Litigation, supra,* 480 F.Supp. at 1143; *American Industrial Contr., Inc. v. Johns–Manville Corp.,* 326 F.Supp. 879, 880 (W.D.Pa. 1971).

108. *United States v. 58.16 Acres of Land, Etc., Clinton Cty., Ill., supra,* 66 F.R.D. at 572 (citations omitted). *See also In Re Folding Carton Antitrust Litigation,* 83 F.R.D. 260, 264 (N.D.Ill. 1979).

109. *Miller v. Doctor's General Hospital,* 76 F.R.D. 136, 139 (W.D.Okla.1977).

110. *Roesburg v. Johns–Manville Corp., supra,* 85 F.R.D. at 297 (citations omitted).

111. *Id.* (citation omitted).

112. *See State of Ohio v. Arthur Andersen & Co., supra,* 570 F.2d at 1374; Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation,* 88 Yale L. J. 612, 624 (1979)."

record. There is not a scintilla of evidence to contradict it. As late as March 25, 1977, GAC was objecting to references to the cartel, "if it did in fact exist," and denying United's allegation that Allen and Hoffman were participants in the cartel.

2. *The Second Set of Interrogatories.*

a. *The Court's Recitals on the Second Set of Interrogatories and the Identification and Production of Canadian Cartel Documents*

The following summarizes the pertinent recitals of the trial court in the sanctions order and default judgment concerning GAC's discovery failures subsequent to the filing of the Second Set of Interrogatories on August 16, 1977:

1. GAC's first answers to the Second Set of Interrogatories consisted in large measure of a "do–it–yourself" kit, merely directing United to deposition pages. These answers were defective, incomplete, inadequate and unacceptable. The answers failed to identify cartel documents as called for by the interrogatories.

2. GAC's second answers to these interrogatories excluded all information contained in Gulf documents in Canada and did not identify the documents as GAC had been ordered to do on October 11, 1977. These answers did not comply with the court's order to make complete, good faith, non–evasive answers.

3. GAC's third answers to these interrogatories were unresponsive and evasive to the questions asked and were mere legal argument in many instances. The answers also failed to make a commitment to a set of facts, posture or position on the subject matter of the interrogatories. Instead, GAC simply stated that various cartel documents "purport to" reflect certain events. GAC steadfastly refused to admit that such events took place or to state true facts concerning the cartel.

4. GAC's three sets of answers to the Second Set of Interrogatories showed disdain for the court's orders, and coupled with what had gone before, constituted obstruction of justice and demonstrated a wilful, deliberate and flagrant scheme of delay, resistance, obfuscation and evasion. GAC has willfully, intentionally, deliberately and in bad faith, failed and refused to answer the Second Set of Interrogatories.

5. GAC did not make a good faith and diligent effort to secure the release of documents in Canada or the information contained in them. GAC's efforts to obtain a waiver of Canadian nonproduction laws demonstrated an intent to conceal evidence on the cartel, rather than a good faith effort to produce such information.

6. Gulf followed a conscious and deliberate policy of housing cartel documents in Canada, rather than in the United States. This action amounted to deliberately courting legal impediments to the production of the records.

7. GAC's failure to provide documents from the files of Gulf Canada was not based on inability to comply with production requests, but rather, on a bad faith refusal to produce.

8. GAC deliberately and improperly failed to inform the court and opposing parties in a timely manner of the actions of U.S. District Judge Snyder on August 10, 1977 deprivileging and making public documents turned over to him by Gulf in another case. GAC never accurately disclosed the existence of all of the documents turned over to Judge Snyder. These documents were called for by the First Set of Interrogatories, but the existence of most of them was not disclosed until over a year after those interrogatories were filed. The existence of some Snyder documents was not disclosed until after Judge Snyder deprivileged them. Some of these documents were first identified and produced only after United brought the matter to the attention of the trial court. The failure to reveal the existence of and to identify all Snyder documents in a timely fashion was a deliberate attempt to further conceal those documents and avoid producing relevant information.

9. GAC in bad faith failed to reveal the existence of documents it produced to a federal grand jury in January 1978, to the trial court or to the opposing parties until after United had learned of their existence from a third party and made a demand upon GAC.

b. *The Proceedings from April 1977 to March 1978*

Four days after filing its massive supplemental answers to the First Set of Interrogatories, GAC moved to extend the discovery period to March 1, 1978, and to delay the trial until April 1978. At the hearing on this motion, GAC asked that the trial setting be further postponed until October 1978. The trial court rejected this delay, but it extended the discovery period from July 1, 1977 to September 1, 1977, and set the trial date for October 31, 1977.

Discovery continued throughout the spring and summer of 1977, during which time the parties produced and reviewed thousands of pages of documents. During this period, GAC alone deposed almost one hundred persons.

Beginning in late May, the Congressional subcommittee began to hold hearings on the cartel. *See Hearings on International Uranium Cartel, supra.* Various Gulf officials were prominent witnesses. New cartel records were released and much information was developed on Gulf's role in the cartel.

On August 16, 1977, one day after the last of these Congressional hearings, United served its Second Set of Interrogatories. These interrogatories inquired in great detail into the cartel and Gulf's role therein. United also filed motions for the production of cartel documents.

One week later, GAC filed objections to the Second Set of Interrogatories and the motions to produce. With the exception of a single specific document United had requested, the objections made no reference to any Canadian nondisclosure laws. GAC's objections were based on the grounds that the interrogatories were untimely, "unduly lengthy, burdensome, oppressive and harassing," and inquired into irrelevant matters.

At the hearing on these objections, United contended that the necessity for the Second Set of Interrogatories "was brought about by the difficulty of obtaining information from Gulf." GAC responded that most of the information covered by the interrogatories had already been provided, particularly with the production of the Grand Jury and Duquesne documents. GAC's counsel specifically objected to the notion that "this whole cartel thing is something new" in this case.[113]

The trial court overruled GAC's objections, but it granted an extension until September 20, 1977–only one day short of the date GAC had requested–to file answers to the interrogatories. The court also gave GAC until September 5, 1977, to file additional, "specific" objections to the interrogatories. The court asked if GAC had any objection to attaching responsive documents to its answers to the extent it was required to answer the interrogatories. GAC stated that it had no such objections. It made no mention of Canadian disclosure laws.

In its specific objections to the interrogatories, GAC again did not mention the foreign nondisclosure laws. At the hearing on these objections, GAC promised to include in its answers information from the senior management of Gulf Canada. The court modified certain interrogatories, but it otherwise overruled GAC's objections. It stated that in identifying documents, a summary of the contents need not be provided if the documents were produced.

The day before the answers were due, GAC filed a motion for an extension until September 26, 1977, to answer the interrogatories. The court granted the extension, but it warned that sanctions would be imposed if the interrogatories were not answered. GAC represented that ninety to

113. Six months later, GAC took the position that the cartel was first raised as an issue when the Second Set of Interrogatories was filed in August. It has abandoned this position on appeal, as it must. *See* n.n. 103 and 105, *supra*, and accompanying text.

ninety–five percent of the information called for by the interrogatories had already been provided to United. Once again, GAC failed to raise the question of Canadian nondisclosure laws.

On September 26, GAC filed its first set of answers to the Second Set of Interrogatories. Although narrative answers were made to most questions, virtually all the answers contained the statement that responsive information was contained in depositions and documents previously produced. GAC cited extensive lists of references to specific depositions and exhibits. GAC finally raised the issue of Canadian law, stating that information contained in the documents of Gulf Canada as well as the documents themselves would not be provided because of the proscriptions of unspecified Canadian statutes and regulations.

United moved to compel further answers to the Second Set of Interrogatories on the grounds that the answers of September 26 were inadequate, that only a few documents were produced, and that no documents were identified in the answers. United also sought the production of cartel documents, and requested that sanctions be imposed. In an accompanying brief, United alleged that Gulf had "deliberately placed documents in Canada so as to make them more difficult for U.S. courts to subpoena." I&M joined in this motion. In response, GAC relied for the first time since March 1977 on the Ontario Business Records Protection Act and the Uranium Information Security Regulations as excuses for the nonproduction of cartel documents located in Canada.

At the hearing on the motion, GAC's counsel assured the court that "[e]very document that is available in the United States that are responsive to these interrogatories have been produced." However, some documents were not produced until February 1978. Again, GAC stated that Canadian laws barred the disclosure of documents in Canada. United again responded by contending that Gulf had deliberately housed documents in Canada in order to avoid their disclosure in courts in this country. The court took the motions under advisement, again warning that it expected "full, complete, good faith discovery."

On October 11, 1977, the court granted the motion for further answers to the interrogatories, finding that most of the first answers were "defective, incomplete, inadequate and unacceptable." The court held that GAC was obligated to make "a firm commitment to a set of facts, posture or position on the subject matter of the interrogatory" in its answers, and that the references in the answers to depositions and other documents were inadequate. The court ordered that new answers be filed by October 20, 1977.

The court also found that GAC had failed to provide the identification of documents called for by the interrogatories, and it ordered compliance with this request. The court found that GAC had not "in good faith, without evasion or reservation" produced all cartel documents in the United States, and ordered that this be done. The court also found that GAC had not made a good faith effort to produce cartel documents in Canada. The court stated that GAC was obligated to make "an immediate diligent and good faith effort to obtain a lawful waiver of or dispensation from" Canadian nondisclosure laws in order to lawfully produce those records. The court said that GAC had not shown that identification of the documents was violative of Canadian law, and it ordered GAC to "separately, clearly and definitively" identify all documents called for by the interrogatories. Again, the court warned that further failures to abide by its orders to make good faith discovery would subject the offending party to sanctions.

On October 13, GAC wrote to the Canadian Minister of Energy, Mines and Resources, requesting a waiver of the Uranium Information Security Regulations in order to produce the records and permission to identify the documents *with* a summary of their contents. The Canadian Minister refused to grant a waiver, and stated that identification of the documents "in the manner described in [GAC's] letter" would

violate the Regulations. On October 21, 1977, GAC filed the Canadian Minister's reply to its request for a waiver, along with its second set of answers to the interrogatories.

On November 4, 1977, four days after the trial began, United again moved to compel GAC to identify and produce all cartel documents and to identify those documents in Canada without a summary of contents. United argued that GAC's second answers were inadequate for failure to identify documents located in Canada, and it charged that Gulf had deliberately courted legal impediments to production of the cartel records by housing them in Canada. It requested that the court find all facts provable by those documents against GAC as a sanction under Rule 37(b)(2)(i).

On November 8, 1977, GAC wrote a second letter to the Canadian Minister requesting permission to identify the Canadian cartel documents without a summary of their contents. The Minister informed GAC that as a result of a decision of the Supreme Court of Ontario on November 9, 1977, he was unable to consider its request.

After hearings on United's motion of November 4, the court found that GAC had failed to produce the documents in part because of "its own early and deliberate policy of housing such documents in Canada." The court held that its order of October 11 had not required identification of the documents with a summary of their contents. It indicated that GAC's request of October 13 to the Canadian Minister to so identify them was an attempt to avoid that order. Again the court ordered GAC to "clearly and definitively" identify all documents in Canada, and it stated that facts provable from documents housed in Canada would be found against GAC.

In December, I&M moved to compel further answers to United's Second Set of Interrogatories. United joined in this motion. On December 27, 1977, the court granted the motion for further answers, and stated that GAC had still failed to show to its satisfaction that the simple identification of cartel documents would violate Canadian law. However, the court held that sanctions would have to be imposed under Rule 37 for failure to comply with its order of November 18, even if such identification was prohibited. The court found that GAC's second set of answers had not complied with its previous orders to give "complete, good faith and non–evasive answers" to the Second Set of Interrogatories. The court set January 13, 1978, as the deadline for the filing of new answers, and again threatened to impose sanctions for further discovery failures.

After receiving two more extensions of time, GAC filed its third set of answers to the Second Set of Interrogatories on February 1, 1978. Nine days later, United again moved for a default judgment based on all of GAC's previous discovery failures. United asserted that GAC's third set of answers to its Second Set of Interrogatories were "deficient and defective in almost every respect," and that GAC had willfully refused to answer the interrogatories in good faith. United also alleged that GAC had willfully and deliberately withheld certain documents which it had submitted to the federal grand jury in Washington, D.C. I&M joined in this motion.

GAC then moved for an evidentiary hearing on the allegations that it had acted in bad faith. The motion was accompanied by various affidavits, including several from Gulf and GAC officials on the question of the housing of cartel documents in Canada. The parties filed briefs and proposed findings of fact on the motions for sanctions. On March 2, 1978, the trial court entered its sanctions order and default judgment, in which it found all issues of liability against GAC and in favor of United and I&M.

GAC filed a motion, accompanied by additional affidavits, for reconsideration of the sanctions order and default judgment. This motion was denied.

c. *Analysis of the Recitals on the Second Set of Interrogatories and the Identification and Production of Canadian Cartel Documents*

We will examine these findings in the following order: (1) The adequacy of the

three sets of answers to the Second Set of Interrogatories; (2) the failure to identify or produce cartel records located in Canada, including the findings that GAC had failed to make good faith efforts to obtain a waiver of the Canadian nondisclosure laws and that it had deliberately courted legal impediments to the production of those records by housing them in Canada; and (3) the production of the Snyder and Grand Jury documents.

(1) *GAC's Answers to the Second Set of Interrogatories*

Before examining the propriety of the trial court's recitals concerning the inadequacy of GAC's three sets of answers to United's Second Set of Interrogatories, it is necessary to consider GAC's contention that the trial court erred in overruling its objections to those interrogatories.

GAC originally objected on the grounds that the interrogatories were "unduly lengthy, burdensome, oppressive and harassing." It also contended that they were untimely because they were served only fifteen days before the date set for the end of all discovery. GAC later contended that the interrogatories were duplicative of the First Set of Interrogatories, and that although prior court orders had required the parties to produce their documents, there was "a clear distinction" between requiring the partners to produce documents and to answer interrogatories.[114]

We hold that the trial court did not abuse its discretion in overruling these objections. The interrogatories were filed within the period set for discovery. As United argued, "the necessity for these late interrogatories was brought about by the difficulty of obtaining information from Gulf." Had GAC properly answered the First Set of Interrogatories, and had it been more diligent in producing documents from the partners, the need for these late interrogatories would have been obviated in whole or in part.[115]

The objection that the interrogatories were harassing is without merit for the same reason. As was stated in *SCM Societa Commerciale S.P.A. v. Ind. & Com'l Res.*, 72 F.R.D. 110, 114 (N.D.Tex.1976):

> [T]he short answer to Defendant's contention is that much of the Plaintiff's so–called harassment has become necessary because of the Defendant's failure to comply with this Court's orders.

GAC's third objection–that the interrogatories duplicated the First Set of Interrogatories–is also without merit. "A claim of duplication is insufficient, unless all documentary material from which the interrogatory answers may be conveniently obtained has been previously provided." *In Re Folding Carton Antitrust Litigation, supra*, 83 F.R.D. at 264–65 (citation omitted). Even GAC has never contended that all documentary evidence on the cartel has been produced.

GAC's objection that the prior orders of the court did not require the partners to provide answers to interrogatories was a spurious argument. Not only had the court so held,[116] but also, its holding was legally correct. *See* Section II A, *supra*

114. GAC also objected on the grounds that the interrogatories inquired into irrelevant matters. This contention is addressed in Section II B, *supra*, of this opinion.

115. For the same reason, it was not error for the trial court to refuse to grant GAC's motion for a continuance of the trial setting or to require additional discovery from GAC during the course of the trial. In *Wieneke v. Chalmers, supra*, 73 N.M. at 12, 385 P.2d at 68, this Court held that it was within the sound discretion of the trial court to permit additional discovery during the course of a trial, particularly where the need for it results from previous failures to make discovery. In refusing to grant a continuance in this case, the trial court noted that the remaining discovery "in good faith should have been taken care of earlier." In these circumstances, "[t]o grant another continuance would in effect be a sanction against the Court." *G–K Prop. v. Redevelop. Agcy. of City of San Jose*, 409 F.Supp. 955, 959 (N.D.Cal.1976), *aff'd*, 577 F.2d 645 (9th Cir. 1978).

116. At a hearing on January 11, 1977, the court stated: "[W]henever an interrogatory is propounded to General Atomic, it is propounded to GAC's constituent partners also. That is my ruling. The interrogatories . . . [are] obligatory upon the constituent partners." On January 21, the court entered an order to this effect.

We turn now to the question of whether the trial court's recitals on the inadequacy of GAC's answers to the interrogatories were correct. In making this determination, we are guided by the principle that "[u]ltimately, the question of what constitutes satisfactory responses to interrogatories rests within the sound discretion of the Court." *Martin v. Easton Publishing Co.*, 85 F.R.D. 312, 316 (E.D.Pa.1980).

The first answers consisted in large measure of references to documents and to depositions, many of which had been taken in other litigation. After hearing argument and reviewing the answers and referenced documents and depositions, the trial court concluded that these answers were inadequate and unacceptable, in part because most of the information contained in the references was subject to wide differences of opinion and interpretation and was "vague, indefinite, uncertain, incomplete, elusive and non-responsive." In the sanctions order and default judgment, the court stated that these answers had constituted "a do-it-yourself" kit. *See Life Music, Inc. v. Broadcast Music, Inc., supra*, 41 F.R.D. at 25.

Although GAC referred to specific pages in the referenced documents and depositions in its answers, rather than committing the universally condemned practice of referring to a mass of undifferentiated material,[117] our review of the record satisfies us that the court did not abuse its discretion in finding these answers to be unacceptable.

First, much of the material GAC referred to was "elusive and non-responsive." [118] A party cannot answer an interrogatory simply by reference to another equally unresponsive answer. *Martin v. Easton Publishing Co., supra*, 85 F.R.D. at 315.

Second, the purpose of interrogatories is to narrow and clarify the basic issues between the parties and to permit the ascertainment of the facts relative to those issues. *Smith v. Danvir Corporation*, 55 Del. 418, 188 A.2d 118, 120 (1963). As one court stated:

> Incorporation by reference of portions of a deposition of a witness, much of it discursive, . . . is not a responsive answer. The fact that a witness testified on a particular subject does not necessarily mean that a party who is required to answer interrogatories adopts the substance of the testimony to support his claim or contention.

J. J. Delaney Carpet Co. v. Forrest Mills, Inc., 34 F.R.D. 152, 153 (S.D.N.Y.1963). *See also Martin v. Easton Publishing Co., supra*, 85 F.R.D. at 315. Such answers make it impossible to satisfy the purposes of interrogatories because a party's admissions under oath cannot be obtained. *Life Music, Inc. v. Broadcast Music, Inc., supra*, 41 F.R.D. at 26.

This problem was clearly apparent in this case. When United sought to admit into evidence at trial the portions of the documents referred to in GAC's interrogatory answers, GAC objected on the grounds that the references "contain opinions, conclusions, . . . legal contemplation speculations," and hearsay. GAC's counsel informed the court that it made the references "without knowing whether or not they were the best evidence or whether they were reliable or trustworthy." GAC's first answers cannot be read as stating that

117. *See Martin v. Easton Publishing Co., supra*, 85 F.R.D. at 315; *Flour Mills of America, Inc. v. Pace*, 75 F.R.D. 676, 682 (E.D.Okla.1977); *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76–77 (D.Mass.1976); *Harlem River Con. C., Inc. v. Associated G. of Harlem, Inc., supra*, 64 F.R.D. at 462; *Budget Rent-A-Car of Missouri, Inc. v. Hertz Corporation*, 55 F.R.D. 354, 357 (W.D.Mo.1972); *Life Music, Inc. v. Broadcast Music, Inc., supra*, 41 F.R.D. at 25; *Smith v. Danvir Corporation*, 55 Del. 418, 188 A.2d 118, 120–21 (1963).

118. For example, one such reference was to thirty-two pages of the deposition of Zagnoli, the head of Gulf Minerals, which had been taken in the *Westinghouse* litigation. In twenty-two of those pages, Zagnoli answered questions with the phrases "I do not recall" twenty-one times and "I don't know" twelve times. When Zagnoli was asked if "I don't recall" meant the same thing as "I don't know," he responded: "I don't know that."

GAC and Gulf did not have or could not obtain information necessary to give narrative answers to the interrogatories. If, as GAC later represented, neither it nor Gulf could furnish the information, it should have so stated at the very outset. *See In Re Master Key*, 53 F.R.D. 87, 90 (D.Conn. 1971).

Even more significant than the inadequacy of the references contained in the answers, however, was GAC's failure to identify or include information from cartel documents located in Canada. GAC's failure to promptly bring the problem of Canadian nondisclosure laws to the attention of the trial court is inexplicable. GAC failed to mention the problems posed by those laws in either set of its objections to the interrogatories. Instead, GAC promised the trial court in August that it would attach responsive documents to its answers, but it did not qualify that promise with any territorial limitations as to their location, even though neither the interrogatories themselves nor the court's order to answer them restricted the scope of inquiry to materials in the United States. At the hearing on GAC's "specific" objections, GAC promised to answer the interrogatories "on the basis of the knowledge, the present knowledge of the senior management of the corporation, *including the senior management of Gulf Minerals Canada* and Gulf Minerals Resources," (emphasis added), but it did not represent that it could only answer on the basis of the knowledge of officials of Gulf Canada who were located in the United States. When GAC received another time extension on the day the answers were due, it again failed to disclose the foreign law obstacles. Only when it filed its answers did GAC finally raise unspecified foreign laws as a bar to the production of information on the cartel.

This failure to promptly raise the foreign law problem was contrary to settled principles of law governing discovery. As we previously noted, objections to interrogatories must be raised within the time provided by Rule 33 or within any extension of time granted by the trial court. The provisions of that rule "should be strictly adhered to." *Lackey v. Mesa Petroleum Co.*, 90 N.M. 65, 67, 559 P.2d 1192, 1194 (Ct.App.1976). As the court stated in *Philpot v. Philco–Ford Corporation*, 63 F.R.D. 672, 674 (E.D.Pa.1974): "A full and precise understanding of the . . . Rules of Civil Procedure will surely escape even the most erudite attorney if he chooses not to read them." (Footnote omitted.) In general, the filing of an answer to an interrogatory is deemed a waiver of the right to object. *Kozlowski v. Sears, Roebuck & Co.*, 71 F.R.D. 594, 597 (D.Mass.1976); *Harlem River Con. C., Inc. v. Associated G. of Harlem, Inc., supra*, 64 F.R.D. at 465; *Skelton & Co. v. Goldsmith*, 49 F.R.D. 128, 130 n.1 (S.D.N.Y.1969); *Riley v. United Air Lines, Inc.*, 32 F.R.D. 230, 234 (S.D.N.Y.1962).

The failure to immediately raise this problem, particularly when considered in light of the trial, set to begin in only four weeks, was itself evidence of a lack of good faith. In *Shepard v. General Motors Corporation, supra*, 42 F.R.D. 425, the defendant failed to answer interrogatories, and later informed the court that it could not answer because key employees had either died or retired. The court imposed sanctions, stating:

> The defendant had the opportunity [at two previous hearings] in conjunction with previous motions concerning this set of interrogatories, to inform both the Court and counsel for the plaintiffs that Gandelot was no longer in the employ of General Motors. . . . [N]o explanation was given for the defendant's failure to raise this matter sooner and, therefore, the Court cannot now accept such an untimely objection. Defendant's conduct amounts to a deception of this Court and said conduct has materially hampered plaintiffs' counsel in the preparation of these cases.

Id. at 427. *Cf. United States v. 3963 Bottles, More or Less, Etc.*, 265 F.2d 332, 337 (7th Cir.), *cert. denied*, 360 U.S. 931, 79 S.Ct. 1448, 3 L.Ed.2d 1544 (1959) ("[T]hough first representing to the court that it had such information available and im-

plicitly offering it in support of this motion, when it was later served with interrogatories seeking details of such 'extensive research and consultation,' claimant asserted its claimed privilege"); *Perry v. Golub, supra*, 74 F.R.D. at 368 ("The fact that the defendants advanced these requested conditions long after the expiration of the period for the filing of objections and *after they had represented to the Court at the hearing that the documents would be produced* is further evidence of the defendants' intransigent conduct in responding to discovery and in complying with the Court's Order") (citation omitted and emphasis added).

GAC had full knowledge at the time the Second Set of Interrogatories was filed that Canadian laws posed a problem for the production of cartel information, for it had informed the court six months earlier that it was prepared to present those proscriptions to the court. However, it was apparently unprepared or unwilling in September to do what it had promised in March; it clearly was not unable to do this in a prompt manner.[119]

Third, even if the reference in the answers to unspecified foreign laws could be considered to have been timely, it was not sufficient. The simple assertion that production would violate the laws of Canada did not comport with established principles governing the filing of objections. *See* n.n. 108–112, *supra*, and accompanying text.

Finally, GAC was under a duty to make every effort to obtain the requested information and, if, after adequate effort, it was unsuccessful, its answers should have recited in detail the attempts which it made to acquire the information. *Jackson v. Kroblin Refrigerated Xpress, Inc.*, 49 F.R.D. 134, 137 (N.D.W.Va.1970). *See also Budget Rent–A–Car of Missouri, Inc. v. Hertz Corporation, supra*, 55 F.R.D. at 357; *Breeland v. Bethlehem Steel Company*, 179 F.Supp. 464, 467 (S.D.N.Y.1959); 4A J. Moore, *Federal Practice* § 33.26, at 33–140 (2d rev. ed. 1980). Until ordered by the court to seek a waiver of Canadian law, GAC did nothing at all, with full knowledge that, at that time, the Uranium Information Security Regulations contained a provision permitting a Canadian Government Minister to consent to the disclosure of cartel information. None of the foregoing failures bespeak of GAC's good faith response to its discovery obligations under the rules or the orders of the court.

As the trial court found, GAC's second set of answers failed to comply with the court's order to identify cartel documents in Canada and failed to contain information from those documents. However, it was not until the filing of these answers that GAC first informed the trial court that, contrary to its earlier representation, it would not provide information from persons in Canada because of Canadian law.

The trial court found that GAC's third set of answers were inadequate because they did not contain "a commitment to a set of facts, posture or position," but merely stated that various cartel documents "purport to" reflect certain events. Based on our review of those answers and the following factors we discuss, we are unable to say that the court abused its discretion in making this finding.

GAC contends that it could not have been faulted for merely stating that certain documents "purport to" reflect certain events, because no personnel employed by GAC or Gulf at the time the answers were prepared were able to verify the contents of those documents. GAC points out that a response to an interrogatory indicating that a party does not know the answer is sufficient if that, in fact, is the case, (*see Harlem River Con. C., Inc. v. Associated G. of Harlem, Inc., supra*, 64 F.R.D. at 463; *Roberson v. Great American Insurance Companies of N.Y.*, 48 F.R.D. 404, 411 (N.D.Ga.1969); 4A J. Moore, *Federal Practice* § 33.26, at 33–140 (2d rev. ed. 1980)), and that where the

119. GAC's mention in March of the proscriptions of those laws is no excuse for its failure to raise the point in August and September. As far as the trial court knew, the laws might have been repealed, or a waiver of them secured. In any case, in March GAC had not specified those proscriptions with the particularity the law requires.

information is obtained from third persons, the party is not required to admit its accuracy. *Riley v. United Air Lines, Inc., supra,* 32 F.R.D. at 233; 4A J. Moore, *Federal Practice* § 33.26, at 33–145 (2d rev. ed. 1980).

Although these are correct statements of basic principles, they do not aid GAC. The time for stating the limited extent of its knowledge and the absence of personnel to make responsive answers had long since passed. If GAC and Gulf were not able to vouch for the contents of their own business records, GAC should have promptly so informed the trial court.[120] Instead, when it promised to attach responsive documents to its answers and to answer "on the basis of the knowledge . . . of the senior management" of Gulf and its subsidiaries, GAC made no representation that the senior management was without sufficient knowledge to answer, or that it could not vouch for the authenticity of the "responsive" documents. In its first answers, GAC represented that various documents and depositions contained answers to United's questions, but it did not represent that it could not vouch for the reliability of the information contained in the references it gave. It was only after United attempted to admit these references at trial that GAC informed the court that it did not know "whether they were reliable or trustworthy."

Even if GAC and Gulf no longer employed personnel who could commit GAC to a posture, position or set of facts concerning the cartel, this inability merely highlighted the significance of the cartel documents located in Canada, and demonstrated the insolubility of the dilemma created by GAC's earlier discovery failures.

In any event, answers to interrogatories were an inadequate substitute for full production of records on the cartel. Without those documents, appellees were in no position to challenge the veracity, responsiveness, or completeness of those answers. As one commentator has stated: "The heart of any American antitrust case is the discovery of business documents. Without them, there is virtually no case." Note, *Discovery of Documents Located Abroad and U.S. Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non–production* 14 Va.J. Int'l L. 747 (1974). As Judge Marshall concluded in the *Westinghouse* case, when he ordered production of Gulf's Canadian cartel documents:

> That is especially true when plaintiffs allege an antitrust conspiracy which has taken deliberate and elaborate steps to cloak its activities. "If true, the nature of the activities must be ferreted out of dark and obscure corners." The documents at issue here are crucial to plaintiffs' proof. (Citation omitted.)

In Re Uranium Antitrust Litigation, supra, 480 F.Supp. at 1155.

(2) *Production and Identification of Canadian Cartel Documents*

GAC contends that because Canadian law forbids production of cartel documents in the custody of Gulf Canada in Canada, its failure to produce them in this litigation was based on an inability to comply, and that such an inability could not be the basis for a default judgment.

The first part of this argument is undoubtedly correct–the Uranium Information Security Regulations prohibit the production of the documents or the release of their contents. Those Regulations, and the act under which they were promulgated, contain criminal sanctions for their violation. It is now clear that there is no possibility of a relaxation of those proscriptions. *See* n.125, *infra.*

The question of the power of a court to impose the severe sanctions provided by Rule 37(b)(2)(iii) for a party's failure to produce documents located in a foreign

120. GAC did inform the trial court on September 9, 1977, that some employees who were active in the cartel no longer were employed by GAC or Gulf. But it did not represent that it would be unable to furnish responsive answers because of their absence, either at that time or in its original answers of September 26, 1977.

country where the laws of that country forbid their disclosure was addressed in *Societe Internationale v. Rogers, supra,* 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255. The facts of that case were set forth in Section II C(2)(a), *supra,* of this opinion, where we discussed the aspect of *Societe* which addressed the propriety of an order to produce documents whose disclosure is prohibited by foreign law. The second aspect of *Societe* is the propriety of sanctions imposed for a party's failure to comply with such an order. In this section we are concerned with the latter issue.

In *Societe,* the Court held that where a plaintiff had in good faith made diligent efforts to secure the documents that could not be released without violating a foreign nondisclosure law, dismissal of the action was an inappropriate sanction under Rule 37. The Court stated that fear of criminal prosecution resulting from production of the documents "constitutes a weighty excuse for nonproduction." 357 U.S. at 211, 78 S.Ct. at 1095. However, the Court did not hold that foreign nondisclosure laws completely preclude the imposition of sanctions. Rather, the Court said that the reasons for noncompliance and the willfulness or good faith of the party "can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply." *Id.* at 208, 78 S.Ct. at 1094. The Court stated that in the absence of complete disclosure, the district court possessed "wide discretion to proceed in whatever manner it deems most effective." *Id.* at 213, 78 S.Ct. at 1096. It indicated that the court could draw inferences of fact unfavorable to the plaintiff as to particular events related to the nonproduced documents.

GAC contends that under *Societe* the default judgment was an improper sanction for its inability to produce the Canadian cartel records. We disagree. The touchstone of *Societe* is that such a sanction is not permissible where the failure to comply with the court's production order was "due to inability, and not to willfulness, bad faith, or any fault of" the noncomplying party. *Id.* at 212, 78 S.Ct. at 1096. In *Societe,* the Court found that the plaintiff had made "extensive efforts at compliance," and that its failure to produce "was due to inability fostered neither by its own conduct nor by circumstances within its control." *Id.* at 211, 78 S.Ct. at 1095.

In this case, the trial court found that GAC's failure to produce the documents in Canada was not based on inability; rather, it was due to its own bad faith conduct. The recitals of bad faith upon which that conclusion was based are supported by the record. As the trial court found, GAC's misconduct in discovery involved more than merely the failure to produce documents located in Canada. The record here is hardly similar to the one that was before the Court in *Societe.*[121]

There are two additional aspects of GAC's failure to produce the documents in Canada which the Court in *Societe* suggested were material to the propriety of the imposition of a Rule 37(b)(2)(iii) sanction. The first concerns GAC's efforts to secure a waiver of the Canadian law; the second involves how the documents came to be

121. For similar reasons, GAC's reliance on *In Re Westinghouse Elec. Corp. Uranium, Etc., supra,* 563 F.2d 992, is misplaced. There the court reversed a contempt citation against Rio Algom for its failure to comply with subpoenas, where compliance would have violated the same Canadian regulations at issue here. However, the Court of Appeals found that Rio Algom had acted in good faith; had made a diligent effort to produce records which were not subject to the Canadian regulations; and had made an adequate effort to secure a waiver of the regulations from Canadian authorities. In this case, the trial court made findings to the contrary, which, with the exceptions noted herein, we have found to be supported by the record. We also take note of the following factors in the Tenth Circuit's opinion which find no parallel here–(1) the discovery at issue was "in a sense cumulative" (563 F.2d at 999); (2) the case did not involve the enforcement of antitrust laws (*id.*); and (3) Rio Algom was not a party in the litigation, had not sought affirmative relief from the court, and therefore, was not in a position to profit from its failure to comply with the production orders. *Compare Societe,* 357 U.S. at 212, 78 S.Ct. at 1095. *See also* n. 125, *infra.*

located in the foreign nation. The trial court made findings on both issues in this case, which will be separately considered here.

In *Societe*, the Court pointed out that the plaintiff, a Swiss Company, was "in a most advantageous position to plead with its own sovereign for relaxation" of the Swiss nondisclosure laws, in order to achieve at least a significant measure of compliance with the court's production order. *Id.* at 205, 78 S.Ct. at 1092. It suggested that a party is required to make all maximum efforts to secure the release of the documents. In this case, the trial court found that GAC had not made a good faith effort to secure a waiver of or dispensation from the proscriptions of Canadian law.

On October 11, 1977, the court had ordered GAC to secure a waiver of the Canadian nondisclosure laws in order to produce the documents. It also ordered GAC to "separately, clearly and definitively" identify the documents.

On October 13, 1977, GAC consulted Canadian counsel on the appropriate way to secure a waiver. It was informed that only the Canadian Minister of Energy, Mines and Resources could grant a waiver. On the same date, GAC wrote to the Minister requesting permission to produce the cartel documents in Canada and to identify the documents *with* a summary of their contents. On October 19, 1977, the Canadian Minister rejected GAC's request of October 13 for a waiver of the Regulations, and he refused to give permission to identify the documents "in the manner" GAC had described. United then moved on November 4 for sanctions for GAC's failure to produce the documents and to compel identification of the documents *without* a summary of contents. Four days later, GAC sent a second letter to the Minister, requesting permission to so identify the documents.

On the following day, the Supreme Court of Ontario handed down a decision upholding the validity of the Uranium Information Security Regulations. *Joe Clark v. Attorney General of Canada*, 17 Ont.2d 593 (1977). However, the court struck down the portion of the Regulations which permitted the Minister to consent to the release of the documents. Accordingly, on December 6, the Minister informed GAC that in light of the court's decision, he was "not able to consider your request." GAC subsequently refused to produce or to in any way identify any of the cartel documents located in Canada.

On December 27, the trial court stated that it was not satisfied that simple identification of the documents was prohibited by Canadian law. GAC did not present further evidence on the issue.[122]

The trial court found that GAC's efforts to secure a waiver were not only insufficient, but also, were deliberate attempts to avoid producing or identifying the documents. First, the court found that it was improper for GAC to request permission to identify the documents *with* a summary of contents, as it did in its original letter of October 13, because the court's order of October 11 did not call for such identification. Second, the court found that GAC's second letter of November 8 requesting per-

122. On February 22, 1978, GAC suggested that the court and counsel for appellees meet with Canadian officials. Both the court and counsel refused. On the day after the default judgment was entered, GAC met with officials of the Government in Canada. GAC gave the court a report of that meeting, which stated that officials of the Canadian Department of Energy, Mines and Resources had informed GAC's representatives that there was no possibility that release of the cartel documents would be permitted by the Canadian Government, and that, in the opinion of the officials, simple identification of the documents without a summary of their contents was also prohibited by Canadian law. One official stated that no Canadian court had decided the latter issue, although it was the Government's intention that such identification be prohibited. However, in a Diplomatic Note sent to the United States on March 15, 1977, the Canadian Government stated that "[t]he interpretation of the Regulations, including a determination of their scope, is a matter for Canadian courts." Prior to entry of the default judgment on March 2, no Canadian court had addressed the question of the propriety of a simple identification of the documents, nor had GAC made any attempt to have a Canadian court decide the question.

mission to identify the documents *without* a summary of contents was written to the Minister with the knowledge that he did not have authority to interpret the Uranium Information Security Regulations. Third, the court construed the Regulations to permit simple identification of the documents. Fourth, the court found that GAC had failed to comply with the court's order to so identify the documents. Fifth, the court found that GAC's only effort, until late February 1978 (*see* n. 122, *supra*), to secure a waiver of the Regulations in order to produce the documents was to write the original letter of October 13. The court stated that writing "a simple letter" to an official who has been declared by the Canadian courts to have no power to interpret the Regulations did not constitute a good faith effort to secure the release of the documents. The court suggested that GAC, Gulf and Gulf Canada should have entered into negotiations with the Canadian Government to secure the documents.

We do not completely agree with these findings. First, GAC's original request to identify the documents with a summary of contents was not unreasonable, although the court's order of October 11 did not call for identification in that manner. United's Second Set of Interrogatories defined the term "identify" to include a summary of the contents of the documents. At a hearing on September 9, the court stated that if the documents were produced, GAC did not need to summarize their contents. The Canadian cartel documents were not produced; therefore, it was understandable that GAC asked for permission to identify them in the manner described in the interrogatories themselves.[123]

Second, GAC could not have written its second letter to the Canadian Minister with the knowledge that he had no power to either consent to a waiver of the Regulations or to construe them, because it was not until the day after that letter was sent that a Canadian court struck down the provision giving the Canadian Minister the authority to grant a waiver.

Third, although we do not necessarily disagree with the court's interpretation that the Regulations permit simple identification of the cartel records, such identification is not an adequate substitute for production of the documents themselves. We cannot perceive how identification which does not draw upon the contents of the documents could have significantly assisted either the court or appellees.

Fourth, GAC concededly did not comply with the court's orders of November 18 and December 27 to make a simple identification of the documents. Although GAC might have taken further steps to ascertain the legality of making such an identification, in light of the time constraints imposed on it and the limited utility of such identification, we cannot agree that its failure to take such steps either constituted bad faith or prejudiced the rights of appellees.

The court's final recital on the issue of efforts to secure a waiver is, however, essentially correct. GAC did not make any effort to secure the actual production of the documents other than its letter of October 13 to the Canadian Minister. Although it was extreme to say that GAC's failure to make additional efforts demonstrated an "intent to conceal" evidence concerning the cartel, GAC's efforts were nevertheless inadequate in at least three respects.

First, GAC was under a duty to make every effort to obtain the requested information, *Jackson v. Kroblin Refrigerated Xpress, Inc., supra*, 49 F.R.D. at 137, which included making all efforts to secure a relaxation of the foreign nondisclosure laws to the maximum of its ability. *Societe Internationale v. Rogers, supra*, 357 U.S. at 205, 78 S.Ct. at 1092. This obligation arose no later than when the court ordered GAC to answer the Second Sets of Interrogatories and to produce cartel documents; it did not originate with the court's order of Octo-

123. However, as we have previously noted, as of the hearing on September 9, GAC had still not informed the court that it would not be able to produce all documents responsive to the Second Set of Interrogatories.

ber 11. It is undisputed that prior to October 13, GAC had made no efforts whatsoever to secure the release of the documents located in Canada. *Compare State of Ohio v. Crofters, Inc., supra,* 75 F.R.D. at 21.

Second, GAC's letter of October 13 to the Canadian Minister did not constitute an effort to the maximum of its ability. GAC's letter was similar to a letter Rio Algom had written to the same Minister on June 23, 1977, requesting permission to comply with the subpoenas for cartel records issued in the *Westinghouse* case. Rio Algom's request had been denied by the Minister on July 19, 1977. GAC was aware of Rio Algom's letter and of the results it achieved. In writing this Minister, GAC chose an avenue which it knew would be to no avail.[124]

Finally, even if the letter of October 13 was a good place to start, as GAC had been advised by Canadian counsel, it was not the proper place to stop. Even if, as is now apparent, the Canadian Government's position on the subject is completely inflexible, GAC's lack of effort after October to secure the documents does not comport with the command that a party make "every effort," or efforts to the maximum of its ability, to secure the information it has been ordered to produce. Taken alone, GAC's inaction is not very significant because it has subsequently become clear that further actions would not have been more successful.[125] However, the court could properly consider this conduct as part of the totality of circumstances surrounding GAC's approach to its discovery obligations.

The final aspect of *Societe* which is relevant to the propriety of the default sanction imposed on GAC for its failure to produce cartel documents concerns the trial court's finding that Gulf had followed a conscious and deliberate policy of housing the cartel documents in Canada, rather than in the United States; and that this action amounted to deliberately courting legal impediments to the production of the records. GAC contends that the recital is improper not only because it did not pursue such a policy, but also, because it was denied a hearing on the allegations that it did.

In *Societe*, the Supreme Court stated that if a party, who failed to comply with a court order to produce documents whose production was proscribed by foreign law, had attempted to take advantage of that foreign secrecy law, and thus, had "deliberately courted legal impediments to production of the . . . records," this fact would have "a vital bearing on justification for dismissal of the action" under Rule 37(b). 357 U.S. at 208–09, 78 S.Ct. at 1094.

United first raised this issue on September 30, 1977 in support of its motion for sanctions and for supplemental answers to its Second Set of Interrogatories. United asked that inferences of fact be drawn against GAC because of the policy of keeping documents in Canada. GAC did not respond to these charges, nor did it offer evidence to refute them. The trial court did not make any findings regarding the housing allegation in its order of October 11.

After GAC informed the court that the Canadian Minister had refused to waive the proscriptions of the Uranium Information Security Regulations, United moved on November 4, 1977, for sanctions for GAC's failure to produce Canadian cartel documents. In a supporting memorandum of the same date, United again raised the housing allegation.

124. GAC contends that this letter was sufficient because the Tenth Circuit had held on October 11 that Rio Algom's letter was an adequate attempt to secure a waiver. *In Re Westinghouse Elec. Corp. Uranium, Etc., supra,* 563 F.2d at 999–1000. However, when Rio Algom wrote on June 23 it did not know what GAC was aware of on October 13–that the Minister would not consent to the release of the documents.

125. In addition to the Canadian Minister's refusals to grant waivers to Rio Algom and GAC, Canadian courts have refused to enforce letters rogatory to secure the cartel records. *See In the Matter of the Evidence Act,* R.S.O.1970, c. 151 (*and In Re Westinghouse Electric Corporation Uranium Contracts Litigation*), 16 Ont.2d 273 (1977); *Joe Clark v. Attorney General of Canada,* 17 Ont.2d 593 (1977); *Gulf Oil Corp. v. Gulf Canada Ltd.* (Sup.Ct. of Canada, slip op. March 18, 1980). *See also In Re Uranium Antitrust Litigation, supra,* 480 F.Supp. at 1155.

The trial court set November 14 as the date for a hearing on United's motion. The court suggested that an evidentiary hearing might be required. GAC stated that with the exception of one witness, it was prepared to present its side on affidavits alone. United stated that it would only rely "on affidavits and deposition references." The court ordered the parties to submit their affidavits by November 11. Neither United nor GAC filed affidavits on that date concerning the housing question.

At the hearing on November 14, a GAC attorney testified on various GAC discovery efforts. However, GAC again did not present any evidence on the housing question.

At the continuation of the hearing on November 16, United's counsel sought to admit into evidence in connection with its motion for sanctions references from Gregg's deposition in the *Westinghouse* litigation. United had quoted these references in the hearing on October 7 and in the memorandum in support of its November 4 motion. GAC objected, claiming surprise because United had not submitted affidavits on the housing issue by the November 11 deadline. The court indicated that it agreed with GAC, but when United's counsel pointed out that the references were quoted in its memorandum, GAC's counsel withdrew the objection and stipulated to the admission of the four references from the Gregg deposition "for purposes of this motion."

On November 18, the court found that GAC's previous failures to produce cartel records were due in part to "its own early and deliberate policy of housing such documents in Canada." In December 1977, GAC moved to vacate the order of November 18. However, it presented no evidence to refute the finding that it had stored cartel documents in Canada. This motion was denied.

Not until three days after United's final motion for sanctions was filed in February 1978, did GAC offer evidence on the question of whether either it or Gulf had pursued a policy of housing cartel documents in Canada. GAC asked for another evidentiary hearing on that question. The court denied this request.

GAC now contends that its constitutional right to due process was denied by the failure to conduct a hearing on the housing issue. We disagree.

GAC had adequate notice that United was relying on the housing allegation in support of its November 4 motion for sanctions. Not only did United's supporting memorandum expressly make this allegation, with specific references to Gregg's deposition, but also, on November 7 the court had listed the subject of "the effort to get away with the Canadian law" as a subject for consideration at the hearing on November 14. In a brief filed with the court on November 14, GAC recognized that "[m]ost of [United's] argument in its memorandum brief in support of its Motion" for sanctions was based on the housing allegation. GAC said that that matter had been settled by the court's order of October 11, which was untrue since the order did not even mention that issue. GAC said that it would "therefore not respond to those arguments," except to note that *it*, unlike Gulf Canada, had no documents in Canada. Thus, GAC had ample notice that United was relying on the housing allegation; it simply did not respond.

The record establishes that GAC's counsel not only stipulated to the admission of Gregg's testimony, but failed to take advantage of several opportunities to present evidence to contradict it.[126] Under such circumstances, GAC was not deprived of an evidentiary hearing on the housing allegation. As the court said in *Satterfield v. Edenton–Chowan Bd. of Ed.*, 530 F.2d

126. When the court agreed to consider Gregg's testimony "for purposes of this motion," it invited GAC to submit a brief on the subject. GAC did not. On the day following the hearing, GAC wrote to the court, stating its understanding that the November hearing was limited to the question of whether it had complied with the court's order of October 11 to secure a waiver. However, it enclosed materials which it said bore on United's other contentions, but none of the submissions were related to the housing issue.

567, 572 (4th Cir. 1975): "[W]hen this opportunity [to be heard] is granted a complainant, who chooses not to exercise it, that complainant cannot later plead a denial of procedural due process." (Footnote omitted.) *See also Birdwell v. Hazelwood School District*, 491 F.2d 490, 495 (8th Cir. 1974).

We turn now to an examination of the evidence in the record on the housing issue, and the applicable principles of law in this regard. In the deposition references whose admission was stipulated to by GAC at the November hearing, Gregg testified that he and Ediger, the head of Gulf Canada, "had an understanding" that "anything that I sent to the United States would be with his approval, and I did not send anything of this type down there." He also stated that there was an understanding that "we should minimize, to the greatest extent possible, sending any of this type of material down." Gregg testified that the subject of "concealing" information on cartel activities had been discussed at "great length" in a meeting at which "a large number of lawyers [were] present," and that it was agreed "not to send anymore across the border than absolutely necessary." This testimony, which is consistent with other evidence in this record,[127] constitutes substantial evidence to support the trial court's finding that Gulf followed a policy of housing cartel documents in Canada.

GAC contends that although cartel documents were kept in Canada, this policy did not amount to the prohibited conduct of "courting legal impediments" to the production of the records. It argues that GAC did not keep such documents in Canada. It also contends that these records were Gulf Canada's, and that it was a normal business practice for Gulf Canada to keep those records at its headquarters in Canada. GAC maintains that the records were kept in Canada before the promulgation of the Uranium Information Security Regulations, and thus, neither it nor Gulf could have been courting legal impediments prior to the enactment of such impediments. It further contends that the documents were kept in Canada long before any foreseeable litigation arose, and thus, Gulf had not been taking unusual actions motivated by a desire to frustrate such litigation. Finally, GAC contends that the presence of many cartel records in this country refutes the notion that Gulf followed an illicit policy of housing them in Canada.

The evidence we have reviewed demonstrates that Gulf's policy of keeping cartel records in Canada was motivated in large part by an unusual concern for secrecy, and thus, was not just a normal business practice. Although Gulf Canada's headquarters are in Canada, many officials of Gulf from the United States participated in meetings of the cartel (e. g., Hunter, Hoffman, Allen, Zagnoli). At the important Johannesburg cartel meeting in May and June 1972, three of Gulf's four representatives were from the United States.

[redacted] Although the Uranium Information Security Regulations were not in effect during the period the cartel was apparently in existence, the Ontario Business Records Protection Act was in effect. Although that Act is not a significant impediment to discovery, it was relied on by GAC in the court below as a total bar to the discovery of cartel records. If documents were housed in Canada with the expectation that the Ontario Act would be applicable, it is largely immaterial that the expectation was later realized in the form of a different

127. In his deposition in this case, Gregg testified that Allen of Gulf Minerals sent cartel materials to Canada from Denver because "he thought it was material that was best kept in Canada or better kept in Canada." In testimony before the Congressional subcommittee, Gregg was asked if there was any reason other than "the need for secrecy" that those materials were "better kept" in Canada. He replied: "None that I can think of." *Hearings on International Uranium Cartel, supra*, Serial No. 95–39, p. 271. Hunter was asked in his deposition in this case if one of the reasons Gregg was transferred to Canada was "the concern about the anti–trust laws of the United States." He replied: "Concern about all the documentation that would flow out of any implementation of the Johannesburg agreement and the desirability of having that out–non–U.S., in the Canadian subsidiary."

secrecy law. When a party places documents outside this country with the expectation that production of those documents will be frustrated in litigation here, the strong policy in favor of broad discovery dictates that that party bear the consequences of the dilemma created by the realization of its expectations.

It is not required that the actual litigation in which the documents are ordered produced must be either pending or contemplated at the time the housing policy is initiated and followed. In *Societe*, the Court suggested that an attempt to take advantage of foreign secrecy laws *before* the United States entered World War II would have "a vital bearing" on litigation which commenced many years later under the Trading with the Enemy Act. The evidence demonstrates that Gulf was very concerned about possible liability under American antitrust laws resulting from its participation in the cartel. *See* n. 127, *supra*, and Section II C(1), *supra*.

We hold that GAC was not deprived of its right to notice of, and a hearing on, the housing allegations against it and Gulf. We also hold that there is substantial evidence to support the court's finding that Gulf followed a deliberate policy of storing cartel documents in Canada, and that this policy amounted to courting legal impediments to their production. Under *Societe*, these findings alone may be the basis for the imposition of such a discovery sanction as a default judgment.

(3) *The Snyder and Grand Jury Documents*

The last two recitals of bad faith we examine concern documents which, for the most part, GAC did not produce until after the commencement of the trial. These documents consisted of two categories–the so-called Snyder and Grand Jury documents.

The term "Snyder documents" refers to a group of documents Gulf produced in another case involving the cartel. In that case, Westinghouse subpoenaed certain documents concerning the cartel from Gulf. Gulf claimed that the documents were subject to the attorney–client privilege. In mid–August 1977, United States District Judge Daniel J. Snyder, Jr. held that many of the documents were not privileged, and ordered that they be turned over to Westinghouse. However, Judge Snyder maintained a confidentiality order prohibiting their disclosure to outsiders. *In Re Westinghouse Elec. Corp., Etc.*, 76 F.R.D. 47 (W.D.Pa.1977).

The trial court in this case found that (1) GAC wrongfully failed to inform it and the opposing parties of Judge Snyder's rulings of August 1977; (2) GAC never accurately disclosed to the court or to United the existence of all the Snyder documents; (3) these documents were called for by the First Set of Interrogatories, but the existence of most of them was not disclosed in this case until over a year after the interrogatories were filed; (4) the existence of some of the documents was not disclosed until after Judge Snyder held them to be public and not subject to claims of privilege; and (5) some of the documents were not identified or produced until after United brought the matter to the attention of the trial court in October 1977. The trial court concluded that GAC's failure to reveal the existence of, and to identify, the Snyder documents in a timely manner was a deliberate attempt to conceal relevant evidence.

As we have previously discussed, documents such as these were called for by the First Set of Interrogatories. Further, on January 11, 1977, the court had specifically ordered the production of such documents, and had set a deadline of April 15, 1977, for complete production or the submission of those documents as to which GAC was claiming a privilege to the court for an *in camera* review.

By April 1977, GAC had produced only a few of the Snyder documents. It had claimed a privilege on many others, but had not submitted any of the documents for an *in camera* review by the April 15 deadline. It was not until late August 1977, that GAC listed twelve of the documents on a privilege list. GAC did not submit the documents as to which its claim of privilege had

been challenged for an *in camera* review until September 16, 1977–five months after the deadline for their submission, over two weeks after the deadline for the completion of all discovery, and six weeks before the scheduled commencement of the trial.

On October 5, 1977, the court upheld GAC's claim of privilege in many of the instances in which it had been challenged. The remaining documents were turned over a week later. On October 7, 1977, United raised the question of the Snyder documents, stating that it had received only a few, despite Judge Snyder's rulings in August that many of the documents were not privileged. On October 11, the court held that documents de–privileged by another court were not subject to a claim of privilege in this case. On October 20, GAC produced the documents Judge Snyder had held were non–privileged, including documents which the court in this case had held to be privileged. On October 28, Judge Snyder order Gulf to produce the remaining documents he had not previously ruled on. On November 7–eight days after the trial commenced–GAC produced all of the remaining Snyder documents.

We cannot agree in all respects with the court's recital on the production of the Snyder documents. The court was incorrect in ruling that Judge Snyder had made the documents public; although produced to Westinghouse, the documents were still subject to a confidentiality order. The court also erred in faulting GAC for its failure to bring Judge Snyder's August order to its attention, since the court had stated prior to October 11 that it would not be bound by other judges' rulings on claims of privilege. Despite these errors, however, the court's conclusion that GAC did not fulfill its obligation to make full and complete discovery of the Snyder documents in a timely fashion is not manifestly erroneous.

GAC did not identify all of the documents in a timely manner. It did not submit the documents as to which it claimed a privilege for an *in camera* review until long after the date set for their submission. By failing to submit them until after the completion of the period set for discovery, appellees were effectively precluded from using the documents during depositions of key individuals taken during the summer of 1977. GAC's excuse for these delays is that discovery was an on going process which took a great deal of time. However, the court had made it clear throughout 1977 that adherence to the deadlines it set was a matter of considerable importance. After GAC failed to produce Gulf's records in response to United's original discovery requests, the court had ordered production of them to commence on January 24 and to continue diligently thereafter. Instead of producing the documents, GAC continued to reargue the production of partner records, despite several previous rulings on that subject. It waited until March 1977 to begin production of Gulf's records. The consequences which flowed from GAC's inability to comply with the court's orders in a timely fashion were self–inflicted wounds.

The second group of documents consisted of records Gulf produced to the federal grand jury. The trial court found that GAC had in bad faith failed to reveal the existence of these documents to the court or the other parties until after United learned of their existence from a third party and had made a demand on GAC for them. The facts concerning these documents are largely uncontested; the only issue is the correctness of the trial court's conclusion that GAC had acted in bad faith with respect to their production.

When these documents were produced to the grand jury in January 1978, copies were apparently sent to GAC's counsel in Santa Fe, but they were not turned over to the court or the opposing parties. United filed a demand for them on February 15, 1978, after learning of their existence from Westinghouse.

GAC contends that it did not act in bad faith because it was still reviewing the documents at the time United filed its demand, and that it turned them over before completing its review. It contends that in view of the constraints involved in reviewing the

documents while the trial was continuing, it acted as expeditiously as possible.

The trial court's finding on this subject was not erroneous. On October 7, 1977, GAC's counsel represented to the trial court that "every document that is available in the United States that are responsive to [the Second Set of Interrogatories] has been produced." That representation could not be made in good faith at a time when a file search was continuing. *Compare Armour & Co. v. Enenco, Inc., supra*, 17 F.R.Serv.2d at 515, 519. When the documents were sent to Santa Fe, GAC could have informed the trial court and opposing counsel that it was reviewing additional material; however, it did not. These documents were called for by United's first discovery requests. Their production had specifically been ordered as early as January 1977, over a year before they were eventually produced. "Such a dilatory response . . . hardly bespeaks of the good faith compliance which [defendant] repeatedly asserts." *State of Ohio v. Crofters, Inc., supra*, 75 F.R.D. at 19. *See also Perry v. Golub, supra*, 74 F.R.D. at 365; *Von Brimer v. Whirlpool Corporation*, 362 F.Supp. 1182, 1186 (N.D.Cal.1973), *aff'd*, 536 F.2d 838 (9th Cir. 1976); *Armour & Co. v. Enenco, Inc., supra*, 17 F.R.Serv.2d at 515–16. Under these circumstances, it was reasonable for the trial court to conclude that GAC's actions as to the production of these documents were improper. *See generally Link v. Wabash Railroad Co.*, 370 U.S. 626, 634–35 n. 11, 82 S.Ct. 1386, 1391 n. 11, 8 L.Ed.2d 734 (1962).

If GAC's conduct with regard to the production of the Snyder and Grand Jury documents were the only matters at issue, we might take a different view. But they are just two instances to be considered in the pattern of intransigence which characterized GAC's actions during discovery. *DiGregorio v. First Rediscount Corporation*, 506 F.2d 781, 787 (3rd Cir. 1974). *See also Link v. Wabash Railroad Co., supra*, 370 U.S. at 634, 82 S.Ct. at 1390; *Diapulse Corporation of America v. Curtis Publishing Co., supra*, 374 F.2d at 446; *Riverside Memorial, Etc. v. Sonnenblick–Goldman*, 80 F.R.D. 433, 436 (E.D.Pa.1978), *aff'd mem., Riverside Memorial Mausoleum, Inc. v. Umet Trust*, 605 F.2d 1196 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1075, 100 S.Ct. 1022, 62 L.Ed.2d 757 (1980). In light of the full record, the trial court did not err in reaching the conclusions it did regarding the production of these two categories of documents.[128]

With the few exceptions we have noted, the recitals of the trial court on GAC's bad faith conduct during discovery are supported. Considering the full record, we do not have the "'definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors'" that is required to reverse the judgment. *Wilson v. Volkswagen of America, Inc., supra*, 561 F.2d at 506. Although we do not agree with a few of the recitals, the conclusion that the trial court reached–that GAC acted in bad faith and that this misconduct precluded a full and fair trial of the issues in the case–was not manifestly erroneous; indeed, it is compelled by an exhaustive review of the record.

B.

REQUIREMENTS OF NOTICE AND HEARING ON DISCOVERY FAILURES

GAC argues that the trial court's findings that it had acted in bad faith during discovery, and the sanction of a default judgment which followed from those findings, could not have been entered without prior, specific notice of, and an evidentiary hearing on, the allegations against it. GAC contends that the trial court's refusal to

128. I&M asserts that GAC and Gulf produced various cartel documents in other litigation subsequent to the entry of the sanctions order and default judgment in this case which it had not produced here, including certain documents from Canada, which it had determined were not covered by the Uranium Information Security Regulations, and various cartel documents from Gulf files in the United States, Japan and Switzerland. Because these matters are not of record in this case, we have not considered them.

conduct such a hearing, at which the parties would have had an opportunity to present live testimony and cross-examine witnesses, amounted to a denial of due process under Article II, § 18 of the New Mexico Constitution and the Fourteenth Amendment of the United States Constitution.

In Section III A, *supra*, we discussed the adequacy of the notice and hearing afforded on the question of whether GAC and Gulf had followed a policy of housing cartel documents in Canada. In this section, we discuss the notice and hearing issues as they relate to all the other recitals on GAC's discovery failures.

GAC requested an evidentiary hearing on February 13, 1978, in response to United's motion for a default judgment. In the sanctions order and default judgment, the court stated that the factual basis for imposing sanctions for GAC's bad faith "manifestly appear[s] from the face of the record . . . , without any need or requirement for an evidentiary hearing." GAC renewed its request for an evidentiary hearing in connection with its March 13 motion for reconsideration of the sanctions order and default judgment. This motion was denied. Both of GAC's requests for an evidentiary hearing were accompanied by numerous affidavits from its attorneys and officers attesting to the good faith of their approach to discovery.

GAC was on notice long before the sanctions order and default judgment was entered that its conduct in discovery was at issue, that the court considered many of its actions improper and unresponsive, and that the court would consider the imposition of sanctions under Rule 37, including a default judgment, for further discovery failures. *See generally Riverside Memorial, Etc. v. Sonnenblick-Goldman, supra*, 80 F.R.D. at 436; *G-K Prop. v. Redevelop. Agcy. of City of San Jose, supra*, 409 F.Supp. at 959-60; *In Re Professional Hockey Antitrust Litigation*, 63 F.R.D. 641, 656 (E.D.Pa.1974), *rev'd*, 531 F.2d 1188 (3rd Cir. 1976), *rev'd, National Hockey League v. Met. Hockey Club*, 427 U.S. 639 (1976). At least five times before it entered the default judgment, the trial court had warned that appropriate sanctions would be imposed for the failure of GAC or either partner thereof to comply with its discovery orders. In March 1977, it warned that it would "look long and hard" at a motion for a default judgment if there was a failure to make good faith discovery. Prior to March 1978, the trial court had found GAC's conduct in discovery deficient on at least four occasions. Under these circumstances, GAC will not now be heard to say that it did not foresee the consequences of its discovery failures. *Compare Link v. Wabash Railroad Co., supra*, 370 U.S. at 636, 82 S.Ct. at 1391, *with Asociacion de Empleados, Etc. v. Rodriguez Morales*, 538 F.2d 915, 917 (1st Cir. 1976).

The other aspect of GAC's attack upon the procedures by which the judgment was entered–the lack of an evidentiary hearing–is also without merit. There is no requirement under Rule 37(b) that an evidentiary hearing be held before sanctions are imposed. *See Norman v. Young*, 422 F.2d 470, 474 (10th Cir. 1970). Under our rules, a court may decide motions on the basis of affidavits, oral testimony or depositions. N.M.R.Civ.P. 43(e), N.M.S.A.1978 (current version at N.M.R.Civ.P. 43(c), N.M. S.A.1978 (Repl.Pamp.1980)). Evidentiary hearings in cases involving the imposition of discovery sanctions have been required under some, but not all circumstances. *Compare Flaks v. Koegel*, 504 F.2d 702, 712 (2d Cir. 1974) *and McFarland v. Gregory*, 425 F.2d 443, 450 (2d Cir. 1970) *with Margoles v. Johns*, 587 F.2d 885, 888-89 (7th Cir. 1978) *and Norman v. Young, supra.*

In a previous opinion in this case, we considered the question of the circumstances under which a trial court is required to hold an evidentiary hearing. In *United Nuclear Corp. v. General Atomic Co., supra*, 93 N.M. at 123-24, 597 P.2d at 308-09, we rejected GAC's argument that the trial court erred in failing to hold an evidentiary hearing on GAC's motion to stay the proceedings pending arbitration. We noted that the critical question is "what type of hearing is 'appropriate to the nature of the case.'" *Id.* at 123, 597 P.2d at 308 (citation

omitted). The following general principles, set forth in our earlier decision, are equally applicable here:

> The requirements of due process are not technical, and no particular form of procedure is necessary for protecting substantial rights. The circumstances of the case dictate the requirements. The integrity of the fact–finding process and the basic fairness of the decision are the principal considerations.

Id. (citations omitted).

GAC's failures to make good faith discovery are "mirrored in the record." *In Re Liquid Carbonic Truck Drivers Chemical, Etc., supra,* 580 F.2d at 822; *DiGregorio v. First Rediscount Corporation, supra,* 506 F.2d at 788; *Norman v. Young, supra,* 422 F.2d at 474. The initial, self–serving misconstruction of the scope of the First Set of Interrogatories, the unjustified failure to include cartel information in the supplemental answers to those interrogatories, the contradictory representations GAC made to the trial court at various stages of the proceedings, the series of inadequate answers to the Second Set of Interrogatories, and the unfulfilled commitments to produce cartel documents, are all apparent from the face of the record. No amount of oral testimony could alter those aspects of the history of this litigation.

Further, the affidavits GAC filed on February 13 and March 13, 1978, in connection with its request for an evidentiary hearing did not demonstrate any need for such a hearing. Rather, portions of those affidavits are themselves evidence of the lack of good faith on GAC's part. For example, the Ross affidavit of February 13, which stated that GAC understood its obligation under the First Set of Interrogatories to include the furnishing of at least some records in the custody of the partners, contradicted the March 13 affidavits of five GAC attorneys stating that they understood that only documents in the possession of GAC were required. One of the March 13 affidavits contained the assertion that United's allegation that documents in Gulf's possession were required was "patently false," which was rather startling in light of the Ross affidavit and the fact that *some* information from Gulf was provided in GAC's original answers to the First Set of Interrogatories. The trial court afforded these contradictory sets of affidavits the weight to which they were entitled.

Even if GAC's representations of February and March 1978 concerning its understanding of the scope of its obligations had been consistent, they would not have established that it had acted in good faith nor would they have demonstrated the presence of factual issues to be resolved at an evidentiary hearing. The undisputed fact is that without objecting to the interrogatories, without disclosing its understanding of its obligations to opposing counsel, and without seeking guidance from the court, GAC made a unilateral, self–serving construction of the scope of the interrogatories. "The wording of the interrogatories and answers themselves would not lead to any other reasonable conclusion." *Hunter v. International Systems & Controls Corp., supra,* 56 F.R.D. at 625 (footnote omitted). It is no defense to say that GAC simply made an innocent mistake of law in determining that information and documents in the possession of the partners were not subject to discovery under Rules 33 and 34. *Compare Unger v. Los Angeles Transit Lines,* 180 Cal.App.2d 174, 4 Cal.Rptr. 370, 378 (Ct. App.1960). As we have previously noted, the rules call for such a question to be presented in advance to the court for its determination.

The affidavits GAC submitted concerning its failure to provide information on the cartel in its supplemental answers to the First Set of Interrogatories similarly failed to present any factual issue as to the good faith of this failure. In one affidavit, a GAC attorney stated that he did not consider the cartel to be an issue when the supplemental answers were filed in April 1977, and only appreciated that it had become "a significant issue" when United filed its Second Set of Interrogatories on August 16, 1977. However, on March 25, 1977, almost three weeks before the supple-

mental answers were filed, this same attorney had objected in the presence of the trial court to United's "continual reference to the so–called international uranium cartel." In a second affidavit the GAC attorney who prepared the supplemental answers to questions 30–34 of the First Set of Interrogatories stated that no information on the cartel was provided in those answers because the cartel was not mentioned in United's complaint or in the interrogatories, and therefore, had not yet been raised as an issue. We have previously reviewed the evidence which contradicts these assertions or demonstrates the unreasonableness of them.

Finally, these affidavits did not create an issue as to the trial court's finding that GAC had, in bad faith, concealed the existence of the cartel and Gulf's participation in it. It was permissible for the trial court to conclude that GAC's excuses for not producing cartel information early in the litigation were inadequate. And it could reasonably be inferred from GAC's conduct in various aspects of the proceedings throughout the course of this litigation, as well as from the nature of the cartel evidence that was eventually made available, that GAC had deliberately concealed cartel information. *Compare Link v. Wabash Railroad Co., supra,* 370 U.S. at 633, 82 S.Ct. at 1390.

Even if GAC's failure to provide information on the cartel in response to the First Set of Interrogatories was not the product of a calculating, illicit attempt to conceal damaging information, the record compels the conclusion that, at best, it could be characterized as "gross disregard for the requirements of the discovery process." *Armour & Co. v. Enenco, Inc., supra,* 17 F.R.Serv.2d at 519. However, whether GAC's original failures to make cartel discovery were the result of a willful, intentional and bad faith attempt to conceal evidence, as the trial court found, or were due to a gross indifference to its discovery obligations, is immaterial. The willfulness required to sustain the severe sanctions of Rule 37(b)(2)(iii) may be predicated upon either type of behavior. *See Rio Grande Gas Company v. Gilbert, supra,* 83 N.M. at 278, 491 P.2d at 166; *Cine Forty–Second St. Theatre v. Allied Artists,* 602 F.2d 1062, 1066–68 (2d Cir. 1979); *Kozlowski v. Sears, Roebuck & Co., supra,* 73 F.R.D. at 77; *Armour & Co. v. Enenco, Inc., supra.* The two types of misconduct differ only in degree as to culpability, and they differ not at all in terms of the adverse effects that GAC's discovery failures have had on the due process rights of appellees and the integrity of the truth–seeking function of the trial court.

In conclusion, we note that the matters set forth in the recitals of bad faith were within the knowledge of the trial court. The parties had full opportunity to brief the facts and law regarding GAC's failures to make discovery, its lack of good faith, and the sanctions to be applied; they filed extensive briefs with the court prior to entry of the sanctions order and default judgment. Each side filed proposed findings, and GAC submitted numerous affidavits. "The briefs and affidavits fully recounted the circumstances surrounding the noncompliance with the court's order[s]." *Margoles v. Johns, supra,* 587 F.2d at 889. Therefore, the trial court did not err in failing to hold additional evidentiary hearings on GAC's conduct in discovery.

C.

THE BREADTH OF THE SANCTIONS FOR NON–COMPLIANCE

GAC contends that even if sanctions should have been entered under Rule 37 for its discovery failures, a default judgment on all issues was unconstitutionally overbroad. GAC makes two points in this regard. First, GAC contends that the trial court could have imposed lesser sanctions to resolve the problem of the nonproduction of cartel documents. Second, GAC argues that its discovery failures, particularly those relating to the cartel, did not relate to all dispositive issues, and that a default judgment depriving it of a trial on the merits on other issues amounted to "mere punishment." We are not persuaded by either argument.

It is well-settled that the choice of sanctions under Rule 37 lies within the sound discretion of the trial court.[129] Only an abuse of that discretion will warrant reversal.[130] Although the severest of the sanctions should be imposed only in extreme circumstances,[131] "in this day of burgeoning, costly and protracted litigation courts should not shrink from imposing harsh sanctions where, as in this case, they are clearly warranted." [132] As one court stated:

> [W]hen a defendant demonstrates flagrant bad faith and callous disregard of its responsibilities, the district court's choice of the extreme sanction is not an abuse of discretion. It is not our responsibility as a reviewing court to say whether we would have chosen a more moderate sanction.

Emerick v. Fenick Industries, Inc., supra, 539 F.2d at 1381.

The trial court's conclusion that GAC acted in flagrant bad faith and callous disregard of its responsibilities is supported by the record. In light of the principle that the choice of sanctions "must be weighed in light of the full record in the case," [133] the trial court did not abuse its discretion in imposing the stringent sanction of a default judgment.[134]

First, we are unpersuaded by GAC's argument that the trial court should have attempted to resolve the problem of Canadian cartel documents by employing lesser sanctions. Although the severest of sanctions should be imposed only "when the court in its discretion determines that none of the 'lesser sanctions available to it,' would truly be appropriate," the court need not exhaust the lesser sanctions. *Asociacion de Empleados, Etc. v. Rodriguez Morales, supra,* 538 F.2d at 917 (construing Fed.R.Civ.P. 41(b)) (citation and footnote omitted). *See also Anderson v. Air West, Inc., supra,* 542 F.2d at 525 (construing Fed. R.Civ.P. 41(b)). GAC's argument rests on a premise we reject–that the discovery dilemma was not due in large measure to GAC's misconduct. But equally important, the lesser sanctions which GAC suggests could have been imposed were not commensurate with the nature of its misconduct, and were totally incapable of remedying the dilemma created by that misconduct.

GAC suggests three alternative means the court could have utilized–(1) an order to produce the Canadian cartel documents pursuant to an order of civil contempt carrying the sanction of a daily fine for disobedience; (2) an attempt to secure the documents by letters rogatory executed in Canada; or (3) the entry of preclusive findings under Rule 37(b)(2)(i) which were closely tailored to facts that could reasonably have been proven by the missing Canadian documents.

The trial court did not err in failing to employ any of these alternatives. Even GAC does not contend that a contempt citation would have secured the production of cartel documents located in Canada.[135]

129. *Rio Grande Gas Company v. Gilbert, supra,* 83 N.M. at 278, 491 P.2d at 166; *Pizza Hut of Santa Fe, Inc. v. Branch, supra,* 89 N.M. at 328, 552 P.2d at 230; *Gallegos v. Franklin,* 89 N.M. 118, 122, 547 P.2d 1160, 1164 (Ct.App.1976), *cert. denied,* 89 N.M. 206, 549 P.2d 284 (1976); *National Hockey League v. Met. Hockey Club,* 427 U.S. 639, 642, 96 S.Ct. 2778, 2780, 49 L.Ed.2d 747 (1976); *DiGregorio v. First Rediscount Corporation, supra,* 506 F.2d at 788.

130. *General Dynamics Corp. v. Selb Manufacturing Co.,* 481 F.2d 1204, 1211 (8th Cir. 1973), *cert. denied,* 414 U.S. 1162, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974).

131. *Emerick v. Fenick Industries, Inc., supra,* 539 F.2d at 1381; *Asociacion de Empleados, Etc. v. Rodriguez Morales, supra,* 538 F.2d at 917 (construing Fed.R.Civ.P. 41(b)).

132. *Cine Forty-Second St. Theatre v. Allied Artists, supra,* 602 F.2d at 1068.

133. *Cine Forty-Second St. Theatre v. Allied Artists, supra,* 602 F.2d at 1068.

134. *See Emerick v. Fenick Industries, Inc., supra,* 539 F.2d at 1381.

135. Other courts have also found a contempt citation or fine to be an inappropriate or inadequate sanction for failure to make discovery. *See G-K Prop. v. Redevelop. Agcy. of City of San Jose, supra,* 409 F.Supp. at 959; *Perry v. Golub, supra,* 74 F.R.D. at 366; *Buehler v. Whalen, supra,* 374 N.E.2d at 467.

Further, such an order would have entailed a command to violate the nondisclosure laws of a foreign state, something the trial court repeatedly, expressly, and properly refused to do. The second alternative, letters rogatory, was equally unavailing, as GAC itself recognized,[136] and as subsequent events have proven. *See* n. 125, *supra.* The third alternative, closely tailored cartel findings, was met in this case. Without fully setting forth those findings here, it is enough to say that we are satisfied those findings were as closely tailored to the withheld information as was possible under the circumstances. After fully considering the entire record, "we are unable on review to hold that the trial court could have fashioned an equally effective but less drastic remedy." *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1127 (5th Cir.), *cert. denied*, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115 (1970).

The second aspect of GAC's argument that the sanction of a default judgment was inappropriate is based on the principle that the least restrictive alternative sufficient to protect the opposing party must be imposed. GAC contends that the default related only to the Canadian cartel documents, and that such information could not have been dispositive of every issue in the case. Therefore, it argues that an across–the–board default judgment amounted to "mere punishment," in contravention of settled principles of constitutional law. *Compare Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909) *with Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897). This argument is also without merit.

When a party takes a cavalier approach to its discovery obligations, as GAC did in this case, the entry of a default judgment is an appropriate sanction. Upon the default, the allegations of the complaint are taken as true. *Gallegos v. Franklin, supra*, 89 N.M. at 123, 547 P.2d at 1165.

A position similar to GAC's was rejected in *Trans World Airlines, Inc. v. Hughes, supra.* There the court said that the non–defaulting party "had no obligation to introduce any evidence whatever in support of the allegations of its complaint." The defaulting party, the court said, cannot escape liability for its bad faith approach to discovery by relying on evidence "which only *tends* to contradict the allegations of the complaint." The defaulting party must show that the evidence it relies upon "could not conceivably have been refuted and disproved . . . had there been a trial." 449 F.2d at 63. The court concluded:

> It would usher in a new era in the dynamics of litigation if a party could suffer a default judgment to be entered against it and then go about its business as if the judgment did not exist and as though, despite the opportunities to comply with the court's orders and to defend on the merits which had been ignored, the slate was wiped clean and a new day had dawned. To state the proposition is to expose the folly of it.

Id. at 63–64.

GAC was not defaulted merely because of the prejudice caused to the opposing parties by its failure to produce Canadian cartel records. The default judgment was entered as a result of a course of misconduct in discovery which began at the very outset of the case and ended only with the entry of that judgment. Although it is settled that discovery sanctions cannot be entered as "mere punishment," all such sanctions involve an element of punishment. *Norman v. Young, supra*, 422 F.2d at 474. As the court stated in *Buehler v. Whalen, supra*, 374 N.E.2d at 467:

> Our discovery procedures are meaningless unless a violation entails a penalty proportionate to the gravity of the viola-

136. On October 7, 1977, GAC's counsel informed the trial court:

> I don't find it all surprising that neither [United] nor [I&M] have tried to go this same course and seek out letters rogatory because it would be my conclusion that they would get exactly the same answers from the Canada Courts that Westinghouse did. . . . Westinghouse tried it and Westinghouse lost and I don't think the courts of Canada will change their mind.

> tion. Discovery for all parties will not be effective unless trial courts do not countenance violations, and unhesitatingly impose sanctions proportionate to the circumstances.

It is "[o]nly where the sanction invoked is more stern than reasonably necessary" that a denial of due process results. *DiGregorio v. First Rediscount Corporation, supra*, 506 F.2d at 789. In light of the nature of GAC's misconduct, the element of punishment involved here does not rise to the prohibited level of reprisal. *Id. See also Norman v. Young, supra*, 422 F.2d at 474.

A party cannot approach its obligation to make good faith discovery however it chooses as to certain matters, and at the same time expect to have the case proceed in a normal fashion as to other issues. *See Haney v. Woodward & Lothrop, Inc.*, 330 F.2d 940, 945 (4th Cir. 1964). At stake is not only the appellees' right to a fair trial on the merits, but also, the integrity of the orders of the court. As the court in *Perry v. Golub, supra*, 74 F.R.D. at 365, stated:

> [T]he refusal of a party . . . to comply with an Order of the Court cuts substantially deeper than the question of prejudice to litigants and their attorneys. A basic tenet of our government of law is that a party is required to obey a Court order.

In imposing stringent sanctions to preserve this basic principle, "courts are free to consider the general deterrent effect their orders may have on the instant case *and on other litigation*, provided that the party on whom they are imposed is, in some sense, at fault." *Cine Forty–Second St. Theatre v. Allied Artists, supra*, 602 F.2d at 1066 (emphasis added and citations omitted). As the United States Supreme Court stated in *National Hockey League v. Met. Hockey Club, supra*, 427 U.S. at 643, 96 S.Ct. at 2781:

> [T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

See also Emerick v. Fenick Industries, Inc., supra, 539 F.2d at 1381; *Perry v. Golub, supra*, 74 F.R.D. at 366–67.

We are fully aware of the severity of the sanctions imposed by the judgment we affirm. Our affirmance of that judgment should not be construed as a retreat from the principle that such discovery sanctions are to be imposed only in extreme cases and only upon a clear showing of willfulness or bad faith. That principle is well–established in this jurisdiction; it is universally recognized in American jurisprudence; and it is fundamental to the constitutional right of due process. The length of this opinion and the months of study and consideration given to it are testimony to the trepidation with which we have approached the judgment in question.[137] In this extraordinary case, our review has been anything but cursory.

Although the sanctions of Rule 37(b)(2)(iii) are to be applied only in aggravated circumstances, they must nevertheless be available to a court in order to achieve compliance with its orders and to insure that a determination of a case on the merits is made only after a full, good faith disclosure of all relevant facts. We are not only concerned with the constitutional right of the defaulted party to an opportunity to be heard on the merits, but also, with the equally fundamental constitutional right of the party who seeks discovery to a hearing which is meaningful. When a party has displayed a willful, bad faith approach to discovery, it is not only proper, but imperative, that severe sanctions be imposed to preserve the integrity of the judicial process and the due process rights of the other litigants. *See In Re Liquid Carbonic Truck Drivers Chemical, Etc., supra*, 580 F.2d at 823; *Norman v. Young, supra*, 422 F.2d at 474.

137. "Because dismissal is the most severe sanction available to a district court under rule 37, we are ever reluctant to affirm its invocation." *DiGregorio v. First Rediscount Corporation, supra*, 506 F.2d at 788.

We are also mindful of the magnitude of the relief afforded in this case. It is unprecedented in New Mexico. We cannot consider such a matter lightly.[138] While we must guard against the possibility that such an enormous judgment is improperly imposed by an impatient court, we must also recognize that with stakes so high, there is a concomitant possibility that parties will make less than full, good faith disclosure. Undue leniency would encourage recalcitrance by litigants with something to hide.[139]

The rules of discovery are as equally applicable to cases involving large sums as they are to small; and the obligation to comply with those rules in good faith and to obey the orders of the court is no less incumbent on the largest company than it is on the poorest citizen. Any contrary rule, or any special considerations in a billion dollar case, would be inimical to the most fundamental postulate of our legal system–that before the law, all stand equal.

IV.

DISQUALIFICATION OF UNITED'S COUNSEL

GAC contends that the trial court erred in denying its motion to disqualify United's counsel, the law firm of Bigbee, Stephenson, Carpenter & Crout, now known as Bigbee, Stephenson, Carpenter, Crout & Olmsted (hereinafter referred to as the Bigbee firm), and that all orders entered by the court subsequent to the filing of its disqualification motion—including the sanctions order and default judgment—are therefore invalid and must be reversed.

This issue first arose on February 23, 1977—almost fourteen months after the filing of the complaint in this case—when GAC suggested that the Bigbee firm would have to be disqualified if Gulf documents regarding its "separate non–partnership uranium activities in New Mexico" had to be produced. On March 21, 1977—two weeks after the court ordered such production for at least the second time—at the direction of Gulf, GAC filed a motion to disqualify the Bigbee firm. The issue was submitted to the trial court on affidavits and depositions.[140] The court denied the motion without making specific findings. The trial court refused to certify the issue for an interlocutory appeal. GAC thereafter sought unsuccessfully to have the denial of its motion of disqualification reviewed by this Court, either as an appeal from a final judgment under the collateral order doctrine of *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), (No. 11469, June 29, 1977), or as a petition for an extraordinary writ (No. 11484, July 1, 1977). GAC renewed the motion in November 1977, which the court again denied.

In 1961, the Bigbee firm began to represent United in connection with its uranium activities in New Mexico. It has continuously represented United since that time. In 1971, Gulf hired the Bigbee firm to represent it on legal matters relating to

138. *Cf. Trans World Airlines, Inc. v. Hughes, supra*, 449 F.2d at 63 ("[I]t would appear that were less at stake in this litigation, the propriety of the default judgment would not nave deserved the full discussion we have afforded it.")

139. *Cf. Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602, 615 (2d Cir. 1964), *cert. denied*, 380 U.S. 248, 85 S.Ct. 934, 13 L.Ed.2d 817 (1965) (misconduct in discovery "is particularly intolerable in a large and complex litigation such as this one"); *Philadelphia Hous. A. v. American Radiator & S. San. Corp.*, 50 F.R.D. 13, 19 (E.D. Pa. 1970), *aff'd sub nom, Mangano v. American Radiator & Standard San. Corp.*, 438 F.2d 1187 (3d Cir. 1971) (severe discovery sanctions are "particularly appropriate in complex antitrust litigation like that now before the Court where efficient and effective discovery procedures are essential to orderly adjudication"). *See also Harlem River Con. C. Inc. v. Associated G. of Harlem, Inc., supra*, 64 F.R.D. at 465.

140. At a hearing in May 1977, GAC informed the court that there was no need for an evidentiary hearing because "there is no genuine issue [as] to any material fact." On appeal, GAC has reversed itself, and argues that there are disputed facts as to some issues, and that an evidentiary hearing was required. In light of its representation to the trial court, and the approach we take to this issue, it is unnecessary for us to decide this question.

Gulf's uranium operations in New Mexico, particularly the large reserves at Mt. Taylor it was then in the process of acquiring. The Bigbee firm had continued to represent Gulf until November 1976, ten months after the complaint in this case was filed. The principal services performed by the Bigbee firm for Gulf during this period were perfecting and protecting Gulf's title to mining rights — including maintenance of possessory rights, application for mineral patents, defense of mining claims, and representation in quiet title suits — and representing Gulf before the New Mexico State Legislature on a variety of issues.

GAC contends that because Gulf's uranium production activities in New Mexico became an issue in this case, there is a substantial relationship between the Bigbee firm's past representation of Gulf and its present representation of United in this case, and a concomitant danger that confidential information given to the Bigbee firm in its prior representation might be used against Gulf's interests in the present action. United argues that there was no substantial relationship between the firm's representation of Gulf and United; that Gulf consented to any conflicting representation; and that by their delay in raising the disqualification issue, Gulf and GAC were estopped from asserting it.

We believe that the substantial relationship test is the proper standard by which motions to disqualify counsel are to be judged under Canon 4 of the Code of Professional Responsibility, which provides that a lawyer must preserve the confidences and secrets of a client. Simply stated, the substantial relationship standard requires disqualification "where an attorney represents a party in a matter in which the adverse party is that attorney's former client . . . [and] the subject matter of the two representations are 'substantially related.'" *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 223 (7th Cir. 1978), *rev'g Westinghouse Elec. Corp. v. Rio Algom, Ltd.*, 448 F.Supp. 1284, 1310–12 (N.D. Ill. 1978). In the *Westinghouse* decision, the Seventh Circuit Court of Appeals found that the substantial relationship test had been satisfied, and reversed the district court's denial of Gulf's motion to disqualify the Bigbee firm from representing United in the *Westinghouse* uranium litigation. We think that the approach taken by the Seventh Circuit was the proper one. Because the facts and law are fully set forth in its decision, we will not further elaborate on the substantial relationship question.

The substantial relationship standard does not, however, entirely dispose of the question of the propriety of the Bigbee firm's professional conduct in this affair. From the filing of the predecessor to this case on August 8, 1975, to the present time, United has alleged that GAC and Gulf have committed various tortious acts in New Mexico and have violated the New Mexico Antitrust Act. United, represented at all times by the Bigbee firm, has repeatedly asserted that by its action in acquiring, and allegedly delaying production from, its Mt. Taylor reserves, Gulf has committed antitrust violations. For the Bigbee firm to be making these accusations on behalf of United, at the same time that it was continuing to represent Gulf with respect to these very reserves, raises a second ethical question of serious dimensions. The propriety of an attorney making such allegations against a *current,* rather than a former, client

> must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients.
>
> * * * * * *
>
> Under the Code, the lawyer who would sue his own client, asserting in justification the lack of "substantial relationship" between the litigation and the work he has undertaken to perform for that client, is leaning on a slender reed indeed.[141]

141. Although the Bigbee firm had ended its representation of Gulf by the time the motion to disqualify was filed, we think that this principle is nonetheless applicable here, where the contemporaneous representation of United and

Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976). *See* Canon 5–105 of the Code of Professional Responsibility;[142] *State v. Aguilar*, 87 N.M. 503, 504, 536 P.2d 263, 264 (Ct.App. 1975); *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 232–35 (2d Cir. 1977).

United argues that "the Bigbee firm's conduct in this litigation was in accord with both the letter and spirit of the highest ethical standards of the bar." We do not agree. However, "a violation of professional ethics does not . . . automatically result in disqualification of counsel."[143] "[E]thical problems cannot be resolved in a vacuum."[144] In disqualification cases, judges cannot "exclude from their minds realities of which fair decision would call for judicial notice."[145] Because a disqualification motion is of an equitable nature,[146] it is appropriate to consider the prior conduct and statements of the movant and its attorneys on the question of the movant's good faith and credibility in connection with the motion to disqualify.[147]

A motion to disqualify opposing counsel should be filed at the onset of the litigation,[148] or "with promptness and reasonable diligence once the facts" upon which the motion is based have become known.[149] A failure to act promptly may warrant denial of the motion.[150]

GAC's delay in raising the disqualification issue — considered in the context of United's allegations against it and GAC's conduct throughout the proceedings in the trial court — casts serious doubt on the good faith with which the motion was made. GAC's motion to disqualify the Bigbee firm was filed after twenty months of litigation with United. During this period very extensive pretrial proceedings were conducted in the trial court, and GAC had sought appellate review of several of its decisions both in this Court and the United States Supreme Court. *E. g., General*

Gulf continued for ten months after the filing of this lawsuit.

142. Canon 5–105 reads in pertinent part:

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under Rule 5–105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under Rule 5–105(C).

(C) In the situations covered by Rule 5–105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

143. *W.T. Grant Co. v. Haines*, 531 F.2d 671, 677 (2d Cir. 1976) (citation omitted).

144. *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562, 565 (2d Cir. 1973). *See also Silver Chrysler Plymouth, Inc. v. Chrysler Mot. Corp.*, 518 F.2d 751, 753 (2d Cir. 1975).

145. *Silver Chrysler, supra*, 518 F.2d at 753. *See also City of Cleveland v. Cleveland Elec. Illuminating*, 440 F.Supp. 193, 197 (N.D. Ohio 1976), *aff'd*, 573 F.2d 1310 (6th Cir. 1977).

146. *Milone v. English*, 113 U.S.App.D.C. 207, 306 F.2d 814, 818 (D.C. Cir. 1962); *Marco v. Dulles*, 169 F.Supp. 622, 632 (S.D. N.Y. 1959), *appeal dismissed*, 268 F.2d 192 (2d Cir. 1959).

147. *Fleischer v. A.A.P., Inc.*, 163 F.Supp. 548, 559 (S.D. N.Y. 1958), *appeal dismissed sub nom., Fleischer v. Phillips*, 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002, 79 S.Ct. 1139, 3 L.Ed.2d 1030 (1959). *See also Marco v. Dulles, supra*, 169 F.Supp. at 632.

148. *International Brotherhood of Teamsters, Etc. v. Hoffa*, 242 F.Supp. 246, 257 (D.D.C. 1965).

149. *Milone v. English, supra*, 306 F.2d at 818. *See also Marco v. Dulles, supra*, 169 F.Supp. at 632.

150. *Redd v. Shell Oil Company*, 518 F.2d 311, 315 (10th Cir. 1975); *Milone v. English, supra*, 306 F.2d at 818; *City of Cleveland v. Cleveland Elec. Illuminating, supra*, 440 F.Supp. at 203–05; *Marco v. Dulles, supra*, 169 F.Supp. at 632. *But see Emle Industries, Inc. v. Patentex, Inc., supra*, 478 F.2d at 574; *W.E. Bassett Company v. H.C. Cook Company*, 201 F.Supp. 821, 825 (D. Conn. 1961), *aff'd per curiam*, 302 F.2d 268 (2d Cir. 1962).

Atomic Co. v. Felter, supra, 90 N.M. 120, 560 P.2d 541, *rev'd, General Atomic Co. v. Felter, supra*, 434 U.S. 12, 98 S.Ct. 76, 54 L.Ed.2d 199, and *United Nuclear Corp. v. General Atomic Co., supra*, 90 N.M. 97, 560 P.2d 161. At no time during any of these proceedings was the disqualification issue raised.

GAC finally moved to disqualify the Bigbee firm only after two actions it had filed against United in federal court had been dismissed (*see* n. 84, *supra*); after the trial court in this case had found GAC's answers to the First Set of Interrogatories to be deficient; after United had twice moved for a default judgment for GAC's discovery failures; after the trial court had twice warned that sanctions would be imposed for further failures; after the court had held on at least five separate occasions in as many months that the partners were subject to discovery; after this Court had upheld the trial court's personal jurisdiction over GAC; and after United had raised Gulf's participation in the international uranium cartel as an issue. In this context, GAC's disqualification motion would seem to have been motivated more by "a desire to fragmentize the [opposition] than by any sensitivity to the ethical considerations involved." *Aetna Cas. & Sur. Co. v. United States*, 570 F.2d 1197, 1201 n. 7 (4th Cir.), *cert. denied*, 439 U.S. 821, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978).[151] The delay in raising the issue could hardly be ascribed to a lack of understanding. GAC and its constituent partners have been represented in this case by large and experienced law firms from throughout the country.[152]

GAC seeks to excuse its delay in raising the disqualification issue by asserting that the legal basis for the Bigbee firm's conflict did not become clear until the court had held that Gulf and Scallop were subject to its discovery orders. Under the terms of United's original discovery requests of December 1975, to which GAC made no objection, the partners were required to provide discovery. Contrary to GAC's representation, it was not in January 1977, but in November 1976, when the court first held that the partners were subject to its discovery orders. GAC waited almost four months after the November order before moving to disqualify the Bigbee firm.

GAC further seeks to excuse its delay by asserting that Gulf's Mt. Taylor uranium operations did not become an issue until early 1977. This excuse is also without merit. The complaint in this case alleged that GAC and Gulf had violated the antitrust laws of New Mexico by restricting trade in, and attempting to monopolize, the uranium market.[153] In light of the fact

151. Numerous other courts have recognized that motions to disqualify opposing counsel "have become common tools of the litigation process," *International Electronics Corp. v. Flanzer*, 527 F.2d 1288, 1289 (2d Cir. 1975), which are often used "for purely strategic purposes." *Woods v. Covington Cty. Bank*, 537 F.2d 804, 813 (5th Cir. 1976) (footnote omitted). *See also Allegaert v. Perot*, 565 F.2d 246, 251 (2d Cir. 1977); *Redd v. Shell Oil Company, supra*, 518 F.2d at 315; *Pennwalt Corp. v. Plough, Inc.*, 85 F.R.D. 264, 274 (D. Del. 1980). Comment, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U.Chi.L.Rev. 450 (1978).

152. That GAC's and Gulf's inaction was not the result of any innocent misunderstanding is evidenced by the notes of the litigation strategy meeting held shortly after this case was filed. Those notes, to which we have previously referred (*see* n.n. 32 and 81, *supra*), reflect that GAC and Gulf attorneys rejected a move to disqualify the Bigbee firm. Those notes, taken by an associate general counsel of Gulf, contain these remarks: "Move to disqualify Bigbee from UNC [United]? . . . *Don't* if case gets before Judge Bratton." (Emphasis in original.) Within a week of this meeting, GAC and Gulf filed a declaratory judgment and an interpleader action against United in federal court. *See* n. 84, *supra*. Both cases were assigned to Judge Bratton. In neither case was a disqualification motion filed. Judge Bratton dismissed both actions.

153. In March 1977, GAC's counsel made it clear that GAC recognized that Gulf's activities were at issue. Referring not to anything that had transpired in early 1977, but to "[t]he fact that the first 53 paragraphs [of the complaint] relate to Gulf's misconduct," he told the trial court that "Gulf is the main focal point of the action." He went on to say:

> [N]early all of the misconduct alleged in the complaint was alleged misconduct on the part of Gulf before GAC was even formed. It

that the Mt. Taylor reserves are the most significant of Gulf's proven domestic uranium reserves and are the largest single body of uranium ore in the United States, it is clear that these reserves were pertinent to these antitrust allegations.[154]

In pleadings filed over one year before the motion to disqualify the Bigbee firm was filed, United charged that Gulf's "huge uranium reserves . . . in New Mexico . . . are part and parcel of the antitrust violations with which General Atomic is charged." United's counsel also alleged that GAC was "trying with this partner Gulf to monopolize uranium in New Mexico." He said: "That is what this suit is all about." United's reply to GAC's counterclaim, filed in June 1976, directly tied its antitrust allegations to Gulf's Mt. Taylor reserves.

In the *Westinghouse* litigation there was no evidence that Gulf belatedly raised the issue of the disqualification of the Bigbee firm. Furthermore, in that case there was a continuing possibility of the misuse of confidential information against Gulf by the Bigbee firm.[155] In the present case there is no such prospect. GAC nevertheless contends that the judgment entered against it for *its* discovery failures must be reversed — including all discovery orders entered after the disqualification motion was filed — "in order to uphold standards of ethics" for the bar. To accept GAC's position would permit a party to virtually ignore its obligation to follow the rules of discovery and the specific orders of the court, and then entirely escape liability for such misconduct by belatedly asserting a motion to disqualify opposing counsel. In such circumstances, we decline to reverse a judgment that is not tainted by the Bigbee firm's conflict and that is otherwise supported by the record. *See W.T. Grant Co. v. Haines, supra,* 531 F.2d at 677.

V.

DISQUALIFICATION OF THE TRIAL JUDGE

GAC also contends that the sanctions order and default judgment must be reversed because the trial judge refused to disqualify himself. This contention is without merit. GAC has failed to demonstrate either a personal bias or prejudice on the part of Judge Felter toward any party or a reasonable basis for questioning his impartiality.

Two weeks after the complaint in this case was filed, GAC moved under Section 38–3–9, N.M.S.A. 1978, to disqualify Judge Campos, who was originally assigned to hear it. Judge Felter was then assigned to the case. Almost two years later, on November 9, 1977, GAC moved for the first time to disqualify Judge Felter, alleging that by language he used in two discovery orders entered in October 1977, and in in-court remarks he made on November 8, 1977, the judge had demonstrated "a bias, prejudice and 'interest'" against it. The motion was denied on the same day. GAC on two occasions renewed this motion, which the judge again denied. The motions were filed pursuant to Article VI, § 18 of the New Mexico Constitution, Canon 3(C)(1) of the New Mexico Code of Judicial Conduct, and the due process clauses of the United States and New Mexico Constitutions, U.S. Const., Amend. XIV, § 1 and N.M. Const., Art. II, § 18.[156]

is not a question of Gulf doing things on behalf of the partnership. What they are being charged primarily with are things that happened before the partnership was even in existence.

154. It is hard to believe that GAC did not recognize that the Mt. Taylor reserves were an issue in this case until late February 1977 when this Court had done so in October 1976. *United Nuclear Corp. v. General Atomic Co., supra,* 90 N.M. at 101, 560 P.2d at 165.

155. In *Westinghouse*, the Court of Appeals held that there had been no legally effective consent by Gulf to the Bigbee firm's representation of United in that litigation because "a client's consent will not justify the use of confidential information against the client." 588 F.2d at 228.

156. Section 38–3–9, N.M.S.A. 1978, provides that a judge may be disqualified by a party who files an affidavit alleging a "belief" that the judge cannot preside impartially. Under this section a judge is automatically disqualified

GAC's charge of bias and prejudice is based on the following allegations:

(1) The "vituperative tone" of several of the judge's orders and statements, especially in the sanctions order and default judgment, manifested a personal hostility towards GAC.

(2) The judge's actions during the trial were one–sided in favor of United, as evidenced by his interruption and termination of GAC's cross–examination of United's witnesses, his curtailment of GAC's right to impeach those witnesses, and his questioning of witnesses.

(3) Various orders and rulings on questions of evidence, procedure and discovery were favorable to United, prejudicial to GAC, and explainable only as expressions of hostility to GAC.

(4) In his conduct of pre–trial discovery and in his entry of sanctions, the judge acted with unreasonable haste and without exercising independent judgment, thereby prejudicing GAC and favoring United.

In this section of the opinion we are not concerned with whether the various rulings GAC complains of were legally correct, but rather, with whether those rulings are sufficient to establish that Judge Felter had a personal bias and prejudice against GAC.

Article VI, § 18 of the New Mexico Constitution provides: "No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause . . . in which he has an interest." In *State v. Scarborough, supra*, 75 N.M. at 705, 410 P.2d at 734, we said that an "interest" necessary to disqualify a judge under this constitutional provision may be an actual bias or prejudice. However, we agree with the construction given to the term "bias or prejudice" by the United States Supreme Court in *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966), where, in construing a federal judicial disqualification statute, 28 U.S.C. § 144, the Court held:

> The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. (Citation omitted.)

See also In Re International Business Machines Corp., 618 F.2d 923, 927–28 (2d Cir. 1980); *United States v. Haldeman*, 181 U.S. App.D.C. 254, 559 F.2d 31, 132 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977); *United States v. Conforte*, 457 F.Supp. 641, 657 (D. Nev.

upon the filing of such an affidavit. *Norton v. Reese*, 76 N.M. 602, 604, 417 P.2d 205, 207 (1966); *Rivera v. Hutchings*, 59 N.M. 337, 341, 284 P.2d 222, 225 (1955). Thus, mere suspicion of bias or prejudice is a sufficient basis for the exercise of the statutory right of disqualification. *State v. Scarborough*, 75 N.M. 702, 713, 410 P.2d 732, 740 (1966) (Noble and Compton, JJ., dissenting). However, only one judge may be disqualified under that section, *Gray v. Sanchez*, 86 N.M. 146, 148, 520 P.2d 1091, 1093 (1974); *Beall v. Reidy*, 80 N.M. 444, 447, 457 P.2d 376, 379 (1969), and a party must file the disqualification affidavit within the statutory time limitations set forth in Section 38–3–10, N.M.S.A. 1978, which are strictly construed. *Gerety v. Demers*, 92 N.M. 396, 401, 589 P.2d 180, 185 (1978).

Because Judge Campos had already been disqualified, and because the motion to disqualify Judge Felter was not filed within the time limitations of Section 38–3–10, GAC had no *statutory* right to disqualify Judge Felter. However, the right of disqualification provided by Section 38–3–9 is not the exclusive method of disqualification. *See State v. Scarborough, supra*, 75 N.M. at 709, 410 P.2d at 736–37. *But see Doe v. State*, 91 N.M. 51, 52, 570 P.2d 589, 590 (1977). The guarantee of a fair and impartial tribunal, embodied in Article VI, § 18 and Canon 3(C)(1), and assured by the concept of due process, cannot be rendered meaningless by the limitations found in Sections 38–3–9 and 38–3–10. However, though mere suspicion is a sufficient basis for disqualification under Section 38–3–9, the other methods require more, as we explain in this section of the opinion. Although not strictly limited by the time limitations of Section 38–3–10, a disqualification motion based on one of the non–statutory grounds must nevertheless be filed within a reasonable time after the party becomes aware of the grounds for it. *Cf. In Re International Business Machines Corp.*, 618 F.2d 923, 932 (2d Cir. 1980) (construing similar federal provisions). Because we find there was no basis to disqualify Judge Felter, we do not consider the question of the timeliness of GAC's motion.

1978); *Lazofsky v. Sommerset Bus Co., Inc.*, 389 F.Supp. 1041, 1043 (E.D. N.Y.1975). Stated another way, the bias must be personal, and not judicial. *In Re International Business Machines Corp., supra*, 618 F.2d at 929.

GAC's original motion to disqualify Judge Felter was filed one day after he had accused GAC of "cover–ups" and "stonewalling information" in connection with an effort by Gulf to quash a subpoena issued for S. A. Zagnoli, the executive vice–president of Gulf Minerals in Denver.[157]

Although these remarks were the immediate precipitating event for the disqualification effort and the principal example of the judge's alleged bias and prejudice up to that time, GAC also cited the court's discovery order of October 11, 1977, wherein the court found that GAC had not answered United's Second Set of Interrogatories in good faith, and an order of the court on October 27, 1977, denying GAC's motion for a continuance of the trial setting, wherein the court stated that adequate time had been given for trial preparation "by the exercise of reasonable diligence and good faith."

GAC has yet to show any extrajudicial conduct or incident which demonstrates any bias or prejudice on the part of Judge Felter.[158] Because GAC can establish no extrajudicial source for Judge Felter's alleged bias, it is forced to rely exclusively on his in–court comments and rulings. But as we have said, these afford no basis for disqualification.[159] The reasons for the extrajudi-

157. GAC had listed Zagnoli, who had represented Gulf at several cartel–related meetings, as a possible GAC witness at trial. United sought to have him appear to identify documents produced from Gulf files by GAC. The court granted the motion to quash, but stated:

> I will not completely buy this nonparty corporate stonewall proposition. The separate corporate identities and the rules relating to partnerships and so forth are not calculated to foment and bring about cover–ups and stonewalling information, and I am not going to permit them to be used that way.
>
> . . . . . .
>
> . . . [I]t seems to me that General Atomic easily could have voluntarily brought about the appearance of Mr. Zagnoli here without any harm to themselves. . . . But instead, it seems they desire to hide behind procedural and other rules in order to play a game of hide–and–go–seek with this Court, and I am getting sick of it. . . .
>
> I don't think that you are acting in good faith at all in this regard. I think you are trying to suppress information that could be brought to light and aid this Court. . . .

158. GAC does suggest that certain newspaper articles which discussed the favorable impact on the State of a judgment for United "could have had a serious prejudicial effect on the court," and amounted to "public pressure exerted through partisan appeals in the media." This is the very type of "indirect, remote, speculative, theoretical or possible interest" which we have previously said is not sufficient to warrant disqualification under Article VI, § 18. *State v. Scarborough, supra*, 75 N.M. at 705, 410 P.2d at 734. The articles were clearly not "partisan appeals." GAC has not shown that Judge Felter ever read those articles. Furthermore, many of the rulings that GAC relies on to support its claim of bias were made before the articles were published. It is difficult to believe that two innocuous newspaper articles had within two weeks of their publication transformed a judge, who GAC had said in May 1977 "has certainly furnished us complete due process all along," into what it now describes as a "patently hostile" jurist, harboring "personal grudges" and incapable of "calm impartial consideration."

159. We do not mean to suggest that a judge's in–court conduct can never be relevant to show a *personal* bias or prejudice against a party which has an extrajudicial source. *See In Re International Business Machines Corp., supra*, 618 F.2d at 928 n. 6. The critical distinction between an impermissible personal, extrajudicial bias, and in–court opinions was explained in *United States v. Conforte, supra*, 457 F.Supp. at 658 n. 12:

> The purpose of the extra–judicial source requirement concerns the origin of the judge's bias rather than the place of its expression. Certainly, judicial rulings or comments on the evidence made during the course of a proceeding do not fall within the rule. However, if a judge's statements or conduct during a trial refer to or reflect bias or prejudice which arose outside of his judicial duties, then the extrajudicial source rule is satisfied and recusal may be required.

The practical meaning of this distinction is perhaps best exemplified by comparing the statements and rulings which allegedly showed Judge Felter's bias with the in–court statements of the trial judge who was disqualified in *United States v. Hatahley*, 257 F.2d 920, 925–26 (10th Cir.), *cert. denied*, 358 U.S. 899, 79 S.Ct. 222, 3 L.Ed.2d 148 (1958).

cial source rule were recently set forth by the Second Circuit Court of Appeals in *In Re International Business Machines Corp., supra,* which involved a similar factual situation.

In the first place,

> [a] trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias. Judicial independence cannot be subservient to a statistical study of the calls he has made during the contest.

618 F.2d at 929.

Second, a judge is not merely "a passive observer." *Id.* at 930.

> He must . . . shrewdly observe the stratagems of the opposing lawyers, perceive their efforts to sway him by appeals to his predilections. He must cannily penetrate through the surface of their remarks to their real purposes and motives. He has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. Disinterestedness does not mean child–like innocence. If the judge did not form judgments of the actors in those court–house dramas called trials, he could never render decisions.

Id., quoting from *In Re J.P. Linahan,* 138 F.2d 650, 654 (2d Cir.1943) (footnotes omitted).

Criticism by the court of a party or its counsel is inevitable if the court's discovery orders are to be enforced in the face of a party's intransigence. Indeed, the ultimate discovery sanctions imposed here require a finding of bad faith or willfulness. *See* Section III, *supra.* Since the principal evidence of the judge's alleged bias is the language he used to describe what he found to be GAC's bad faith in discovery, it would seem that if GAC's argument was accepted, only a biased judge could ever make the requisite finding of bad faith necessary to support the sanctions authorized by Rule 37(b)(2)(iii).[160] If this were true, such sanctions could never be imposed.[161]

Rulings adverse to a party do not necessarily evince a personal bias or prejudice on the part of the judge against it, even if the rulings are later found to have been legally incorrect. In *International Business Machines,* IBM contended, as GAC does here, that various erroneous rulings of the trial judge demonstrated that he was personally biased or prejudiced against it. The Second Circuit rejected this notion, stating that it

> would necessarily require this court to examine each and every ruling to determine whether it was, initially, legally valid. If we determine that some adverse rulings were correctly made, obviously they could not be tainted by bias. Even if they were deemed to be incorrect, it of course does not follow that they were motivated by personal bias. We would next have to ask whether the error could be attributed to the judge's misunderstanding of the facts or the law. The exercise would require this court to be-

160. GAC also argues that the fact that the recitals containing this language were adopted almost verbatim from the proposed findings of United demonstrates the judge's bias against it and in favor of United. Although, as we have noted, this practice is not to be commended, it does not necessarily demonstrate that the judge acted in such a judicially irresponsible way as to require his disqualification. *See Ramey Const. Co., Inc. v. Apache Tribe, Etc., supra,* 616 F.2d at 468–69.

161. Not only is Judge Felter's description of GAC's conduct supported by the record, but also it was similar to language other courts have used to describe bad faith discovery efforts. *See, e.g., Fox v. Studebaker–Worthington, Inc.,* 516 F.2d 989, 991 (8th Cir.1975) ("shocking abuse," "flagrant violations of the rules of discovery"); *Conrad Music v. Modern Distributors, Inc.,* 433 F.Supp. 269, 270 (C.D. Cal.1977) ("utter disdain," "gross indifference," "deliberate callousness"); *Technograph Printed Cir. v. Packard Bell Electronics Corp.,* 290 F.Supp. 308, 320 (C.D. Cal.1968) ("wilful, intentional, and conscious flouting and disobedience," "callous, cynical disdain"); *Life Music, Inc. v. Broadcast Music, Inc., supra,* 41 F.R.D. at 28 (S.D. N.Y.1966) ("deliberate flouting of this court's order," "willful, intentional, and in bad faith," "contumacious conduct calculated and designed to frustrate the order of this court," "reprehensible and irresponsible in the extreme").

> come intimately familiar with a 90,000 page trial transcript and to examine thousands of underlying documents and exhibits.

Id. at 930. The court concluded that it would be meaningless for it to determine the propriety of each contested ruling because it would be impossible to "divine its motivation." *Id.* at 933. In such circumstances, "the attribution of extrajudicial bias would require extrasensory perception." *Id.* at 934.

Another reason for the rule that judicial disqualification may not be based on in-court rulings is that "such rulings are reviewable otherwise." *Ex Parte Am. Steel Barrel Co.*, 230 U.S. 35, 44, 33 S.Ct. 1007, 1010, 57 L.Ed. 1379 (1913). *See In Re International Business Machines Corp., supra*, 618 F.2d at 929. This is particularly true here, where the propriety of the court's discovery orders and sanctions–which were the principal bases for the motions to disqualify Judge Felter–have been subject to full appellate review in this Court. *See* Sections II and III, *supra*.

GAC's contention that, independently of Article VI, § 18 of the New Mexico Constitution, Judge Felter's disqualification was required by Canon 3(C)(1) of the New Mexico Code of Judicial Conduct is also without merit. That Canon provides: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . . ." This provision sets up an objective standard geared to the appearance of justice, and thus expands the instances in which a judge should disqualify himself beyond those set out in Article VI, § 18. However, we adopt the construction given to an identical provision in 28 U.S.C. § 455(a) (1976), to the effect that there must be "a reasonable factual basis for doubting the judge's impartiality." Report of the Judiciary Committee of the United States House of Representatives (1974 U.S. Code Cong. & Ad. News 6351, 6355).

> [I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

S.Rep.No. 93–419, 93d Cong., 1st Sess. 5 (1973); H.Rep.No. 93–1453, 93d Cong., 2d Sess. 5 (1974).[162]

For the very same reasons that courts have refused to permit a judge's in-court rulings to form the basis for his disqualification for actual bias or prejudice, Canon 3(C)(1) and identical language in its federal counterpart have been repeatedly construed to require extrajudicial bias. *In Re International Business Machines Corp., supra*, 618 F.2d at 929; *United States v. Haldeman, supra*, 559 F.2d at 132–33 n. 297.[163]

162. It is important to note that GAC moved to disqualify Judge Felter only after he had warned time and time again that he would impose sanctions for failure by either party to comply with the court's discovery orders; after he found in October 1977 that GAC had not previously acted in good faith in discovery; and after United had filed its fourth motion for sanctions. This is not the first case in which a party faced with the imposition of sanctions for its discovery failures has sought to question the judge's integrity and impartiality. *State of Ohio v. Arthur Andersen & Co., supra*, 570 F.2d at 1372; *Henry v. Sneiders*, 490 F.2d 315, 317–18 (9th Cir.1974), *cert. denied*, 419 U.S. 832, 95 S.Ct. 55, 42 L.Ed.2d 57 (1974); *Pioche Mines Consolidated, Inc. v. Dolman, supra*, 333 F.2d at 259.

163. Canon 3(C)(1)(a) states that one instance in which a judge's impartiality "might reasonably be questioned" is where "he has a *personal* bias or prejudice concerning a party." (Emphasis added.) Because subsection (a) is not the only such instance, disqualification under Canon 3(C)(1) could also be required where the judge did not in fact have such a personal bias, but where there was nonetheless "a reasonable factual basis" for believing that he did. How-

In *Lazofsky v. Sommerset Bus Co., Inc., supra*, 389 F.Supp. at 1044, the court said:

> If the words "impartiality might reasonably be questioned" and "avoid impropriety and the appearance of impropriety" were to be interpreted to encompass judicial rulings in the course of a trial or other proceeding, . . . then there would be almost no limit to disqualification motions and the way would be opened to a return to "judge shopping", a practice which has been for the most part universally condemned. Certainly every ruling on an arguable point during a proceeding may give "the appearance of" partiality, in the broadest sense of those terms, to one party or the other.

Therefore, we conclude that GAC's disqualification argument under Canon 3(C)(1) is deficient for the same reasons it is under Article VI, § 18 of the New Mexico Constitution.[164]

Because GAC failed to meet its burden of establishing that Judge Felter had a personal or extrajudicial bias or prejudice against it, the judge properly refused to disqualify himself. *See Gerety v. Demers, supra*, 92 N.M. at 400, 589 P.2d at 184; *In Re International Business Machines Corp., supra*, 618 F.2d at 934.

VI.

APPROPRIATENESS OF THE REMEDIES GRANTED APPELLEES

In this final section of the opinion we examine GAC's contentions concerning the propriety of the remedies awarded United and I&M by the trial court.

After entry of the sanctions order and default judgment, the court conducted a trial on damages.[165] The court invalidated the 1973 and 1974 Supply Agreements, and held that United had no obligation to supply any uranium to GAC or its predecessors. The court also found that GAC was obligated to indemnify United for any liabilities connected to United's failure to deliver uranium covered by the 1973 Agreement or any of the utility contracts. The court awarded I&M $15,950,752 in damages, and decreed specific performance of GAC's obligation to supply uranium to I&M. GAC contends that these remedies were improper.

GAC argues that the invalidation of a contract which displaced a prior, valid contract reinstates the prior contract. GAC also argues that rescission of a contract requires restoration of the status quo ante. *Prudential Insurance Company of America v. Anaya*, 78 N.M. 101, 106, 428 P.2d 640, 645 (1967). Because the 1973 Supply Agreement replaced the 1971 Agreement and continued United's obligation to supply uranium to Gulf–United, GAC contends that if the 1973 Agreement was correctly invalidated, the 1971 Agreement remains in force. Therefore, it concludes that the trial court erred in holding that United had no further obligations to supply uranium to GAC. Alternatively, GAC argues that if the 1971 Agreement is also invalidated,

ever, for the reasons stated in the text, even in that instance the extrajudicial source requirement must be satisfied.

164. Our determination that Judge Felter's disqualification was not mandated by Article VI, § 18 of the New Mexico Constitution or Canon 3(C)(1) of the Code of Judicial Conduct disposes of GAC's claim that its due process right to a fair trial was violated by Judge Felter's alleged bias against it. Clearly, the right to "[a] fair trial in a fair tribunal is a basic requirement of due process." *In Re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). *See also Beall v. Reidy, supra*, 80 N.M. at 446, 457 P.2d at 378. Although we cannot say that a judge's disqualification may never be required by the due process clauses of the United States and New Mexico Constitutions even though it is not also mandated by Article VI, § 18 of the State Constitution or Canon 3(C)(1), it is difficult to conceive of circumstances in which a claim sufficient under the latter two standards would not also satisfy the due process test. *See In Re International Business Machines Corp., supra*, 618 F.2d at 932 n. 11; *United States v. Haldeman, supra*, 559 F.2d at 130 n. 276; *United States v. Conforte, supra*, 457 F.Supp. at 659 n. 13.

165. Upon the default, GAC is deemed to have admitted the allegations of the complaint, but the prevailing parties must prove the damages to which they are entitled. *Gallegos v. Franklin, supra*, 89 N.M. at 123, 547 P.2d at 1165.

United remains obligated to supply uranium to the utilities by virtue of the utility contracts it entered into prior to the execution of the 1971 Agreement.

The principles GAC relies on do not apply here. Entry of the default had the effect of establishing as true the allegations of the complaint (*Gallegos v. Franklin, supra*, 89 N.M. 123, 547 P.2d at 1165)–namely that the 1973 Supply Agreement was unenforceable due to antitrust violations, fraud, breach of fiduciary duty, economic coercion and commercial impracticability. Among the averments established by the default was that the purpose or effect of the 1973 Agreement was to restrain trade in and further the monopolization of the uranium market in New Mexico. Acceptance of GAC's contract revival argument would merely substitute one invalid contract with another which would have the same illegal effect. *See Evans v. Ideal Brick and Brikcrete Mfg. Co.*, 287 P.2d 454, 456 (Okla. 1955). The default also established as true the allegation that United's performance of the 1973 Agreement was commercially impracticable. If performance of the 1973 Agreement is commercially impracticable, performance of the 1971 Agreement at the lower prices contained therein would be even more so.

Second, GAC contends that there was no basis for the trial court to hold that GAC was obligated to indemnify United. We disagree. In this instance, the issue of indemnification was a question of liability and not of damages. United pled facts entitling it to indemnification. The default established the truth of those averments. *Gallegos v. Franklin, supra.*

Finally, GAC contends that the remedies awarded to I&M were improper because I&M was not entitled to specific performance of its contract, and because the trial court improperly refused to hear evidence on limitation of liability and equitable adjustment clauses in the I&M contract.

GAC argues that specific performance was not a proper remedy because fabricated nuclear fuel is not a unique good. Section 55–2–716, N.M.S.A. 1978, provides that specific performance may be decreed "where the goods are unique or in other proper circumstances." Official Comment 1 to Section 55–2–716 states that the intent of this provision is to liberalize the availability of this remedy. Comment 2 makes it clear that the uniqueness of the goods is not "the sole basis of the remedy." A decree of specific performance is proper where the remedy at law, in this case damages, is inadequate. To be adequate, the remedy at law " 'must be as certain, prompt, complete, and efficient to attain the ends of justice as a decree of specific performance.' " *Laclede Gas Company v. Amoco Oil Company*, 522 F.2d 33, 40 (8th Cir. 1975), quoting from *National Marking Mach. Co. v. Triumph Mfg. Co.*, 13 F.2d 6, 9 (8th Cir. 1926).

In this case, there is substantial evidence to support the conclusion that damages are an inadequate remedy. The evidence shows that no seller was willing to make a long–term contract with I&M on any basis other than the market price at the time of delivery. Because fixed price contracts for future delivery were unavailable, there was no way to predict the price I&M might have to pay. Thus, specific performance was a proper remedy, even though the goods involved are not "unique" in the traditional sense of that term. Other courts have decreed specific performance in similar circumstances. *Laclede Gas Company v. Amoco Oil Company, supra*, 522 F.2d at 40 (supply contract for propane); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F.Supp. 429, 442–43 (S.D. Fla. 1975) (supply contract for aviation fuel).

The issues concerning the limitation of liability and equitable adjustment clauses are more troubling. The I&M contract contains a clause which limits the seller's liability. Another clause provides for certain adjustments in price for increased costs incurred by the seller as a result of delays caused by the purchaser. The trial court held that by reason of the default, GAC was precluded from offering evidence on either issue. We disagree.

The limitation of liability clause is directly related to the question of damages. A

hearing on its applicability was not precluded by the act of default. *See Kohlenberger, Inc. v. Tyson's Foods, Inc.*, 256 Ark. 584, 510 S.W.2d 555, 565 (1974). We need not consider I&M's various arguments as to the inapplicability of this clause. The time and place for resolving those issues is at a damages hearing in the trial court.

We also hold that the trial court erred in refusing to hear evidence on the question of the applicability of the equitable adjustment clause of the I&M contract. I&M argues that the default established that "the largest component of GAC's claimed increase in cost" was caused by the activities of the cartel, and that GAC therefore had no equitable claim to compel I&M to bear the consequences of GAC's misdeeds. Although the default established that uranium price increases were due to cartel activities, which is a finding we do not disturb, GAC was nevertheless entitled to show that other costs, such as those for separative work, were due to I&M's delays in constructing one of its nuclear reactors, and that it was therefore entitled to price increases under the equitable adjustment clause of the I&M contract.

The trial court did not make specific findings setting forth any factual or legal basis for precluding evidence with respect to these contractual clauses. A search of the record shows a dearth of argument, briefing, or other means by which we can pinpoint the reasons for that decision. On the record before us, we cannot determine whether these clauses are applicable, or whether, if applied, they would reduce the amount of damages which were awarded. That award will not be disturbed unless on remand the trial court finds that the limitation of liability or equitable adjustment clauses are applicable and would change the result. We are satisfied that the trial court adequately considered the other damage questions GAC raises on appeal. However, the case is remanded to the trial court for the limited purpose of a hearing on the applicability of the limitation of liability and equitable adjustment clauses of the I&M contract.

VII.

CONCLUSION

Our exhaustive examination of the record in this extraordinary case convinces us that the trial court properly found that GAC had acted in bad faith throughout the discovery process and that the court did not, in the face of such misconduct, abuse its discretion in entering the sanction of a default judgment.

In discovery, as well as in other aspects of this litigation, GAC's efforts have been marked by an extraordinary lack of diligence that cannot be characterized as accidental, unintentional, or involuntary. In addition to the discovery failures we have extensively outlined, GAC unjustifiably delayed asserting its rights to arbitration, *United Nuclear Corp. v. General Atomic Co., supra*, 93 N.M. 105, 597 P.2d 290, and to the disqualification of United's counsel. The following language of the court in *Pioche Mines Consolidated, Inc. v. Dolman, supra*, 333 F.2d at 260, aptly characterizes the situation here:

> Throughout, appellants' position has been that the litigation is totally without merit. One cannot help wondering why, if this is so, appellants did not promptly answer, press for an early trial, and get a judgment to that effect.

The trial court's conclusion that GAC pursued a persistent policy of delay and resistance is supported by the record; indeed, that conclusion is inescapable.

Therefore, the sanctions order and default judgment is affirmed. The amended final judgment is also affirmed, except to the extent that evidence as to the limitation of liability and equitable adjustment clauses of the I&M contract was excluded. The cause is remanded for the purpose of holding a new hearing on those limited issues.

IT IS SO ORDERED.

SOSA and EASLEY, JJ., concur.

629 P.2d 330

STATE of New Mexico, ex rel. ATTORNEY GENERAL, Petitioner,

v.

The FIRST JUDICIAL DISTRICT COURT OF NEW MEXICO, Respondent.

No. 13504.

Supreme Court of New Mexico.

May 15, 1981.

Rehearing Denied June 10, 1981.

Jeff Bingaman, Atty. Gen., Art Encinias and Reese Fullerton, Asst. Attys. Gen., Santa Fe, for petitioner.

Jones, Gallegos, Snead & Wertheim, John Wentworth and Steven L. Tucker, Santa Fe, for Jimmy Urioste, Manuel F. Martinez and Ray Vallejos.

Ellen Pinnes, Santa Fe, for Antonio DeVargas.

Teel & Walker, John L. Walker, Albuquerque, for Herman R. Buzbee.

Mark H. Donatelli, Prison Defense Director, David Stafford, Asst. Public Defender, Santa Fe, for Richard Chapman and Michael Colby.

D'Angelo, McCarty & Vigil, Scott McCarty, Albuquerque, for respondents.

OPINION

RIORDAN, Justice.

At the request of the Attorney General we issued an alternative writ of superintending control in this cause. We also ordered a stay on all present proceedings involving the discovery of material in the possession of the Attorney General relating to the 1980 Penitentiary of New Mexico riot.

We have determined that the action by this Court on the writ of superintending control is premature insofar as it relates to any criminal case. The district court has not ruled on the discovery issues in any criminal cases. For this reason, the writ

and stay in the criminal matters is hereby quashed.

The discovery matters in pending and future civil cases is a different matter. There have been over five hundred notices filed against the State of New Mexico under the Tort Claims Act, §§ 41–4–1 through 41–4–26, N.M.S.A. 1978 (Orig.Pamp. and Cum.Supp.1980), for damages arising out of the riot. At the time we issued our writ, five civil cases were pending in district court, all in the pre-trial discovery stage. The litigants involved in the cases that have been filed are seeking full disclosure of all of the investigative material in the Attorney General's possession. Three district judges, sitting *en banc,* heard the competing claims and issued a joint opinion and supplemental letter recognizing executive and public interest privileges and setting up procedures for *in camera* inspection. However, one of the trial judges who participated in the joint opinion left office and his successor refused to issue orders implementing the opinion in the two cases pending before him. The Attorney General claims that the opinion is in error in a number of respects and that the materials in his possession are not subject to discovery. The district court certified the matter for an interlocutory appeal, but the Court of Appeals denied the motion.

The Attorney General seeks a ruling from this Court that will prevent the judges of the First Judicial District from ordering discovery of any of the materials and information obtained by his office during the investigation into the February 2, 1980, Penitentiary of New Mexico riot.

We are generally reluctant to issue a writ of superintending control directed at a lower court while a case is in progress. However, the number of potential cases that may arise out of the penitentiary riot and the cumbersome and expensive trial and appellate process make this case, in our judgment, one of paramount importance and compel the Court to exercise its superintending control in this matter. *State ex rel. DuBois v. Ryan,* 85 N.M. 575, 514 P.2d 851 (1973).

Shortly after the Attorney General began his investigation into possible criminal charges arising out of the riot, he ceased that investigation and transferred all the investigative files in criminal matters to the district attorney in the First Judicial District. The Attorney General also separated his office from any investigation into any possible civil actions that might be brought against the State under the Tort Claims Act as a result of the riot. This was done to assure that the investigation by the Attorney General was impartial and that his report on the riot would be based upon candid information and opinions. The Attorney General completed his investigation with funds appropriated by the Legislature for this purpose. After the report of the riot was released, the Attorney General received a federal grant, for which application had previously been made, to assist his office.

In the first phase of the investigation, which was an inquiry into the events that occurred just prior to, during, and in the aftermath of the riot, persons interviewed were promised by the Attorney General's staff that their names would be kept "completely anonymous, unless you ask us to use your name." It was also promised that a final report on the riot would be issued, "but no other information which we gather will be disclosed to any other public or private person." Elaborate precautions were taken, such as destroying the tapes of the interviews and editing the typed interviews to conceal identities to prevent the discovery or identification of the person being interviewed. The Attorney General cites no authority, either by statute or court rule, that authorizes such a promise of confidentiality.

The second phase of the investigation was conducted in a different manner and dealt with determining and analyzing practices and policies at the penitentiary for the last ten years. Of the 133 persons interviewed during this second phase, seventy-seven guards and inmates were later randomly selected and requested to answer written questionaires. They were asked not to sign

or identify themselves in the questionaire and were given no promise of confidentiality. The Attorney General placed transcripts of these questionaires in the state archives without any identification as to the person who executed the documents.

The Attorney General has asserted in the trial court and before us a number of very broad claims of privilege and confidentiality. He claims that the privileges are absolute and that the materials are not subject to discovery in any manner. The trial court did not agree with this contention nor do we.

A person, through judicial process, is generally required to disclose any information which he may possess that is relevant to a case pending before a court of justice. *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976). However, there are exceptions to this general rule. For example, the Constitution of the United States provides that no person shall be compelled in any criminal case to be a witness against himself. In addition, other evidentiary privileges have been recognized by this Court or adopted in our Rules of Evidence.

> As a preliminary matter we note that [o]ur constitutional power under N.M. Const. art. III, § 1 and art. VI, § 3 of superintending control over all inferior courts carries with it the inherent power to regulate all pleading, practice and procedure affecting the judicial branch of government. (Citation omitted.)

State ex rel. Anaya v. McBride, 88 N.M. 244, 246, 539 P.2d 1006, 1008 (1975).

> The powers essential to the functioning of courts, in the absence of the clearest language to the contrary in the constitution, are to be taken as committed solely to us to avoid a confusion in the methods of procedure and provide uniform rules of pleading and practice.

State v. Roy, 40 N.M. 397, 421, 60 P.2d 646, 661 (1936).

The rules of evidence, including rules of privilege, are part of the judicial machinery administered by the courts for determining the facts upon which the rights of the litigant rest and are resolved. *Ammerman v. Hubbard Broadcasting, Inc., supra.*

Pursuant to the exercise of this power, we have adopted a comprehensive set of rules of evidence which govern proceedings before the courts. N.M.R.Evid., N.M.S.A. 1978 (Orig.Pamp. and Cum.Supp.1980). Article V of these rules sets forth the privileges available in judicial proceedings.

The starting point in any inquiry regarding privileges is Rule 501. This rule states:

> Except as otherwise required by constitution, and except as provided in these rules or in other rules adopted by the supreme court, no person has a privilege to:
>
> (1) refuse to be a witness; or
>
> (2) refuse to disclose any matter; or
>
> (3) refuse to produce any object or writing; or
>
> (4) prevent another from being a witness or disclosing any matter or producing any object or writing.

N.M.R.Evid. 501, N.M.S.A. 1978.

EXECUTIVE PRIVILEGE

The Attorney General claims that he is exempt from disclosing any information collected by his office during the investigation of the riot because of the existence of an executive privilege. As mentioned above, for a privilege to exist in New Mexico, it must be recognized or required by the Constitution, the Rules of Evidence, or other rules of this Court. Neither the Rules of Evidence nor other rules of this Court provide for an executive privilege. We hold, however, that recognition of an executive privilege is required by the Constitution of the State of New Mexico.

Article III of the Constitution provides for the separation of powers among the three departments of state government. Certain rights are implied as being inherently necessary to foster and give meaning to the intent of the Constitution. The executive department is independent within its own sphere and has the implied rights vested in it by the Constitution in order to maintain its independence.

Inherent in the successful functioning of an independent executive is the valid need for protection of communications between its members. The purposes of the executive privilege are to safeguard the decision-making process of the government by fostering candid expression of recommendations and advice and to protect this process from disclosure. Executive personnel who fear or expect public dissemination of their remarks may temper their comments because of their concern for their own personal interests, safety, or reputation. *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C.1966), *aff'd on opinion below*, 384 F.2d 979, *cert. denied*, 389 U.S. 952, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967).

Executive privilege is a recognition by one branch of government, the judiciary, that another co-equal branch of government, the executive, has the right not to be unduly subjected to scrutiny in a judicial proceeding where information in its possession is being sought by a litigant. The legislative and judicial branches of state government enjoy similar privileges which are required to be recognized by this Court under our Constitution.

■ The Attorney General is a member of the executive department of state government. N.M.Const., Art. V, § 1. As a member of the executive he enjoys the right to claim only the executive privilege.

The mere fact, however, that the executive department holds information and claims executive privilege does not of itself render the information exempt from judicial process. Nor does the fact that the privilege is of constitutional origin make the privilege absolute. An absolute privilege would conflict with the constitutional duty of the courts to do justice in matters brought before it.

■ The need for confidentiality among the executive is worthy of protection through an evidentiary privilege. However, when this privilege comes into confrontation with other values or interests which are also protected by law, a balancing of the protected interests must be undertaken by the courts.

■ Trial courts are first required to determine whether the claim of executive privilege has been properly invoked in each situation. Once it is found that the privilege applies, the trial court must balance the public's interest in preserving confidentiality to promote intra-governmental candor with the individual's need for disclosure of the particular information sought. *United States v. Nixon, supra; Armstrong Bros. Tool Co. v. United States*, 463 F.Supp. 1316 (Cust.Ct.1979).

■ In administering this balancing test, certain procedures are followed. The movant must first show good cause for the production of the requested information. If good cause can be shown, the court must then conduct an *in camera* examination of the requested material. The trial court must be satisfied that the requested material would be admissible in evidence and that it is otherwise unavailable by exercise of reasonable diligence. Once these prerequisites are met, the requested information is discoverable provided that the public's interest in preserving confidentiality does not outweigh the specific needs of the movant. *See United States v. Nixon, supra; Armstrong Bros. Tool Co. v. United States, supra.*

■ The material obtained by the Attorney General from corrections officers and other executive department personnel is protected by the executive privilege. However, this privilege does not protect communications, whether intended as confidential or not, between the executive department and members of the public or others not employed in the executive department.

PUBLIC INTEREST PRIVILEGE

The Attorney General also asserts that the information in his possession is exempt from discovery under a privilege which protects communications between private individuals and government officials, and which he refers to as a "public interest" privilege.

He claims that this privilege is needed to encourage persons to provide information to the government. For a public interest privilege to exist, it must be recognized or required by the Constitution, the Rules of Evidence or other rules of this Court. N.M. R.Evid. 501, N.M.S.A. 1978.

We find no basis in the Constitution for the existence of a public interest privilege. Article III of the Constitution, on which we based the existence of an executive privilege, provides for separate and independent departments of government. However, there is no basis in the separation of powers doctrine for a public interest privilege. The inherent right of the executive to not be subjected to undue judicial scrutiny of its internal affairs does not encompass nor extend to communications or situations involving persons who are not within the executive department.

There is no mention of a specifically entitled "public interest" privilege in the Rules of Evidence or other court rules. However, two of our Rules of Evidence provide privileges similar to a "public interest" privilege. The first is Rule 510 of the Rules of Evidence which states:

> The United States or a state or a subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

N.M.R.Evid. 510(a), N.M.S.A. 1978.

Rule 510 is a recognition by the judiciary that certain privileges are necessary to aid law enforcement officers and the Legislature in obtaining information through investigations and hearings without having to be concerned with being subpoenaed into court or having to disclose sources of information.

Although the Legislature appropriated money for the Attorney General to conduct the study, the Attorney General cannot be considered a "member of a legislative committee or its staff" for purposes of falling within the privilege of Rule 510. Nor does the fact that the Attorney General was investigating this matter at the request of the Governor automatically render the information privileged under Rule 510. The Governor asked the Attorney General to "investigate the circumstances surrounding the violence at the New Mexico Penitentiary and to initiate such criminal prosecutions which, in your judgment, are appropriate in the interests of the State of New Mexico." [1] This investigation is within the jurisdiction of the Attorney General when the Governor so requests. § 8-5-3, N.M.S.A. 1978. It is only where information relating to or assisting in an investigation of a possible violation of law was furnished to the Attorney General as a law enforcement officer that he would have a privilege to refuse to disclose the identity of the person who furnished the information. However, the Attorney General has not asserted a privilege under Rule 510.

The second evidentiary rule providing for a privilege similar to the claimed public interest privilege is Rule 502 of the Rules of Evidence, N.M.S.A. 1978, which states:

> A person, corporation, association or other organization or entity, either public or private, making a return or report *required by law* to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, *if the law requiring it to be made so provides.* A public officer or agency to whom a return or report *is required by law* to be made has a privilege to refuse to disclose the return or report *if the law requiring it to be made so provides.* (Emphasis added.)

Neither the statute which authorizes the Attorney General to conduct investigations

1. Letter from Governor Bruce King to Attorney General Jeff Bingaman dated February 11, 1980.

at the request of the Governor, the Appropriations Act[2], nor any other statute to which we are referred grants a privilege under Rule 502.

We can assume only that the Legislature did not intend that the material accumulated by the Attorney General during his investigation be privileged unless the privilege was one already provided by court rule or existing law.

Both the Attorney General and the trial court rely on the case of *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 568 P.2d 1236 (1977) to support the existence of a public interest privilege. The decision in that case does not give rise to an evidentiary rule of a public interest privilege.

Alarid was an action by a reporter on behalf of a student newspaper against the personnel director for the University of New Mexico. The personnel records of thousands of employees were being sought by the plaintiff under Section 71–5–1, N.M. S.A. 1953 (Supp.1975) [now codified as Section 14–2–1, N.M.S.A. 1978], which provides, with limited exceptions, for a citizen's right to inspect all public records. This Court held that certain personnel records were exempt because of their similarity to records specifically exempted under the statute.

The *Alarid* case and the statute under which it was brought involves an interpretation of the law enacted by the Legislature. It did not, nor was it intended to, create a new evidentiary privilege applicable to discovery. *See generally Kerr v. United States Dist. Ct. for North Dist. of Cal.*, 511 F.2d 192 (9th Cir. 1975), *aff'd*, 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976). We have previously pointed out that evidentiary rules can only be adopted or recognized by this Court. *Ammerman v. Hubbard Broadcasting, Inc., supra.* There is a difference between what is subject to discovery in a court of justice and what private citizens are able to discover under "Right to Know" statutes. The Court has never ruled on whether materials excepted under this statute may be subject to discovery in a case where the material is relevant to the issues presented.

Many of the cases upon which the Attorney General relies to show the existence of a public interest privilege are based upon common law evidentiary principles. The common law has been adopted in New Mexico. § 38–1–3, N.M. S.A. 1978. However, the common law does not apply when the subject matter of any procedural right is fully covered by the Constitution, statutes or rules. *See Sellman v. Haddock*, 62 N.M. 391, 310 P.2d 1045 (1957).

The New Mexico Rules of Evidence are patterned after the Federal Rules of Evidence. However, our Rule 501 is very different from Federal Rule 501 which states that privileges are "governed by the privileges or the common law." The fact that New Mexico did not follow the approach of Congress but instead limited the privileges available to those recognized by the Constitution, the Rules of Evidence, or other rules of this Court manifests the abrogation and inapplicability of the common law evidentiary privileges.

If we were to accept the Attorney General's position as to the public interest privilege, there would be no limit to the communications that could be protected.

CONFIDENTIALITY REQUIRED BY FEDERAL LAW

The Attorney General maintains that since his office received a federal grant

2. Section 9 of 1980 N.M. Laws, ch. 24 reads as follows:

"APPROPRIATION.—There is appropriated from the general fund to the attorney general the sum of one hundred thousand dollars ($100,000) for expenditure in the sixty-eighth and sixty-ninth fiscal years for the purpose of conducting a study to determine the cause of the events at the state penitentiary on or about February 2 and 3, 1980, to investigate any claims the state may have against other persons and to recommend any necessary changes in the administration and facilities of the penitentiary. The attorney general shall report his findings to the first session of the thirty-fifth legislature. Any unexpended or unencumbered balance remaining at the end of the sixty-ninth fiscal year shall revert to the general fund."

to supplement the funds appropriated by the Legislature to investigate the riot, that under federal law, 42 U.S.C. § 3789g(a) (1976) (Supp. III 1979), he must maintain the confidentiality of the records and his sources. Although this claim was not raised or ruled on by the trial court, the various exhibits attached to the briefs and the legal arguments and authorities submitted to the Court fully present this claim. We will discuss and decide this issue as if it had been ruled on in the trial court.

The Attorney General applied for a grant from the Law Enforcement Assistance Administration (LEAA) to assist in the investigation and the preparation of the report. There is some difference of opinion as to when and how the application was made. However, the Attorney General concedes that the official notification of the award of the grant is dated September 29, 1980[3]. The purpose of the grant is for "emergency aid for the New Mexico State Penitentiary riot." The period of the grant is from September 1, 1980 to September 1, 1981.

The report of the Attorney General on the riot was issued in two parts. The letter introducing the second part of the report is dated September 25, 1980, which is four days before the grant was actually awarded. The Attorney General, by necessity, must have completed his investigation before the award of the grant. In light of this, the Attorney General is not able to claim a privilege, assuming one exists under federal law, to prevent disclosure of the evidence obtained for the report.

The criteria we set out in this opinion are intended to serve as broad guidelines for the discovery allowed in these civil cases. We cannot anticipate each problem that will arise, nor do we tell the trial court when it is necessary or appropriate to conduct *in camera* hearings to enable them to rule on the claims of the executive privilege that may be raised or the confidential informant privilege that might be claimed under Rule 510 of the Rules of Evidence. Likewise, we do not tell the trial court when it is appropriate to issue protective orders under Rule 26 of the New Mexico Rules of Civil Procedure, N.M.S.A. 1978 (Repl.Pamp. 1980), to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense. In our view, the rules are self-explanatory and have been interpreted a number of times by the Court of Appeals and this Court in the past.

In ruling on the discovery motions in the criminal cases, the trial court should be governed by the principles set out in this opinion insofar as appropriate. However, the interest in preserving the confidentiality of the privileged materials in the possession of the Attorney General in civil cases may be outweighed by a demonstrated, specific need for evidence in a criminal trial.

To the extent that this opinion is inconsistent with the previous discovery orders issued in those civil cases arising out of the 1980 riot at the Penitentiary of New Mexico, the First Judicial District Judges are directed to follow this opinion and be guided by the principles set out herein.

IT IS SO ORDERED.

SOSA, Senior Justice, and PAYNE, J., concur.

EASLEY, C.J., and FEDERICI, J., concurring in part and dissenting in part.

EASLEY, Chief Justice and FEDERICI, Justice (dissenting).

We concur in part and dissent in part. We agree that this Court is reluctant to issue a writ of superintending control directed at a lower court. However, the majority of this Court has decided that it is appropriate to exercise our superintending control in a case of great public interest such as this one. The number of potential cases arising out of the penitentiary riot, the cost of litigation, the cumbersome and expensive trial and appellate process, all combine to compel this Court to exercise its

3. Letter from Law Enforcement Assistance Administration awarding grant # 80–PG–AX–0080 dated September 29, 1980.

superintending control in this matter. The majority applies this reasoning only to the civil cases arising out of the riot. The basis of the majority opinion is that the trial court has not ruled on the discovery issues in any criminal cases. However, the matters are now pending in the district court and no doubt will soon be back in this Court. The reasons for exercising our superintending control are just as strong in the criminal cases as they are in the civil cases. From a review of the statutes, rules and case law, there can be little doubt that any privileges which apply in civil matters extend to criminal proceedings as well. *Cirale v. 80 Pine Street Corporation*, 35 N.Y.2d 113, 359 N.Y.S.2d 1, 316 N.E.2d 301 (1974). Because this is true, it is inappropriate to exercise our superintending control in civil cases and not do so in the criminal cases, when the legal issues to be decided are identical. Our principles of judicial economy and prompt administration of justice are subverted by the majority's decision to rule on civil proceedings but wait until later to decide applicability of privileges in the criminal proceedings.

We agree with the majority that a claim of executive privilege is available in New Mexico, and we agree with the tests set down by them in determining applicability of the privilege in individual cases.

In determining that an executive privilege exists in New Mexico, the majority begins with the New Mexico Constitution. This is a logical starting place, since our Constitution controls if any state statutes or judicial rules conflict with it. The majority points out that Article III of the New Mexico Constitution provides for the separation of powers among the three departments of government. Each department is independent within its own sphere and has expressed and implied powers vested in it by the State Constitution. *Cf. Marshall v. Gordon*, 243 U.S. 521, 37 S.Ct. 448, 61 L.Ed. 881 (1917). Since the Attorney General is a member of the Executive Department, N.M.Const., Article V, § 1, he is entitled to all of the express and implied powers within the sphere of the Executive Department.

Implied powers of a department are such powers as are necessary to enable it to perform its duties or to exercise the powers expressly conferred by the Constitution. *Marshall v. Gordon, supra.*

The majority finds an implied power in the Executive Department to invoke the *executive privilege* because "it is necessary and appropriate to the powers of the executive that [it] be free from disclosure of confidential communications among its members." We agree. However, if we are to give effect to the executive privilege, the same reasons apply for giving effect to a *public interest privilege.*

Any analysis of the public interest privilege must begin with the New Mexico Constitution as was done by the majority here for the executive privilege.

The public interest privilege applies to confidential communications to public officers, in the performance of their duties, where the public interest requires that the confidential communications or their sources not be divulged. *See Cirale v. 80 Pine Street Corporation, supra; Fischer v. Citizens Committee*, 72 Misc.2d 595, 339 N.Y.S.2d 853 (1977).

A public officer is one whose position is created by law, who has certain definite duties imposed by law, which must involve the exercise of some portion of the government power. *Pollack v. Montoya*, 55 N.M. 390, 234 P.2d 336 (1951).

The office of Attorney General is created by Article V, § 1 of the New Mexico Constitution. The Attorney General has certain definite duties imposed by law, and they involve the exercise of a portion of the executive power. The Attorney General is a public officer. As such, he must exercise such implied powers as are necessary for him to perform his duties. Just as it is necessary and appropriate that his intragovernmental confidential communications be free from disclosure (executive privilege), so it is necessary and appropriate that certain confidential communications from the public and the identity of other informants be free from disclosure (public interest privilege). Both privileges are neces-

sary to enable the Attorney General to perform his duties as an executive officer under the New Mexico Constitution.

The majority finds that an executive privilege for internal communications is necessary to the successful functioning of an independent executive and therefore is implied in the Constitution. But the majority's analysis of a constitutional basis for a public interest privilege extends no further than a bare conclusion that the privilege inherent in the executive "does not encompass nor extend to communications or situations involving persons who are not of the executive." In so concluding, the majority has closed its eyes to the possibility that there may exist, in rare and compelling circumstances, situations in which a privilege for communications between members of the Executive Department and the public is equally necessary to the successful functioning of an independent executive.

At stake is the ability of the Executive Department to investigate the causes of the penitentiary riot. Such an investigation is of vital importance in order to enable the executive to identify and root out the causes and contributing factors of the riot in order to prevent similar catastrophes in the future. In these extraordinary circumstances, a limited privilege for communications between Executive Department investigators and members of the public is crucial to the ability of the Executive Department to effectively conduct such an investigation. Anything less is a denial of the ability of the Executive Department to perform its constitutional duties.

An additional reason is available for upholding both the executive privilege and the public interest privilege. Like the federal courts which are governed by privileges available under the common law, so the courts of this State are governed by privileges available at common law when not otherwise covered in our Constitution or by the rules of this Court because New Mexico has adopted the common law. Section 38–1–3, N.M.S.A. 1978.

That common law privileges exist in New Mexico is supported by *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 568 P.2d 1236 (1977). The majority holds that *Newsome* was a case which merely involved a statutory interpretation.

However, in that opinion, the Court quoted from *MacEwan v. Holm*, 226 Or. 27, 359 P.2d 413 (1961), with approval:

> The public's right of inspection is not without qualification. There may be circumstances under which the information contained in a record can be justifiably withheld from the person seeking it. Obviously, if it is shown that the information is being sought for an unlawful purpose, the request for it may be denied. [Citations omitted.] *Even where the request is made for a lawful purpose the public interest may require that the information be withheld. Thus where the information is received in confidence, it may be proper to refuse access to it. . . . And in* City and County of San Francisco v. Superior Court, *38 Cal.2d 156, 238 P.2d 581 (1952), confidential information furnished to a municipal corporation by some of its employees for the purpose of establishing rates of compensation was held to be non-accessible. Similarly, in* Mathews v. Pyle, supra, *75 Ariz. [76] at page 81, 251 P.2d [893] at page 897, it was held that a report of a state Attorney-General to the Governor was subject to inspection* unless "confidential and privileged" or if "disclosure would be detrimental to the best interests of the state." *(Emphasis added.)*

Id. at 795, 568 P.2d at 1241.

The Court in *Newsome* concluded:

> We hold that a citizen has a fundamental right to have access to public records. The citizen's right to know is the rule and secrecy is the exception. Where there is no contrary statute or *countervailing public policy*, the right to inspect public records must be freely allowed. (Emphasis added.)

Id. at 797, 568 P.2d at 1243.

It is readily apparent that the opinion in *Newsome* involved more than statutory interpretation. There is precisely the sort of

"countervailing public policy" expressed in *Newsome* when one applies either the executive or the public interest privilege.

As was stated in *Jones v. State*, 58 A.D.2d 736, 395 N.Y.S.2d 862 (App.Div. 1977), the basic reason for recognition of a public interest privilege is to protect the "public interest in enabling the government effectively to conduct sensitive investigations involving matters of demonstrably important concern." *Id.* 395 N.Y.S.2d at 863. Certainly an investigation into the causes of the New Mexico State Penitentiary riot with a purpose of taking appropriate steps to prevent a recurrence is the type of investigation covered under the common law.

Respondents and real parties in interest argue that since neither the Governor nor the Legislature specifically granted the Attorney General the right to extend a promise of confidentiality to informants, the promise was of no effect. The Governor's letter and the Attorney General's authority under the letter are set forth in the majority opinion. Furthermore, the Legislature appropriated $100,000 to the Attorney General "for the purpose of conducting a study to determine the cause of the events at the state penitentiary on or about February 2 and 3, 1980, to investigate any claims the state may have against other persons and to recommend any necessary changes in the administration and facilities of the penitentiary." N.M. Laws 1980, ch. 24, § 9.

Neither of these directions to the Attorney General specifically allows him to grant confidentiality to sources of information. However, the common law public interest privilege does not rest upon a specific grant of privilege by the Governor, the Legislature, or our rules. It rests upon the common law. The majority reasons that this common law privilege was superseded by our Rules of Evidence. However, we do not believe that our Rules of Evidence contemplated the sort of extraordinary situation involved here, and we are convinced that they do not address the applicability of either the executive or the public interest privilege. *See State ex rel. Newsome v. Alarid, supra.*

For the reasons set forth above, we are of the opinion that both an executive and a public interest privilege exist in New Mexico. We would apply the same tests for disclosure under the public interest privilege as the majority has set forth under the executive privilege. We would direct the district court to apply these privileges to discovery matters in both civil and criminal cases arising out of the New Mexico State prison riot. In all other respects, we concur with the remainder of the majority opinion.

629 P.2d 340

Patrick CHISCHILLY, Plaintiff-Appellant,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION, a Delaware Corporation, Defendant-Appellee.

No. 4163.

Court of Appeals of New Mexico.

July 10, 1980.

Joseph F. Gmuca, Crownpoint, Wayne H. Bladh, Window Rock, Ariz., for plaintiff-appellant.

Nicholas R. Pica, Campbell, Cherpelis & Pica, Albuquerque, for defendant-appellee.

OPINION

LOPEZ, Judge.

Chischilly, a Navajo Indian, brought suit in District Court in Bernalillo County against General Motors Acceptance Corporation (hereafter, GMAC) for damages for unlawful repossession of a truck. He had purchased the truck from Schultz Buick on August 18, 1976, on a retail installment contract. GMAC financed the transaction and obtained a security interest in the truck. On two occasions one around August 1, 1977, and the other around January 18, 1978, an employee of GMAC repossessed the truck from Chischilly's residence at the Littlewater Community and removed it to Albuquerque. On neither occasion did GMAC obtain either Chischilly's consent or a tribal court order to allow it to repossess the truck. The Littlewater community is located in McKinley County in the State of New Mexico, on land owned by the United States and held in trust for the Navajo Indians. Repossession without the debtor's consent, or a tribal order, is prohibited by Navajo law.

After studying the stipulations and briefs submitted by the parties, the lower court dismissed the complaint. The court determined that New Mexico law, not Navajo tribal law, should apply and accordingly found that Chischilly had no cause of action in a New Mexico court. We reverse.

The sole issue we must decide is whether a New Mexico court should apply New

Mexico or Navajo Tribal law to repossessions which occurred on lands under the jurisdiction of the Navajo Tribe. We conclude that Navajo law should be used.

The trial court's ruling that the repossessions took place within the jurisdictional limits of the State of New Mexico is irrelevant in determining whether or not a New Mexico court should apply New Mexico law since the trial court also found that the lands where the repossessions occurred was under the jurisdiction of the Navajo Tribe.

> If there is a conflict between an Indian law and a state law, the state law is unenforceable on Indian land.

Quechan Tribe of Indians v. Rowe, 350 F.Supp. 106, 109, (S.D.Cal. 1972), *affd*, 531 F.2d 408 (9th Cir. 1976). Thus, if the dispute were wholly between Indians on land under the tribe's jurisdiction, and concerning internal matters over which the tribe had legislated, Indian law would govern, assuming a state court even had jurisdiction to hear the case. *See generally, Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959). Since the dispute is between an Indian and a non-reservation entity and arose out of repossessions which took place on Indian land, the usual conflicts of laws rules should be used to determine whose law to apply. In our deliberations, we assign the same status to the Navajo tribe as we would to another state. This is proper because, in certain respects, Indian tribes possess attributes of sovereignty akin to those of the states.

Indian reservations have a peculiar and unique political status in the United States. Although physically they lie under the dominion of one or several states, politically, they exist somewhat outside of the states' authority. As early as 1882, Justice Marshall wrote:

> [T]he several Indian nations [are] . . . distinct political communities, having territorial boundaries, within which their authority is exclusive.
>
> . . . . .

Worcester v. Georgia, 31 U.S. 515, 557, 6 Pet. 515, 557, 8 L.Ed. 483 (1882). This principal remains essentially intact today. Absent an act of Congress, the internal affairs of the Indians are within the jurisdiction of the tribal government. *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). The Indian tribes are free to make their own laws and be governed by them in their own territory. *Id.: Native American Church, supra.*

In enacting laws which regulate the manner in which goods may be repossessed in its territory, the Navajo Tribal Council was rightfully exercising its police power to insure peace on the land under its jurisdiction. The exercise of the police power is an elemental attribute of the sovereignty possessed by the Navajos. Nevertheless, the recognition of the right of the Navajos to enact their own law concerning the manner of repossession does not of itself mandate that New Mexico courts apply that law. We must be guided by the law concerning conflicts of laws.

If New Mexico and Navajo law were the same, there would be no conflicts of law issue. But, they are not the same; New Mexico had adopted the Uniform Commercial Code; the Navajos have not. Under New Mexico law, repossession of goods upon default is permissible without the consent of the debtor.

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace. . . .

Section 55–9–503, N.M.S.A. 1978. Under Navajo Law, however, self-help repossession of personal property is prohibited without the debtor's consent, or a tribal court order. Title 7 of the Navajo Tribal Code § 607 [1] reads:

> Repossession of personal property
>
> The personal property of Navajo Indians shall not be taken from land subject to

1. At the time of both repossessions the relevant sections of the Navajo Tribal Code were 7 N.T.C. §§ 307 and 309, now recodified as 7 N.T.C. §§ 607 and 609.

the jurisdiction of the Navajo Tribe under the procedures of repossession except in strict compliance with the following:

(1) Written consent to remove the property from land subject to the jurisdiction of the Navajo Tribe shall be secured from the purchaser at the time repossession is sought. The written consent shall be retained by the creditor and exhibited to the Navajo Tribe upon proper demand.

(2) Where the Navajo refuses to sign said written consent to permit removal of the property from land subject to the jurisdiction of the Navajo Tribe, the property shall be removed only by order of a Tribal Court of the Navajo Tribe in an appropriate legal proceeding.

In the event of unlawful repossession, The Tribal Code allows the wronged purchaser to recover damages.

Civil liability

Any person who violated 7 N.T.C. § 607 and any business whose employee violated such section is deemed to have breached the peace of the lands under the jurisdiction of the Navajo Tribe, and shall be civilly liable to the purchaser for any loss caused by the failure to comply with 7 N.T.C. §§ 607–609.

If the personal property repossessed is consumer goods (to wit: goods used or bought for use primarily for personal, family or household purposes), the purchaser has the right to recover in any event an amount not less than the credit service charge plus 10% of the principal amount of the debt or the time price differential plus 10% of the cash price.

7 N.T.C. § 609. The parties do not dispute that the truck was a consumer good under Navajo Law. Consequently, if Navajo law applies in this case, Chischilly is entitled to recover "not less than the credit service charge plus 10% of the principle amount of the debt or the time price differential plus 10% of the cash price." *Id.*

This is a case of first impression in New Mexico. When five years ago, a case with similar facts came before the New Mexico Supreme Court, it was remanded for determination of what law the parties, in their contract, had agreed would govern. *Jim v. CIT Financial Services Corp.*, 87 N.M. 362, 533 P.2d 751 (1975). The question of which law to apply in the event the parties had not themselves made a choice of law was not reached. In the case before us, however, the court found that the contract made no provision as to which law should apply. This ruling is not contested on appeal. Consequently, we must determine from New Mexico choice of law rules whether to apply New Mexico or Navajo law.

The appropriate choice of law rule is found in the Uniform Commercial Code, which has been adopted in New Mexico. Sections 55–1–101 *et. seq.*, N.M.S.A. 1978. Section 9–102 of the Code [§ 55–9–102, N.M.S.A. 1978] provides the choice of law rule applicable in a case of repossession arising from a conditional sale of personal property wherein a security interest was created. It is, therefore, governing in the instant case. Section 55–9–102 reads:

(1) Except as otherwise provided in Section 9–103 [55–9–103 NMSA 1978] on multiple state transactions and in section 9–104 [55–9–104 NMSA 1978] on excluded transactions, *this article applies so far as concerns any personal property and fixtures within the jurisdiction of this state*:

(a) *to any transaction* (regardless of its form) which is *intended to create a security interest in personal property* or fixtures *including goods* . . .

. . . .

(2) *This article applies to security interests created by contract including* . . . *conditional sale.* . . . [Emphasis added.]

The exceptions in §§ 9–103 and 9–104 do not apply to the case before us. Section 9–103 [55–9–103, N.M.S.A. 1978] provides a choice of law rule governing the validity and perfection of security interests. Since those issues are not before us, Section 9–103 is not pertinent. Section 9–104 [§ 55–9–104, N.M.S.A. 1978] lists transactions not included under Article 9. The conditional sale of consumer goods wherein a security interest in the goods is created is not includ-

ed in this list. Hence, § 9–102 is the proper section to consider in the present case.

Other jurisdictions that have adopted the Uniform Commercial Code have interpreted § 9–102 as a choice of law rule which mandates the application of the law of the situs where the collateral is located at the time the dispute arises. *Joint Holdings & Trading Co. v. First Union National Bank,* 50 Cal.App.3d 159, 123 Cal.Rptr. 519 (1975); *Lewis v. First National Bank,* 134 Ga.App. 798, 216 S.E.2d 347 (1975); *Doyle v. Northrop Corp.,* 455 F.Supp. 1318 (D.N.J. 1978); *Associates Discount Corp. v. Cary,* 47 Misc.2d 369, 262 N.Y.S.2d 646 (1965); *Fidelity Bank & Trust Co. v. Production Metals Corp.,* 366 F.Supp. 613 (E.D.Pa.1973). Thus, the law of the place where the collateral was located at the time of repossession governs any dispute involving the repossession. *Lewis, supra; Cary, supra.* This result also has been reached in at least one jurisdiction that has not adopted the Uniform Commercial Code *Universal C.I.T. Credit Corp. v. Hulett,* 151 So.2d 705 (Ct.App.La.1963).

We believe that these jurisdictions have correctly interpreted Section 9–102. As Professor Weintraub has written:

> That section 9–102 is intended as a general situs choice of law rule, not as just an indication of when forum law applies, is suggested by the first sentence of official comment 3 to that section: "In general this Article adopts the position, implicit in prior law, that the law of the state where the collateral is located should be the governing law, without regard to possible contracts in other jurisdictions."

Weintraub, *Choice of Law in Secured Personal Property Transactions: The Impact of Article 9 of the Uniform Commercial Code,* 68 Mich.L.Rev. 683, 704 (1970). Professor Cavers suggests the policy behind the situs choice of law rule in cases involving repossession.

> Rules with respect to the repossession, removal and disposition of goods conditionally sold affect the orderly enjoyment and peaceful possession of property within the community. On occasion, failure to observe the local laws may lead to violence. The law of the situs at the time of repossession should clearly supply the rules governing the seller's behavior in retaking the goods. . . .

Cavers, *The Conditional Seller's Remedies and the Choice of Law Process—Some Notes on Shanahan,* 35 N.Y.U.L.Rev. 1126, 1141 (1960). In the instant case, the parties having come to no agreement to the contrary, Navajo law, that is, the law of the place where the repossession occurred, is to be used to determine the rights and liabilities of the parties with respect to the method of repossession. We do not decide here which law would apply had the parties contracted to be governed by New Mexico law as allowed by Section 1–105 [§ 55–1–105, N.M.S.A. 1978] (contracting parties may make choice of law), but contrary to Section 9–102 [§ 55–9–102, N.M.S.A. 1978] (law of situs at time of repossession governs).

The laws of the Navajo Tribe are entitled to full faith and credit in the Courts of New Mexico. *Jim, supra.* To rule otherwise would infringe on the Navajos' right to make their own laws and be governed by them, and would be contrary to *Williams, supra.* GMAC does not put forth any policy of the State of New Mexico, and we find none, which would be thwarted by our application of Navajo Law to a dispute involving repossession which occurred on lands under the jurisdiction of the Navajo Tribe.

Generally a state will not apply the penal statutes of another sovereign. *See Loucks v. Standard Oil Company,* 224 N.Y. 99, 120 N.E. 198 (1918). Chischilly argues persuasively that 7 N.T.C. § 609, the law under which he seeks damages, is not a penal statute. GMAC cites no authority to the contrary. The standard for determining whether a law is penal was set out by the United States Supreme Court in 1892.

> The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual. . . .

Huntington v. Attrill, 146 U.S. 657, 668, 13 S.Ct. 224, 228, 36 L.Ed. 1123 (1892). Justice Cardozo further amplified the meaning of penal law.

> A statute penal . . . [within the rules of private international law] is one that awards a penalty to the state . . . or to a member of the public, suing in the interest of the whole community to redress a public wrong. [Cites omitted.] The purpose must be, not reparation to one aggrieved, but vindication of the public justice. . . . [T]he statute is not penal in the international sense . . . [when] the purpose of the punishment is reparation to those aggrieved by his offense.

Loucks, supra, 224 N.Y. at 102–103, 120 N.E. at 198–199. The main purpose of 7 N.T.C. § 609 is to provide compensation to a person wronged by the unlawful repossession of consumer goods. *Jim v. CIT Financial Services Corp.*, 86 N.M. 784, 527 P.2d 1222 (Ct.App. 1974) (Hernandez, J., dissenting), *rev'd on other grounds*, 87 N.M. 362, 533 P.2d 751 (1975). As such Section 609 seeks to redress a private, not a public wrong. It provides reparation to an aggrieved party and is not a penal statute. It is enforceable in the New Mexico courts.

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

IT IS SO ORDERED.

WOOD, C. J., dissents.

HERNANDEZ, J., concurs.

WOOD, Chief Judge (dissenting).

This lawsuit presents a choice of law problem in connection with the repossession of a pickup truck at the Littlewater community. This community is located on land purchased by the United States and held in trust for the Navajo Tribe.

Plaintiff, a Navajo, purchased the pickup truck from Ken Schultz Buick-GMC, Inc. in Albuquerque. This purchase was by a written instrument entitled "INSTALMENT SALE CONTRACT". It is stipulated that defendant "financed" the purchase by extending credit to plaintiff and that the terms of the credit arrangement are contained within the contract signed by plaintiff and Ken Schultz Buick-GMC, Inc. Defendant has twice repossessed the pickup truck. Plaintiff sought damages in connection with the repossessions. In doing so, plaintiff relied on provisions of the Navajo Tribal Code. Ken Schultz Buick-GMC, Inc. was dismissed as a party by stipulation; the parties are plaintiff, the purchaser, and defendant, whose money financed the purchase. The choice of law problem presents no question concerning the rights of defendant as an assignee of the purchase contract. See § 55–9–318, N.M.S.A. 1978. The choice of law issue is presented on the basis that defendant's right of repossession is no different than the rights of Ken Schultz Buick-GMC, Inc.

The contract provided that if the buyer was in default and the seller declared the unpaid installments to be immediately due and payable, the seller might take immediate possession without demand and "may enter upon the premises where said property may be and remove same." The contract also provided that "[a]ny provision of this contract prohibited by law of any state shall as to such state be ineffective. . . ."

The repossession provision of the contract accords with New Mexico law. See § 55–9–503, N.M.S.A. 1978. The repossession provision of the contract is inconsistent with Navajo law. 7 N.T.C. § 607 requires written consent to be secured from the purchaser at the time repossession is sought. Absent a contemporaneous written consent, the pickup truck could be removed only by order of a tribal court. If New Mexico law applied to the repossession, plaintiff's damage claims were properly dismissed; if Navajo law applied, the claims were improperly dismissed.

The question for decision, a usual one in choice of law cases, is which of two laws should be applied. However, the factual basis for answering the question is unusual. This is not a case where only one of the two laws could apply; in this case, either of the two laws could apply. New Mexico and the Navajo Tribe had concurrent jurisdiction.

The trial court ruled that the pickup was repossessed in New Mexico. "This repossession took place within the jurisdictional limits of the State of New Mexico and the jurisdictional limits of the Navajo Tribe." Plaintiff has expressly abandoned his claim that the Navajo Tribe had "exclusive authority *vis a vis* the State of New Mexico to control the disposition of tribal member property on land subject to Navajo jurisdiction." Abandonment of the claim that Navajo law was exclusively applicable was proper. *State Securities, Inc. v. Anderson*, 84 N.M. 629, 506 P.2d 786 (1973).

Plaintiff claims that § 55–9–102, N.M.S.A. 1978 requires that the law of the situs of the repossession governs the method of repossession. The trial court held that New Mexico law applied because New Mexico had "the most significant contacts" which was an application of the "appropriate relation" test stated in § 55–1–105, N.M.S.A. 1978. Plaintiff contends the trial court erred in applying this test. The trial court also ruled that to apply Navajo law in this case would result in one choice of law rule for persons not within any Indian jurisdiction and the possibility of a separate choice of law rule for each Indian tribe and pueblo within New Mexico. According to the trial court, this posed the possibility of at least twenty choice of law rules within New Mexico. Plaintiff does not discuss this ruling.

Sections 55–1–105 and 55–9–102, supra, are part of the Uniform Commercial Code enacted in New Mexico in 1961. As enacted, these two sections are identical to §§ 1–105 and 9–102 of the original Uniform Commercial Code. New Mexico has not adopted the 1972 amendments to 9–102 of the Uniform Commercial Code.

The portion of § 55–1–105, supra, pertinent to this case, reads:

> (1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation, shall govern their rights and duties. Failing such agreement this act [this chapter] applies to transactions bearing an appropriate relation to this state.
>
> (2) Where one of the following provisions of this act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:
>
> * * * * * *
>
> policy and scope of the article on secured transactions. Sections 9–102 [55–9–102 NMSA 1978] and 9–103 [55–9–103 NMSA 1978].

The portion of § 55–9–102, supra, pertinent to this case reads:

> (1) Except as otherwise provided in Section 9–103 [55–9–103 NMSA 1978] on multiple state transactions and in Section 9–104 [55–9–104 NMSA 1978] on excluded transactions, this article applies so far as concerns any personal property and fixtures within the jurisdiction of this state:
>
> (a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, accounts or contract rights; and also
>
> (b) to any sale of accounts, contract rights or chattel paper.
>
> (2) This article applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This article does not apply to statutory liens except as provided in Section 9–310 [55–9–310 NMSA 1978].

Neither § 55–9–103 nor § 55–9–104 N.M.S.A. 1978 is applicable in this case.

Weintraub, *Choice of Law in Secured Personal Property Transactions: The Impact of Article 9 of the Uniform Commercial Code*, 68 Mich.L.Rev. 684 at 691 (1969–70) states:

If one seeks to utilize the choice-of-law provisions of the Uniform Commercial Code in order to determine what law should govern the rights and duties between a debtor and a secured creditor, he confronts many puzzles for which the solutions are not clear. The first, and perhaps most fundamental, of these Code conundrums is whether to apply the basic Code choice-of-law section, 1–105, or the article 9 choice-of-law sections, 9–102 and 9–103.

Section 1–105(1) provides the basic choice-by-law rules for the Code and thus for article 2, which covers sales. Section 1–105(2), however, indicates that the conflicts provision of 1–105(1) is superseded to the extent that the conflicts provisions of sections 9–102 and 9–103 apply to secured transactions.

This case does not involve a situation where the parties agreed to a choice of law. The trial court ruled that the contract "makes no provision as to which law should apply" and this ruling is not challenged. A New Mexico decision involving contractual choice of law does illustrate one of the conundrums to which *Weintraub*, supra, refers.

Section 55–1–105(2), supra, provides that if the policy and scope of § 55–9–102, supra, specifies the applicable law then § 55–9–102, supra, governs, and an agreement of the parties as to choice of law is effective only to the extent permitted by § 55–9–102, supra. Levenberg, *Comments on Certain Proposed Amendments to Article 9 of the Uniform Commercial Code*, 56 Minn.L.Rev. 117 at 141 (1971–72) states that

> the present conflict of laws provisions of Section 9–102, when read in conjunction with present Section 1–105, prohibit the parties to a secured transaction involving tangible collateral subject to Section 9–102 from selecting the law of some state other than that prescribed by Section 9–102 as the law governing any aspect of the transaction covered by a provision of Article 9 as enacted in the prescribed state.

Jim v. CIT Financial Services Corporation, 87 N.M. 362, 533 P.2d 751 (1975) had facts almost identical to this case. Recognizing that § 55–1–105(2) and § 55–9–102, supra, limited the right of the parties to choose an applicable law, *Jim*, supra, nevertheless held that "nothing" in § 55–9–102, supra, "indicates that, under the facts of this case, the parties were not free to choose their own law."

The view in *Jim*, supra, of the limited effect of § 55–9–102, supra, on a contractual choice of law differs from that expressed by *Levenberg*, supra. Why? These differences occur because § 55–9–102, supra, is ambiguous. *Weintraub*, supra, at 697 comments that whatever the shortcomings of § 55–1–105(1), supra, those shortcomings are minimal in comparison to § 55–9–102, supra, in which "the Code reaches its nadir with regard to both Delphic draftsmanship and regressive policy."

Jim, supra, and *Levenberg*, supra, give different meanings to § 55–9–102, supra. This is my starting point in determining the applicability of the "appropriate relation" test of § 55–1–105(1), supra, because the trial court was attempting to follow *Jim* in applying that test.

To what does § 55–9–102, supra, apply? The Official Comment to § 9–102 of the original Uniform Act states the "main purpose" was to bring all consensual security interests in personal property and fixtures within Article 9, except as provided in §§ 9–103 and 9–104. 3 U.L.A.–U.C.C. (Master Edition) page 20. The inclusive language of § 55–9–102, supra, is consistent with this purpose.

The Official Comment, 3 U.L.A.–U.C.C., supra, at 22, goes on to state: "In general this Article adopts the position, implicit in prior law, that the law of the state where the collateral is located should be the governing law, without regard to possible contacts in other jurisdictions." The choice of law position is stated in § 55–9–102(1), supra; the position stated in the statute is not worded as broadly as the Official Comment suggests. Section 55–9–102(1), supra, provides that Article 9 applies to personal

property within the jurisdiction of this state. To what does it apply? To transactions intended to create a security interest and to certain sales.

Neither *Jim*, supra, nor this case, involved the creation of a security interest or a sale as described in § 55–9–102(1), supra. Thus *Jim*, supra, under the language of the statute, could properly view § 55–9–102, supra, as not barring an agreement of the parties as to choice of law under § 55–1–105, supra. This view was not an aberration by our Supreme Court. *Weintraub*, supra at 702, cautions that § 55–9–102(1), supra, should not be read literally and, at 705, recognizes that "several reasonable constructions" are possible. *Levenberg*, supra, Note 37 at 138, states:

> 37. UCC § 9–102 fails to state explicitly which state's law applies when the collateral has been located in different states at various times. That is, the present provision leaves open the question—"located at what time?" The possible choices would be the law of the state where the collateral was located at the time of the signing of the security agreement, at the time of the attachment of the security interest, at the time of the perfection of the security interest or at the time a controversy arose as to rights in it.
>
> Professor Gilmore, one of the principle drafters of the current provisions of Article 9, has stated that this silence in UCC § 9–102 "presumably . . . refers to the location of the collateral at the time the security interest attaches." 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 318 n.5 (1965).

Neither *Jim*, supra, nor this case, involved the signing, attachment of perfection of the security interest. Both were concerned with the choice of law applicable to repossession rights exercised in protecting the unchallenged security interest. In this situation, *Jim* found nothing in § 55–9–102, supra, which barred the applicability of the choice of law provisions in § 55–1–105, supra. It should be noted that the 1972 amendments to § 9–102 of the Uniform Commercial Code attempted to correct the ambiguity in the original Code by certain deletions. These deletions were for the purpose of correcting an "incomplete statement" and to "make applicable the general choice of law principles of Section 1–105". 3 U.L.A.–U.C.C. (1980 Pamphlet) page 8, "Official Reasons for 1972 Change". Thus, the 1972 amendments approach the interpretation placed on § 55–9–102, supra, in *Jim*.

This Court, as well as the trial court, is to follow decisions of the Supreme Court. *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973). Accordingly, the trial court proceeded properly in applying *Jim*, in considering that § 55–9–102, supra, did not apply to the facts, in applying § 55–1–105(1), supra, and there being no agreement by the parties as to choice of law, in applying the "appropriate relation" test.

Plaintiff contends that the trial court misapplied the "most significant contacts" test. Section 55–1–105(1), supra, does not use the words "most significant contacts"; rather, the statutory words are "appropriate relation to this state." I do not determine whether the phrases have different meanings; it is unnecessary to do so.

Plaintiff recognizes that the contract was negotiated and entered in Albuquerque, and that Ken Schultz Buick-GMC, Inc.'s and defendant's businesses were located in Albuquerque. Plaintiff seems to argue that the "appropriate relation" was with the Navajo Tribe because plaintiff is a Navajo and the acts of repossession occurred at the Navajo community of Littlewater. However, plaintiff makes no effort to demonstrate that the Navajo relationship is more appropriate than New Mexico's and disregards the fact that all of the relationships in this case occurred in New Mexico even though some also occurred in an Indian community within New Mexico.

It is unnecessary to decide the basis for the appropriate relation test. The essence of plaintiff's argument is that an appropriate relation test is inapplicable because § 55–9–102, supra, applies; that under that section, "appellee's rights of repossession

are *not* governed by New Mexico law but instead this court is required to look instead to the Navajo Tribal Code (7 N.T.C. § 607) regarding appellee's rights at the time of each repossession."

The basis for this argument is that § 55–9–102, supra, means more than the words used in the statute. *Levenberg*, supra, at 140–41, takes this view in suggesting that § 55–9–102, supra, applies to "any aspect" of a transaction governed by Article 9 of our Uniform Commercial Code. Several decisions have held the choice of law provision of § 55–9–102, supra, applicable in repossession or security foreclosure situations. *Fidelity Bank & T. Co. of N.J. v. Production Metals Corp.*, 366 F.Supp. 613 (E.D.Penn.1973); *Associates Discount Corp. v. Cary*, 47 Misc.2d 369, 262 N.Y.S.2d 646 (1965); see *Doyle v. Northrop*, 455 F.Supp. 1318 (D.N.J.1978). Although this interpretation is contrary to *Jim*, supra, I will assume, in answering plaintiff's contention, that § 55–9–102, supra, applied to the repossessions in this case.

In contending for the applicability of § 55–9–102, supra, plaintiff relies on the applicability of Article 9 to "personal property . . . within the jurisdiction of this state." This is a New Mexico statute. For the statute to be applicable, the pickup truck must have been within New Mexico's jurisdiction. The trial court ruled that the pickup truck was within New Mexico's jurisdiction. This being so, if § 55–9–102 applied, then § 55–9–503, supra, an Article 9 provision, applied and authorized the repossessions.

Plaintiff contends that § 55–9–102, supra, compels the application of Navajo law rather than New Mexico law. His view is that § 55–9–102, supra, is a situs rule, that the law of the situs controls repossession rights. Assuming, but not deciding, that § 55–9–102, supra, does more than state when New Mexico law applies and adopts a situs rule by implication, plaintiff does not benefit. The site of the pickup truck in this case was within two jurisdictions. If § 55–9–102, supra, adopts a situs rule, it does not choose between two different situs rules, both of which apply to the particular location. Because the laws of two jurisdictions apply to the situs in this case, any situs rule in § 55–9–102, supra, does not resolve the choice of law question, and § 55–1–105(1), supra, applies.

The foregoing has answered plaintiff's attack on the trial court's ruling and sustains the trial court's judgment of dismissal. I also, as an independent ground, would affirm the trial court's application of New Mexico law to the repossession as a matter of policy.

What plaintiff seeks is the application of Navajo law to the repossession and the exclusion of New Mexico law. The trial court pointed out that each Indian tribe and pueblo might have a repossession law different from New Mexico's and that if plaintiff's view should prevail, there could be some twenty different repossession rules applicable within the boundaries of this state. The trial court rejected this view and so do I.

Jim, supra, held that the full faith and credit provisions applied to the laws of the Navajo nation; I assume that this same result would be reached for all Indian tribes and pueblos within New Mexico. However, full faith and credit need not be given where "a foreign legislative enactment or statute is sought to be enforced in the forum state. A forum state need not subordinate its own statutory policy to a conflicting public act of another state." As a matter of policy, New Mexico need not, because of the full faith and credit clause, enforce Indian laws on repossession contrary to the statutory policy of New Mexico expressed in § 55–9–503, supra.

The underlying purpose of New Mexico, in adopting its version of the Uniform Commercial Code, was to "simplify" the law governing commercial transactions and to "make uniform" the law among the various jurisdictions. Section 55–1–102, N.M.S.A. 1978. New Mexico's purpose of simplification and uniformity would not be furthered by enforcing each variation on the law of repossession adopted by Indian tribes and pueblos located within the boundaries of New Mexico.

The trial court's order of dismissal should be affirmed.

629 P.2d 350

Mary METHOLA, as guardian of the person and estate of Guadalupe Hernandez, an incompetent person, Plaintiff-Appellee,

v.

The COUNTY OF EDDY, New Mexico: Leroy Payne, Sheriff: Louie Granger, Simon Martinez, Jose Gutierrez, and Alonzo Onsurez, Defendants-Appellants.

Mary METHOLA, as guardian of the person and estate of Guadalupe Hernandez, an incompetent person, Plaintiff-Appellant,

v.

The COUNTY OF EDDY, New Mexico; Leroy Payne, Sheriff: Louie Granger, Simon Martinez, Jose Gutierrez, and Alonzo Onsurez Defendants-Appellees.

No. 4180, 4217.

Court of Appeals of New Mexico.

April 14, 1981.

Rehearing Denied May 4, 1981.

Glenn B. Neumeyer, Las Cruces, for Mary Methola.

Roger E. Yarbro, James W. Klipstine, Jr., McCormick & Forbes, Carlsbad, for County of Eddy et al.

OPINION

WALTERS, Judge.

This case was the companion, on certiorari, of *Hooton-Doe v. City of Albuquerque*, Nos. 13,227 and 13,228, consolidated, also decided today. Earlier Court of Appeals decisions in all of these cases were reversed by the Supreme Court on the issue of liability of law enforcement officers under the Tort Claims Act for negligence in the performance of their duties. *See Methola v. County of Eddy*, consolidated, (St.Ct.1980), 95 N.M. 329, 622 P.2d 234. As with *Hooton* and *Doe*, this appeal is back in this Court on remand, for determination of other issues raised by the briefs of both plaintiff and defendants and not decided in the earlier disposition (Walters, J., not participating) of the Court of Appeals.

Methola was tried to the court without a jury, and a judgment totalling almost $218,000 was entered to cover plaintiff's incompetent's indebtedness to Methodist Hospital and Dr. Jack Dunn of Lubbock, Texas, and for his future custodial and medical care. Eddy County, Payne and Granger, in addition to the immunity argument settled by the Supreme Court, raise issues of indispensable parties, standard of duty of a custodian, and contributory negligence, in Cause No. 4180. Plaintiff, in a separate appeal, No. 4217, urges that because the trial court failed to award damages for loss of the incompetent's earning capacity and for pain and suffering, the judgment should be increased.

The salient facts of this case are recited in the Supreme Court decision; we will not encumber this opinion with a repetition.

The appealing defendants contend that the state and federal governments were indispensable parties in this lawsuit because, under §§ 27–2–23 and –24, N.M.S.A. 1978, they were subrogated to the right of any recipient of medical assistance against a third party for medical expenses recovered, to the extent such expenses were paid by either the state or federal government.

The argument is a tempest in a teapot, for no damages were awarded to plaintiff to cover any medical services rendered by any state agency of which a portion would be returnable to the federal government if those costs had been recovered.

The principal purposes of requiring "indispensable" parties to be joined are expediency and the protection of parties from the risk of double, multiple, or inconsistent liabilities. N.M.R.Civ.P. 19, N.M.S.A. 1978. In the instant case, only defendants could have been subjected to double liability had

plaintiff recovered from them the expenses borne on his behalf by the State. But plaintiff did not so recover; thus, the evil sought to be avoided by Rule 19 does not exist, and the reason for the rule also wanes into insignificance.

Defendants-Appellants advise us that in addition to services provided to plaintiff by the New Mexico Department of Vocational Rehabilitation, other medical benefits were rendered by the Health and Social Services Division. The Department of Vocational Rehabilitation filed a written waiver of any right, interest or cause of action it might have had against defendants for services extended to plaintiff's incompetent; the reference to this five-volume transcript provided us by defendants, regarding the claim of the State Health and Social Services Division, reflects only a stipulation that some "minimum figures" had been "paid by medicaid." Without independently reviewing this entire record, we are left completely in the dark on the amount to which that department might have had subrogation rights under the statute.

In *White v. Sutherland*, 92 N.M. 187, 585 P.2d 331 (Ct.App.1978), Chief Judge Wood pointed out that the provisions of § 27–2–23, *supra*, require the Health and Social Services Department to "make reasonable efforts to ascertain any legal liability of third parties," and to make its recovery, if any, against such third parties. "The statute does not pertain to the recovery of payments from the recipient or beneficiary of such payments. . . . " *Id.*, 92 N.M. at 189, 585 P.2d 331. The subrogation granted to the department by the statute was said, in *White, supra*, to be "the right to collect what it has paid from the party who caused the damage." *Id.*, at 190, 585 P.2d 331. The department could have intervened below. N.M.R.Civ.P. 24, N.M.S.A. 1978. Even so, having failed to intervene, it would appear that nothing has jeopardized the State's rights since damages for the department's expenditures were not entered against defendants; the department's subrogated rights were not disposed of. Presumably, the department's remedy still exists.

Whether or not a subrogation claim by the State would now be entertained, because of the State's inaction, we do not decide. There surely was some obligation on the part of the department to protect its rights if it intended to do so. The record indicates that the department and the Attorney General knew of plaintiff's suit soon after it was filed, but did nothing. The State apparently elected not to pursue the rights granted by the statute. The Plaintiff having recovered nothing under the trial court's judgment for the expenses to which the State was subrogated, we conclude that no harm whatever was caused to defendants by reason of the State's nonjoinder.

We do note that a motion for dismissal for failure to join an indispensable party, or a motion to join such a party, was never made before trial, even though the complaint alleged "care and treatment" provided by the State and that it "should be compensated for the reasonable value of their [sic] treatment and services." Defendants' request for dismissal came on the second day of trial and after eight of plaintiff's witnesses had testified. Under subsection (b) of Rule 19, we think the trial court acted with exemplary judicial wisdom in refusing to dismiss the case at that point, recognizing that any prejudice to the States' subrogation claim could be avoided by the manner in which relief was shaped.

We are further persuaded that this point of defendants' appeal is disingenuous because, if they were concerned that prejudice would truly attach, they made no effort to interplead the State by way of cross-claim or counterclaim at any time before or after the matter went to trial. *See* N.M.R.Civ.P. 22, N.M.S.A. 1978.

Beginning with *Sellman v. Haddock*, 62 N.M. 391, 310 P.2d 1045 (1957), and continuing at least through *Holguin v. Elephant Butte Irrigation Dist.*, 91 N.M. 398, 575 P.2d 88 (1977), it has been the rule in New Mexico that those whose interests will necessarily be affected by any judgment or order in a particular case, are necessary or

indispensable parties. But as Justice Easley noted in *Holguin, supra*, at 91 N.M. 401, 575 P.2d 88, the Supreme Court put Rule 19 in a proper perspective in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119, 88 S.Ct. 733, 743, 19 L.Ed.2d 936 (1968), when it observed:

> To say that a court "must" dismiss in the absence of an indispensable party and that it "cannot proceed" without him puts the matter the wrong way around: a court does not know whether a particular person is "indispensable" until it has examined the situation to determine whether it can proceed without him.

The trial court, in this case, correctly examined the necessity for joining the Department of Health and Social Services, and determined it could proceed without injury to the State. As a result of the trial court's assessment at the time joinder was raised, the defendants have sustained no "substantial risk" of double or multiple liability; the court was able to limit its decree in such a manner as not to affect the State's interest. *Provident, supra*, urges appellate courts to recognize the utility of a decree which protects absent parties' interests when indispensable party is urged; Professor Moore agrees. 3A Moore's Federal Practice, ¶¶ 19.07–2[1], 2[2].

There was no failure of complete relief between this plaintiff and these defendants; there was no harm done to the State or defendants by the State's absence as a party. Consequently, neither the State nor the federal government were necessary or indispensable parties in the adjudication of the rights and obligations between the parties to this suit.

■ Defendants next contend that the trial court articulated the proper duty of a jailer to reasonably exercise care for an inmate's protection, and then improperly applied it. The argument seems to be that there was a failure of evidence on the foreseeability of danger to plaintiff's incompetent and unless the danger was apparent or reasonably to be foreseen, there could be no breach of a duty to "exercise reasonable and ordinary care for the protection of the life and health of the person in custody," which is the standard announced in *City of Belen v. Harrell*, 93 N.M. 601, 603 P.2d 711 (1979). Defendants point to the fact that this was "the only serious injury" in the Eddy County jail in twelve years. They complain that the trial court decided, with hindsight, that the County should have maintained monitoring equipment and adequate supervisory quarters that would enable them to stay informed of inter-prisoner conduct on the jail's second floor.

This argument overlooks several of the trial court's crucial findings in its opinion and its formal findings and conclusions, to the effect that Guadalupe Hernandez was severely, cruelly, inhumanly, and brutally battered for three nights without intervention by any jail personnel. It found that testimony of prisoners which might otherwise be unworthy of belief was supported by unimpeachable medical testimony, and it therefore accepted the prisoners' evidence that the noise during the period of the beating was so loud that it was heard by inmates jailed on the first floor. There was "loud cursing and hollering," and such noise caused when "the incompetent was thrown against the table, floor, bars and walls," that the commotion "could be heard throughout the jail."

With this sort of evidence, it is not a question of what dangers the jailers knew or could anticipate at the time the incompetent was placed in the cell; it is the absolute failure of defendants to (1) provide for adequate monitoring of activity in the cells to prevent such conduct; (2) make adequate and periodic cell inspections to learn the condition of those in custody; (3) sufficiently supervise and account for the presence and safety of all prisoners in the custody of jail officials; and (4) adequately protect those who, in the exercise of the jailer's reasonable and ordinary care, the jailer would have learned were in need of protection. *See Blakeman v. Wichita*, 93 Kan. 444, 144 P. 816 (1914); Rest. Torts (Second) § 320.

Judge Neal specifically noted in his written memorandum opinion, made a part of

his findings and conclusions, that he relied on the Legislature's stated principle that the Tort Claims Act was based on "traditional tort concepts of duty and the reasonably prudent person's standard of care," § 41–4–2, N.M.S.A. 1978. That principle, coupled with that form of negligence recognized when one fails to do an act in the face of a duty to so act to prevent injury to another, U.J.I. (Civ.) 12.1, N.M.S.A. 1978 [now U.J.I.Civ. 16.1, 1980 Rev.], formed the basis of the trial court's judgment against defendants.

The trial judge's decision makes it clear that he was not primarily concerned with what the jailers knew about the prisoners in the cell where plaintiff's incompetent was placed; he was convinced that, in the exercise of due care, the jailers would and should have learned of the assault and protected the incompetent's safety. Instead, they "negligently failed . . . [in] their duty to come to the aid or to rescue him." (Judge Neal's opinion.) That view of the evidence is amply supported, and reflects the trial court's proper application of the standard of care owed by custodial officers to their prisoners.

Defendants' final point rests on the premise that Guadalupe Hernandez was on unfriendly terms with Simon Martinez, one of the cell occupants when Guadalupe was jailed, and that Guadalupe was therefore contributorily negligent (1) in failing to tell the jailer of the contentious relationship before entering the cell, as well as in failing to ask to be moved after he had been in the cell a few days; and (2) in failing to call for help or for removal to another cell after he had been attacked.

The issue of contributory negligence concerns whether Guadalupe exercised ordinary care for his own safety, and that question only becomes one of law requiring the fact-finder's resolution to be overturned when reasonable minds cannot differ and readily reach the conclusion that plaintiff's conduct falls below the standard to which he should have conformed for his own protection. *Stewart v. Barnes*, 80 N.M. 102, 451 P.2d 1006 (Ct.App.1969). Under the circumstances of this case, with evidence that Hernandez screamed for help loud enough for the entire jail to hear, and that no jailer came around while Hernandez was being beaten; and in view of the trial court's explicit findings not only that it was defendants' duty, not plaintiff's, to determine where prisoners would be confined, but that by reason of the severe beating Hernandez could not "intelligently be held accountable for his actions and conduct" in protection of himself, we adhere to the long-standing appellate rule of upholding the decision of the fact-finder if it is supported by findings which are sustained by the evidence. *Wendell v. Foley*, 92 N.M. 702, 594 P.2d 750 (Ct.App.1979). Simply because defendants believe the evidence could have supported different findings and conclusions, we are not free to substitute that judgment, or our own, for the judgment of the fact-finder. *Sternloff v. Hughes*, 91 N.M. 604, 577 P.2d 1250 (1978).

The trial court did not commit error in its findings against defendants regarding plaintiff's contributory negligence.

Turning now to plaintiff's appeal on the amount of damages awarded, the pertinent findings regarding the incompetent's losses are that he:

A. . . . is unable to engage in any business or trade.

B. . . . will require large sums of money for caretaking, custodial, and medical expense.

C. . . . has suffered great pain and mental anguish.

D. . . . will require future custodial care, medical care, and maintenance . . . in the sum of $189,800.00.

Three other findings related to the propriety of recovery for plaintiff's payments for Dr. Dunn's services, the hospital's entitlement to payment for medical services rendered, and plaintiff's rights to recover court costs. The court then concluded that plaintiff "has suffered damage in the amount of $189,800.00," plus the additional amounts due to the hospital and for the doctor's bill, and that "judgment should be entered accordingly."

In his memorandum opinion, the judge declared that "the Court will enter judgment in favor of the plaintiff, . . . [f]or pain and suffering, *future* custodial care, medical care and maintenance for the benefit of . . . plaintiff incompetent, [in] the sum of $189,800.00."

The judgment entered thereafter decreed that plaintiff recover:

> A. The sum of $189,800 for the future custodial care, medical care, and maintenance of the Plaintiff's incompetent ward. . . .

None of the trial court's documents provided any monetary recovery for loss of the incompetent's ability to engage in business or trade, or for pain and mental anguish.

Finding D assigns the amount of $189,800 to costs of *future* care; the memorandum opinion, which became a part of the findings, conflicts with Finding D and the judgment to the extent that it promises a judgment of $189,800 to include pain and suffering with the future costs, whereas the other documents describe losses which would carry separate entitlements to damages in addition to the $189,800.

Although plaintiff did not refer us to a single transcript page relating to the incompetent's wage-earning capacity, or lack of it, defendants supplied some of the references in their answer brief which lead us to testimony on that issue. The expert economist's estimate of Guadalupe's probable work-lifetime gross earnings was based upon an assumption of future earnings at minimum wage and some period of unemployment during Guadalupe's remaining work life. He considered Guadalupe's past criminal incarcerations, and applied, as well, government statistics on the annual earnings of Spanish-origin males. He did not take into account other specifics of Guadalupe's past work history or what defendant's counsel described, on cross-examination, as Guadalupe's "sociopathic tendencies."

There was evidence that the incompetent had been employed by the Carlsbad Irrigation District; always worked a few days out of the week; was always looking for a job; and took whatever was available when he was out of work.

The trial court, on all of the evidence, found that

> [A]s a result of . . . defendants' failure to properly care for and protect the incompetent, . . . [he] *has suffered loss* in the following particulars:
>
> A. The incompetent, Guadalupe Hernandez, is unable to engage in any business or trade[,]
>
> . . . .

but it awarded nothing in compensation for that loss.

Defendants justify the absence of an award for lost earning capacity on grounds that the expert did not consider the incompetent's "actual work history . . . past criminal record . . . likely . . . incarceration . . . [and] sociopathic tendencies" in evaluating that loss. We are referred to the pages of the expert's testimony where he agrees, on cross-examination, that some specific items were not included in his analysis. Where the evidence might appear in the 830 pages of testimony in this record, however, to show that those factors should have been included, is left to us to find. We decline to sift through the testimony of thirty-four witnesses. If additional information should have been incorporated into the expert's calculations, defendants have failed to point to a single transcript page establishing the alleged missing "facts." We will not search the record; that is the burden of defendants. *Louis Lyster, Gen. Contr., Inc. v. Town of Las Vegas*, 75 N.M. 427, 405 P.2d 665 (1965). The economic evidence, therefore, stands unimpeached. *See Tafoya v. Tafoya*, 84 N.M. 124, 500 P.2d 409 (1972). We would also emphasize that, whether there is any evidence of past earnings or of any decrease in plaintiff's earning capacity, proof of a continuing disability or an irreparable physical injury is all that is needed to permit the fact-finder to "award substantial damages" for loss of wage-earning ability. *Jackson v. Southwestern Publ. Serv. Co.*, 66 N.M. 458, 349 P.2d 1029 (1960). *See also Baros v. Kazmierczwk*, 68 N.M. 421, 362 P.2d 798 (1961).

Because the trial court explicitly found that plaintiff's incompetent has suffered, among other damages, the loss of wage-earning ability through the tortious conduct of defendants, we must conclude it was error to neglect awarding damages for that injury. Justice is not done if damages are not awarded for a loss found to have been inflicted through defendants' fault. *Jones v. Pollock*, 72 N.M. 315, 383 P.2d 271 (1963).

All that we have said above on the issue of damages applies equally to the trial court's failure to award an amount for Guadalupe's pain and suffering. The intention of the court to do so is clear from its findings. No doubt it was an oversight that lost earning capacity and pain and suffering were omitted from the judgment when damages were assessed. The $189,800 allowed by the judgment was specifically earmarked in the findings and the judgment to compensate for maintenance and custodial and medical care of plaintiff's incompetent in the future. The other elements of loss, i. e., pain and suffering and earning capacity, found by the court to have been suffered by Guadalupe as a result of this grisly incident, were compensable (*see* Chapter 14, N.M.U.J.I. (Civ.), N.M.S.A. 1978). Just as with lost earning capacity some compensation for pain and suffering should have been included in the award. The matter must be remanded for the trial court's determination of the additional amount that will "reasonably and fairly compensate" for those losses. N.M.U.J.I.(Civ.) 14.2; *Jones v. Pollock, supra.*

We affirm the trial court's decisions of liability. We remand for consideration of additional damages in accordance with this opinion.

HERNANDEZ, C.J., and ANDREWS, J., concur.

629 P.2d 784

Charlotte STRONG, Plaintiff-Appellee,

v.

Roy B. SHAW and Reco Corporation d/b/a Shaw Mobile Home Park, Defendants-Appellants.

No. 4606.

Court of Appeals of New Mexico.

Nov. 26, 1980.

Martin E. Threet, Rolf A. Melkus, Threet & King, Albuquerque, for defendants-appellants.

Harry N. Relkin, Coan, Harris, Relkin & Lee, P. C., Albuquerque, for plaintiff-appellee.

OPINION

SUTIN, Judge.

This is a res ipsa loquitur case in which defendant, Reco Corporation appeals an adverse judgment rendered by the district court in favor of plaintiff growing out of a fire that took place in a rented mobile home owned by Reco. We affirm.

The trial court found that on January 22, 1978, the date the fire took place in the rented space of plaintiff, she was a tenant of Shaw Mobile Home Park, owned and managed by Reco. The fire began in the hot water closet and was the proximate cause of plaintiff's loss. In order to have a fire of this type and nature, there must be combustibles and a source of ignition. The fire was not caused by an act of God. The gas water heater was not defective and there was no gas surge in the lines to the gas water heater. Neither was the apartment nor water heater closet defectively constructed. The hot water heater closet was under the exclusive control of Reco at all times until after the fire and in the ordinary course of events the fire would not have occurred had Reco exercised reasonable care over the hot water heater closet.

The court concluded that the doctrine of res ipsa loquitur was applicable. Defendant claims that this doctrine was inapplicable.

A. *Facts.*

The facts show that plaintiff spent one night in the apartment after she rented it and went to Willard to help her parents. She was then told the apartment had burned. Plaintiff had no knowledge of the location of the water closet, had never been in it, but learned after the fire that there was no access to the water closet from the apartment. It was located outside of the apartment.

Expert opinion established that the origin of the fire was the water heater closet; that there is such a term as "fire cause" which presupposes an ignition and combustibles. When these two come together, it is a "fire cause"; that absent combustibles, under normal conditions, no fire could occur. One expert testified that any combustible material in the closet would have been consumed in the fire; that none could be found. Another expert testified that the combustibles were the structural framing of

the trailer which indicated a malfunction of the hot water heater. This opinion was not accepted by the trial court. It found that the heater was not defective. But even if this evidence be classified as attempting to prove specific acts of negligence, plaintiff is not penalized by loss of the res ipsa loquitur doctrine. *Tuso v. Markey*, 61 N.M. 77, 294 P.2d 1102 (1956).

Access to the hot water heater could be obtained with a screw driver or a quarter. It was just a turn latch. Anybody could have access to it that wanted to walk around the apartment. An employee of Reco had worked there 10 years and it was his duty to clean the hot water heater area. He inspected the hot water heaters every three months. It could have been inspected one or two months before the fire occurred but he did not remember when the fire occurred.

The accepted definition of "res ipsa loquitur" is U.J.I. 12.14. As applied to the facts of this case, it reads:

> The plaintiff relies upon the doctrine of "res ipsa loquitur" which is a Latin phrase and means "the thing speaks for itself".
>
> In order for the . . . [fact finder] to find the defendant negligent under this doctrine, the plaintiff has the burden of proving each of the following propositions:
>
> 1. That the damage to plaintiff was proximately caused by the flame in the gas water heater and combustibles located in the hot water closet which were under the exclusive control and management of defendant.
>
> 2. That the event causing the damage to the plaintiff was of a kind which ordinarily, does not occur in the absence of negligence, on the part of the person in control of the instrumentality.
>
> If each of these propositions had been proved, then the law permits . . . [the fact finder] to infer that the defendant was negligent and that the damage proximately resulted from such negligence.
>
> If, on the other hand, one of the propositions have [sic] not been proved, or, if notwithstanding the proof of these propositions, that the defendant used ordinary care for the safety of others, in his control and management of the hot water closet, then plaintiff cannot recover under the doctrine of res ipsa loquitur.

We begin this discussion with the rule that if a landlord retains possession or control of a portion of the leased premises, he is charged with the duty of exercising ordinary care in maintaining the retained portion. *Brown v. Frontier Theatres, Inc.*, 369 S.W.2d 299 (Tex.1963); *Braunstein v. Robinson*, 47 A.D.2d 700, 364 N.Y.S.2d 605 (1975); *Glaude v. Nash*, 46 A.2d 542 (D.C. 1946); *Golden v. Conway*, 55 Cal.App.3d 948, 128 Cal.Rptr. 69 (1976). See, Annot. *Landlord's Liability For Damage To Tenant's Property Caused By Water*, 35 A.L.R.3d 143 (1971).

In *Brown, supra*, the landlord failed to repair electrical defects in wiring in a drive-in theatre tower which resulted in fire damage to the tenant. In *Golden, supra*, the landlord caused a defective wall heater to be installed that resulted in fire damage to tenant's personal property.

Res ipsa loquitur applies after the duty is established. It helps to establish negligence—nothing else. Res ipsa loquitur is a rule of evidence, not of substantive tort law. Its sole function is to supply inferences from which some negligent conduct can be found, without finding what that negligence was. The tenant does not have to prove a specific act of negligence—only an inference that the landlord was in some way negligent. Only in this narrow point does the incident "speak for itself" and then only in appropriate cases.

A plaintiff simply proves what occurred. The fact finder makes a determination, based upon experience, whether the occurrence is one of a res ipsa type. The weight of the inference is for the fact finder. Loth, *Res Ipsa Loquitur In Iowa*, 18 Drake L.Rev. 1 (1968). See, Griffith & Griffith, *The Doctrine of Res Ipsa Loquitur in Negligence Actions—Old Solutions for New Problems*, 48 Miss.L.J. 259 (1977);

Kaye, *Probability Theory Meets Res Ipsa Loquitur*, 77 Mich.L.Rev. 1456 (1979); Schiff, *A Res Ipsa Loquitur Nutshell*, 26 U. of Toronto L.J. 451 (1976).

Defendant contends that the doctrine of res ipsa loquitur is not applicable to this fire case. The only New Mexico case that approaches the problem is *Gray v. E. J. Longyear Company*, 78 N.M. 161, 429 P.2d 359 (1967). The factual situation differs from that in the instant case. Plaintiff leased a garage a few feet away from defendant's building. Defendant's building, plaintiff's garage and their contents were destroyed by a fire that started in defendant's building. Plaintiff's testimony was the only evidence adduced at trial. It established that the only means of heating defendant's building was an open metallic container into which diesel fuel was poured and ignited, and that gasoline, other inflammable liquids and various combustible materials were also kept in defendant's building. Plaintiff observed these contents and the method by which it was heated three days before the fire and protested regarding the fire hazard. The court said:

> . . . The fact that a hazardous condition may have existed three days before the fire will not support an inference that the condition not only continued, *but, in fact, started the fire.* [citation omitted.] An inference which will support a judgment cannot be mere supposition or conjecture but must be a logical deduction from facts proved. [citation omitted.] Plaintiff, however, seeks to supply the necessary proof by invoking the doctrine of res ipsa loquitur. That doctrine is applicable only when the evidence establishes that in the ordinary course of events the injury would not have occurred had the one having exclusive control of the instrumentality causing the injury exercised due care. [citation omitted.]
>
> We find nothing in the circumstances surrounding the destruction of the property located in plaintiff's garage which would permit application of the doctrine of res ipsa loquitur. Negligence may not be inferred from the mere happening of an injury. Accordingly, the mere occurrence of a fire raises no inference of negligence. [Emphasis added.] [Id. 163, 429 P.2d 359.]

In *Gray*, no evidence appeared of the origin of the fire. Plaintiff's case went no further than to show that a fire hazard exited. The evidence failed to create a jury issue as to what kindled the fire and caused the damage. He had not shown the way the damage occurred. The doctrine of res ipsa loquitur did not avail him until he had made such a showing. Courts recognize that fires are frequent occurrences and in a great many cases without any negligence on the part of anyone. While plaintiff showed a condition which could possibly have caused a fire, it was only conjecture that it did so. The evidence to establish the manner in which the damage occurred need not be conclusive, it may be circumstantial; but it must arise above mere speculation. The foundation facts for the application of the res ipsa loquitur doctrine were missing. *Tedrow v. Des Moines Housing Corporation*, 249 Iowa 766, 87 N.W.2d 463 (1958), 86 A.L.R.2d 830.

■ The doctrine of res ipsa loquitur is inapplicable where the origin of the fire is unknown and it could not be determined that the fire could not or would have occurred except for negligence and where the physical facts surrounding the fire did not create a reasonable probability that the fire resulted from negligence.

■ Where, however, the origin of the fire is known, and the agency or instrumentality is under the exclusive control and management of the owner, res ipsa loquitur is applicable. It is sufficient to take the case out of the general rule that mere occurrence of a fire raises no inferences of negligence. *Wilson v. Paul*, 176 N.W.2d 807 (Iowa 1970); *Granata v. Schaefer's Bake Shop, Inc.*, 4 Conn.Cir. 382, 232 A.2d 513 (1967); *Collgood, Inc. v. Sands Drug Company*, 5 Ill.App.3d 910, 284 N.E.2d 406 (1972); *Fireman's Fund Ins. Co. v. United States F. & G. Co.*, 276 So.2d 754 (La.App. 1973); *Seeley v. Combs*, 65 Cal.2d 127, 52 Cal.Rptr. 578, 416 P.2d 810 (1966); *Jones v.*

Garney Plumbing Company, 409 S.W.2d 637 (Mo.1966); *John Rooff & Sons, Inc. v. Winterbottom*, 249 Iowa 122, 86 N.W.2d 131 (1957); *Waterway Terminal Company v. P.S. Lord Mechanical Contr.*, 256 Or. 361, 474 P.2d 309 (1970).

In the instant case, the hot water heater was kindled by defendant. It was burning at the time the fire started. Defendant was in exclusive control and management of the hot water heater closet at the time of the damage-causing event. This is the crux of the res ipsa loquitur doctrine. *Waterman v. Ciesielski*, 87 N.M. 25, 528 P.2d 884 (1974). Plaintiff established that there was a "fire cause" which presupposes ignition and combustibles. To experience a fire of this kind, combustible materials subject to flame of the water heater had to be present to begin the fire. Otherwise, no fire could have begun. This is a logical deduction from facts proved. The fire causing the damage to plaintiff, therefore, was of a kind which ordinarily does not occur in the absence of negligence on the part of the person in exclusive control and management of the hot water heater and closet. Since such control and management places defendant in a superior position to know or ascertain the cause of plaintiff's damage, the defendant is saddled with the "burden of explanation." " '[T]he fact of the occurrence of an injury and the surrounding circumstances may permit an inference of culpability on the part of the defendant, make out plaintiff's prima facie case, and present a question of fact for the defendant to meet with an explanation.' " *Hepp v. Quickel Auto & Supply Co.*, 37 N.M. 525, 528, 25 P.2d 197 (1933).

No other reasonable or logical deduction can be made and none have been suggested as the cause of the fire except, perhaps, an Act of God. "An Act of God is an unusual, extraordinary sudden and unexpected manifestation of the forces of nature for which man is not responsible." U.J.I. 13.11. We cannot stretch reason and logic to reach an Act of God as the cause of a fire in a hot water heater closet. No evidence bearing on this defense was presented.

Defendant attempted an explanation. It is the province of the trier of the fact to consider the explanation factually and from the standpoint of credibility of the witnesses. If the explanation rebuts the inference of negligence, the trier of the fact may declare the doctrine of res ipsa loquitur inapplicable. *Glens Falls Ins. Co. v. Denver Building Supply Co.*, 501 P.2d 748 (Colo.App.1972); *Branco Eastern Company v. Leffler*, 173 Colo. 428, 482 P.2d 364 (1971). The defendant may overcome the inference of negligence by showing that prior to the damage, it had thoroughly inspected the water closet or that it was not negligent with respect to plaintiff's specific damage.

In the instant case the testimony presented, as to inspection by defendant's employee, was so vague and uncertain that the trial court was free to give it little or no value. A reasonable inference can be drawn that the combustible material was present for failure of defendant to exercise ordinary care to keep the water heater closet clean. Certainly, the fire was one which ordinarily does not occur in the absence of someone's negligence, absent some evidence that it was incendiary in origin.

Horner v. Barber, 229 Cal.App.2d 829, 40 Cal.Rptr. 570 (1964), 8 A.L.R.3d 966 (1966) presents a case of a gas heater located in defendant's office which adjoined the garage in which a number of vehicles were stored. A fire started in the portion occupied by defendants causing a loss to plaintiffs. It was plaintiff's theory that the fire, which started at 2:30 a. m., resulted from the ignition of some kind of fuel by some "source of ignition." The exact cause of the fire was unknown. Expert testimony showed that the most probable fuel was gasoline vapor; that it was probable that a slight draft created by either the pilot light of the heater or its burners, or both, drew the vapors from under the automobiles along the floor of the garage under the door in the partition to the heater in the office. This factual situation met the demands of res ipsa loquitur. In affirming a

judgment for plaintiff, the court quoted the following from a previous Supreme Court opinion.

> "Res ipsa may apply where the cause of the injury is a mystery, if there is reasonable and logical inference that defendant was negligent, and that such negligence caused the injury. (Prosser on Torts, supra, at p. 204.)
>
> "As applied to this case, the test is whether a reasonable man could reach the conclusion from the evidence offered that it was more likely than not that the injury involved was the result of negligence on the part of defendant." [Id. 973.]

Res ipsa loquitur does not demand proof of the precise cause of the fire. If it did, proof of specific acts of negligence would result. Res ipsa loquitur searches primarily for such facts which lead to a reasonable and logical inference that defendant was negligent, and that such negligence caused the damage. A review of the subject matter is set forth in Annot. *Res Ipsa Loquitur In Actions Against Owner Or Occupant Of Premises For Personal Injury, Death, Or Property Damage Caused By Fire*, 8 A.L.R.3d 974 (1966).

The defendant relies on *Blair v. Saguaro Lake Development Company*, 17 Ariz.App. 72, 495 P.2d 512 (1972); *Hansen v. Phagan*, 146 Colo. 484, 361 P.2d 977 (1961); and *Northwestern Nat. Ins. v. Raid Quarries Corp.*, 249 N.W.2d 640 (Iowa 1977). Each of these cases fall within the perimeter of *Gray, supra*. The instrumentality that caused the fire must be established before any causal connection can be made regarding any alleged negligent act of defendant, and the burden of proof was on plaintiff. These cases do not assist defendant in the instant case.

Affirmed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

WOOD, C. J., dissents.

WOOD, Chief Judge (dissenting).

I dissent.

The trial court found that the fire was not caused by an Act of God and (a) no evidence of a gas surge in the lines to the water heater, (b) no evidence that the water heater was defective, and (c) no evidence of defective construction in the water heater closet. In addition to these unchallenged findings, there is no evidence as to what caused the fire.

The trial court found that the fire began in the water heater closet, that this closet was under defendant's exclusive control, and that in the ordinary course of events the fire would not have happened had defendant exercised reasonable care over the closet. This was the basis for applying res ipsa loquitur; this was an insufficient basis for applying the doctrine.

To have a fire of any kind there must be a source of ignition and combustibles; to say that, because there had to be a "fire cause", the fire was of a kind that ordinarily did not occur in the absence of negligence, adds nothing in resolving the question of whether the doctrine of res ipsa loquitur was applicable.

The injury, in this case, was the fire. *Clark v. Cassetty*, 71 N.M. 89, 376 P.2d 37 (1962). The fire itself raises no inference of negligence. *Gray v. E. J. Longyear Company*, 78 N.M. 161, 429 P.2d 359 (1967). There must be some evidence as to the cause of the fire. *Waterman v. Ciesielski*, 87 N.M. 25, 528 P.2d 884 (1974); see *Renfro v. J. D. Coggins Company*, 71 N.M. 310, 378 P.2d 130 (1963). There being no evidence as to the cause of the fire, there was no factual basis for applying res ipsa loquitur.

Accordingly, I would reverse that part of the judgment which awards damages against Reco Corporation and direct that judgment be entered in favor of Reco Corporation.

629 P.2d 1216

STATE of New Mexico, Petitioner,

v.

Norman ELLENBERGER, Respondent.

No. 13449.

Supreme Court of New Mexico.

May 21, 1981.

Jeff Bingaman, Atty. Gen., Fred Chris Smith, Stephen J. Westheimer, Asst. Attys. Gen., Santa Fe, for petitioner.

Leon Taylor, Albuquerque, for respondent.

Eloy F. Martinez, Dist. Atty., Santa Fe, amicus curiae.

OPINION

EASLEY, Chief Justice.

Norman Ellenberger was indicted by a grand jury on ten counts of fraud in excess of $100 in violation of Section 30–16–6, N.M.S.A. 1978, and twelve counts of making false public vouchers contrary to Section 30–23–3, N.M.S.A. 1978. The trial court dismissed all the charges involving alleged false vouchers. The State filed an interlocutory appeal as to dismissal of those counts to the Court of Appeals, which affirmed. We granted certiorari and reverse.

The issues are whether Ellenberger is within the class of persons subject to the provisions of Section 30–23–3, which makes the filing of a false public voucher a felony, and whether the false voucher charges are merged with the fraud charges.

Ellenberger is the former head coach of the University of New Mexico men's basketball team. While so employed, Ellenberger allegedly made twelve false travel vouchers for which he received nine separate checks. The nine counts of fraud are based upon the receipt of the money from

the twelve false vouchers. The trial court ruled that Ellenberger was not a "public official" and that Section 30–23–3 did not apply to him and further held that the two sets of charges were merged. The Court of Appeals affirmed the decision that the statute did not apply to Ellenberger but did not reach the merger issue.

1. *Whether Section 30–23–3 Applies to a State University Head Coach.*

The Section provides:

> Making or permitting false public voucher consists of knowingly, intentionally or willfully making, causing to be made or permitting to be made, a false material statement or forged signature upon any public voucher, or invoice supporting a public voucher, with intent that the voucher or invoice shall be relied upon for the expenditure of public money.
>
> Whoever commits making or permitting false public voucher is guilty of a fourth degree felony.

This statute is part of an article headed "Misconduct by Officials". While nothing on the face of the statute would limit its application to public officials, the Court of Appeals, relying on its opinion in *State v. Thurman*, 88 N.M. 31, 536 P.2d 1087 (Ct. App.1975), *cert. denied*, 88 N.M. 29, 536 P.2d 1085 (1975), held that the legislatively-enacted heading to the article revealed a legislative intent that the statute apply only to public officials and hence would not apply to a public employee.

While we agree with the Court of Appeals that a legislatively-enacted heading may be useful in the effort to resolve ambiguities in the meaning of a doubtful statute, *American Automobile Ass'n, Inc. v. Bureau of Rev.*, 88 N.M. 148, 538 P.2d 420 (Ct.App.1975), *rev'd on other grounds*, 88 N.M. 462, 541 P.2d 967 (1975), it is not the business of the courts to look beyond the plain meaning of the words of a clearly drafted statute in an attempt to divine the intent of the Legislature. As this Court stated in *State ex rel. Barela v. New Mexico State Bd. of Ed.*, 80 N.M. 220, 222, 453 P.2d 583, 585 (1969), "[w]e are not permitted to read into a statute language which is not there, particularly, if it makes sense as written." We agree with the following statement of the rule:

> The rule which permits reading the title of an act in aid of statutory construction applies only in cases where the legislative meaning is left in doubt by failure to clearly express it in the law. *Moreover, the ambiguity which justifies a resort to the title must arise in the body of the act; an ambiguity arising from the title is not sufficient.* * * * The title of an act cannot limit the plain meeting of the text.* * * The title is not conclusive in regard to the meaning of a statute.

73 Am.Jur.2d, *Statutes*, § 98 (1974) (emphasis added and footnotes omitted). Thus the starting point of statutory analysis must always be the statute itself which represents the primary expression of the intent of the Legislature. The heading to an article represents little more than a convenient tag to an organizational grouping of statutes; it therefore cannot be used to create an ambiguity in an otherwise clear expression of the intent of the Legislature. *See Hewatt v. Clark*, 44 N.M. 453, 103 P.2d 646 (1940).

We now proceed to an examination of the language of the statute. The first sentence sets forth the elements of the crime of making or permitting false public voucher and contains no language which could possibly be construed as limiting its application to a certain class of persons. The second sentence declares that "*[w]hoever* commits [this crime] is guilty of a fourth degree felony." The Court of Appeals found it significant that the statute as originally enacted began with "[a]ny person who." 1959 N.M. Laws, ch. 11, § 3. The statute was amended to its present language in the recodification of the Criminal Code in 1963, at which time it was grouped with other, related statutes into the present Article 23. 1963 N.M.Laws, ch. 303. We fail to see the significance of the change from "[a]ny person who" to "[w]hoever." Webster's Third New International Dictionary (1971) defines "whoever" as "whatever person: any person at all that: no matter

who * * *." There could be no clearer statement of an intent that the statute apply to anyone who commits the acts proscribed therein. We therefore conclude that the statute is unambiguous and applies to public employees as well as public officials.

Even if we assume for the sake of argument that the statute is ambiguous and statutory construction is appropriate, we reach the same conclusion. The apparent restrictiveness of the heading to the article, "Misconduct by Officials", is tempered by the language of the statutes found therein. Several of the statutes, including the very first sentence of the first statute after the title, specifically include public employees within their terms. §§ 30–23–1, 30–23–2, 30–23–5, 30–23–6 and 30–23–7, N.M.S.A. 1978. The explicit extension of the statutes beyond the apparent limitations of the act's heading indicates that the heading is intended merely as a convenient description rather than as a limitation of the scope of the statutes found therein.

At this point it is appropriate to note that Ellenberger's contention that under N.M. Const., Art. IV, § 16, the scope of an act *cannot* exceed its title, is without merit. That provision relates to the title of a bill presented to the Legislature and its primary purpose is to prevent fraud or surprise upon the Legislature because of concealed or hidden provisions in an act which the title fails to express. *City of Raton v. Sproule*, 78 N.M. 138, 429 P.2d 336 (1967). That is not the situation here, and "Misconduct by Officials" was not the title of the bill by which this statute was enacted. Rather, this heading to article 23 was merely the title given to a new grouping of statutes effected by the 1963 recodification and revision of the Criminal Code. 1963 N.M.Laws, ch. 303.

Finally, we observe the familiar rule that where a statute is ambiguous, the Court will construe the statute in a manner which will not render its application absurd or unreasonable and which will not defeat the object of the Legislature. *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 568 P.2d 1236 (1977). The evil which the Legislature sought to punish by Section 30–23–3 was the use of false public vouchers to wrongfully obtain public money. This evil can be perpetrated by officials, public officials, employees, and head coaches alike. Limiting the application of the statute to only a few persons at the top of the bureaucracy would accord with neither common sense nor reason and could only serve to defeat the object of the Legislature. We will not adopt such a strained construction, absent a clear indication that that was the Legislature's intent.

We hold that the trial court erred in dismissing the twelve counts of making false public vouchers. *State v. Thurman, supra*, is overruled to the extent that it is inconsistent herewith.

2. *Whether the Offenses Merged.*

The trial court also dismissed the counts of making or permitting false public voucher on the basis that those counts merged with the fraud counts which arose out of the same criminal acts. The Court of Appeals found it unnecessary to reach this issue. In view of our disposition of the first issue in this appeal, we must determine whether the trial court's action may yet be sustained on this alternative ground.

The doctrine of merger is based upon the constitutional guarantee against double jeopardy contained in the Fifth Amendment of the United States Constitution and Article II, Section 15 of the New Mexico Constitution. The scope of the double jeopardy clause was outlined by the Supreme Court in *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969):

> That guarantee [against double jeopardy] has been said to consist of three separate constitutional protections. It protects against a *second prosecution* for the same offense after acquittal. It protects against a *second prosecution* for the same offense after conviction. And it protects against *multiple punishments* for the same offense. (Footnotes omitted and emphasis added.)

Neither the first nor the second protection is involved here as there has been no prior prosecution of Ellenberger on any of these charges. Any contention that imposition of consecutive sentences for both fraud and making false public voucher arising out of the same act would constitute multiple punishment is premature. Ellenberger has not been convicted of any of the charges, much less sentenced.

We find nothing in the double jeopardy clause, the New Mexico statutes, or prior case law which would prohibit the State from charging and trying Ellenberger for violations of every criminal statute which the State has sufficient grounds to believe he has violated. We note that in *State v. Quintana*, 69 N.M. 51, 364 P.2d 120 (1961), in which this Court held that the offenses of armed robbery and larceny arising out of the same criminal transaction merged and that imposition of consecutive sentences for the two crimes was therefore impermissible multiple punishment, the Court nonetheless stated that "[t]he defendant was *properly convicted* on both armed robbery and grand larceny. . . ." *Id.* at 59, 364 P.2d at 125 (emphasis added).

Since the issue is not properly before us at this time, we express no opinion on whether the imposition of consecutive sentences for fraud and making false public voucher would violate the double jeopardy clause guarantee against multiple punishments for the same offense.

We note, however, that this question is primarily one of legislative intent. Multiple punishments run afoul of the double jeopardy clause only where the Legislature has not authorized multiple punishments. *See United States v. DiFrancesco*, —— U.S. ——, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980); *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1874). Mr. Justice Blackmun, concurring in *Whalen*, 445 U.S. at 697, 100 S.Ct. at 1441, stated, "[t]he *only* function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended." Since the question turns on the intent of the Legislature, the "same evidence" and "necessarily involved" tests previously utilized by this Court are not constitutional litmus tests, but are merely aids for determining legislative intent.

We find no constitutional or statutory bar to charging Ellenberger with violations of Section 30–23–3, relating to the making of false public vouchers, and Section 30–16–6, relating to fraud. The trial court therefore erred in dismissing the twelve counts of making false public voucher on the basis that those counts merged with the fraud counts.

The cause is reversed and remanded for trial.

IT IS SO ORDERED.

SOSA, Senior Justice, and PAYNE, FEDERICI and RIORDAN, JJ., concur.

629 P.2d 1219

Rose Ann SPIDLE, Petitioner,

v.

KERR–McGEE NUCLEAR CORPORATION, Respondent.

No. 13550.

Supreme Court of New Mexico.

June 2, 1981.

Rehearing Denied June 26, 1981.

James L. Brandenburg, John L. Walker, Albuquerque, for petitioner.

Glascock, McKim, Head & Kozeliski, George W. Kozeliski, Gallup, for respondent.

OPINION

SOSA, Senior Justice.

The issue before this Court on certiorari is whether, pursuant to Section 52–1–30(B), N.M.S.A.1978, the district court was correct in awarding appellant Rose Ann Spidle a lump-sum settlement in lieu of future weekly workmen's compensation benefits. Appellant, the widow of a worker covered under the Workmen's Compensation Act, §§ 52–1–1 through 52–1–69, N.M.S.A.1978 (Orig.Pamp. and Cum.Supp.1980), intends to use the lump-sum payment to purchase or build a larger home for herself, her four children and grandchild.

Glen Dean Spidle was fatally injured on July 22, 1977, in the course and scope of his employment for appellee Kerr-McGee Nuclear Corporation (Kerr-McGee). After his death, appellee paid appellant workmen's compensation benefits of $142.59 per week. On April 18, 1979, appellant filed a complaint asking the district court to compel appellee to pay her in a lump sum all future workmen's compensation benefits to which she might be entitled pursuant to Section 52–1–30(B). On February 27, 1980, the district court granted her a lump-sum award of $49,014.67 as of December 28, 1979. On appeal by Kerr-McGee, the Court of Appeals reversed the lower court. Appellant petitioned for a writ of certiorari. We reverse the Court of Appeals and affirm the district court's grant of the lump-sum payment.

In workmen's compensation cases, Section 52–1–30(B) states that:

> If, upon petition of any party in interest, the court, after hearing, determines * * * in case of death that it is for the best interests of the persons entitled to compensation, * * * the liability of the employer for compensation may be discharged by the payment of a lump sum equal to the present value of all future payments of compensation * * * *

The Court of Appeals has held that a petitioner for a lump-sum award of workmen's compensation

> has the burden of showing that it is in his best interest and that the lack of lump summing would create a manifest hardship where relief is essential to protect claimant and his family from want, privation or to facilitate the production of income or to help in a rehabilitation program.

Codling v. Aztec Well Servicing Co., 89 N.M. 213, 216, 549 P.2d 628, 631 (Ct.App. 1976). The question to be determined in this case is whether appellant has met this burden.

■ In workmen's compensation cases, periodic payments are the general rule and lump-sum awards are the exception. The purpose of the Workmen's Compensation

Act is to help protect the recipient of the payments against want and to avoid his becoming a public charge. *Codling, supra.*

We agree with the Court of Appeals in *Codling, supra*, that:

> [E]ach case stands or falls on its own merits. As each request for a lump sum payment is unique, a precise enumeration of what factual ingredients constitute special circumstances is impossible. But in considering the cases which have granted a lump sum award, it becomes apparent that in each a certain factual situation has emerged which, by its quantum and quality of evidence, has convincingly portrayed the existence of exceptional circumstances.

89 N.M. at 216, 549 P.2d at 631.

In *Livingston v. Loffland Brothers Co.*, 86 N.M. 375, 524 P.2d 991 (Ct.App.1974), *cert. denied*, 86 N.M. 372, 524 P.2d 988 (1974), a lump-sum award was ordered so that the plaintiff in that case, the surviving spouse of a deceased employee, could purchase land and a trailer for herself and her minor son. The plaintiff and her four-year-old son were living in a three-bedroom house with her father, mother and brother. She had attempted to rent an apartment but either the rental was too high or landlords refused to rent to a person with a child. The court found that with the land and trailer house plaintiff could manage on her monthly income from Social Security, that she had managed the family finances during her seven years of marriage to the decedent, and that the balance of the award would be invested for the eventual use of the child.

In *Arther v. Western Company of North America*, 88 N.M. 157, 538 P.2d 799 (Ct.App.1975), *cert. denied*, 88 N.M. 318, 540 P.2d 248 (1975), the court denied a lump-sum award to a twenty-one-year-old widow who had been married about one month who was not pregnant nor had any children from the marriage. The plaintiff sought the lump sum for investment purposes and to avoid forfeiture of future payments which would otherwise stop on her death or remarriage. Although such a result would clearly be in the plaintiff's best interest, the court noted that granting a lump-sum award would be inconsistent with the legislative intent that compensation was only to be paid while plaintiff was a widow. Thus, proof that a lump-sum award is in the best interest of the recipient will not justify a court in ordering such an award if to do so would undermine the public policy which the statute is intended to promote.

Other New Mexico cases have denied lump-sum awards to dependents of disabled workers. *Codling, supra*, decided under the "best interest" standard of the pre-1975 version of the statute (§ 59–10–13.5, N.M.S.A.1953 (2nd Repl.Pamp.1974)), involved a partially disabled worker who was actively pursuing a training program and requested the award so that his wife could stay home with their youngest child. Two other cases which involved disabled workers were decided under the "interest of rehabilitation" standard of § 52–1–30, N.M.S.A.1978, as it now reads: *Lamont v. New Mexico Military Institute*, 92 N.M. 804, 595 P.2d 774 (Ct.App.1979), *cert. denied*, 92 N.M. 675, 593 P.2d 1078 (1979), in which the evidence relating to the therapeutic value of the plaintiff's receiving a lump-sum award was not conclusive because of her mental condition and because her motive for wanting the award (to buy a house) might leave her without sufficient funds for everyday living costs; and *Lane v. Levi Strauss & Co.*, 92 N.M. 504, 590 P.2d 562 (Ct.App.1979), in which a totally and permanently disabled plaintiff might have undertaken rehabilitative surgery, or, if not, might have quickly exhausted the award, turning to welfare for relief. Either result would have thwarted the purpose of the Workmen's Compensation Act.

Although dealing with disabled instead of deceased workers, cases applying the "best interest" standard and awarding lump-sum awards include: *Livingston v. Loffland Brothers Co., supra; Kuehn v. National Farmers Union Property & Cas. Co.*, 164 Mont. 303, 521 P.2d 921 (1974), in which it was held to be in the best interests of the plaintiff to uphold a partial lump-sum award so that plaintiff, whose age, abbreviated education, somewhat limited literacy,

and lack of clerical experience rendered his employment prospects negligible, could satisfy his personal indebtedness; *Chatfield v. Industrial Accident Board*, 140 Mont. 516, 374 P.2d 226 (1962), in which the Montana Supreme Court upheld the district court's lump-sum award to a plaintiff who was unable to secure employment due to the nature of his injuries and the scarcity of jobs for which he was trained even though he was a partner with his son in a successful farm operation; *Cole Spurgeon Drilling Company v. Parris*, 346 P.2d 173 (Okl.1959), where a lump-sum award was upheld in favor of the plaintiff who requested the payment in order to satisfy his indebtedness caused by his inability to work and the small amount of his monthly payments, and to use the remaining amount to purchase a chicken farm as a means of obtaining a greater income with which to support his family. In all of these cases, the district court's power to determine the best interests of the claimant and the public by awarding lump-sum payments was upheld.

Accordingly, we affirm the district court's decision that it is in the best interests of appellant in this case to receive a lump-sum payment of the workmen's compensation benefits to which she is entitled. Appellant is a widow with three teen-age boys, a daughter and a grandchild. She and her husband had made plans for a new home prior to his death due to the crowded living conditions and lack of privacy in the family home. The district court found that this was a valid reason for the award and dismissed the argument that appellant would squander the lump-sum payment. Under the facts of this case, we do not find that the trial court abused its discretion in making the lump-sum award.

For the foregoing reasons, the Court of Appeals is reversed and the district court's grant of the lump-sum payment is affirmed.

IT IS SO ORDERED.

EASLEY, C. J., and PAYNE, FEDERICI and RIORDAN, JJ., concur.

629 P.2d 1222

STATE of New Mexico, Plaintiff-Appellant,

v.

William R. KOEHLER, Defendant-Appellee.

No. 12958.

Supreme Court of New Mexico.

June 9, 1981.

Jeff Bingaman, Atty. Gen., Janice Marie Ahern, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Steven G. Farber, Santa Fe, for defendant-appellee.

OPINION

EASLEY, Chief Justice.

The Attorney General (AG) obtained a multicount indictment against the appellee, William R. Koehler, charging him with embezzlement and securities law violations. The trial court dismissed the indictment without prejudice. The AG appealed to the Court of Appeals. Koehler cross-appealed. The AG moved to certify the appeal to this Court. The motion was granted. We reverse the trial court, reinstate the indictment and dismiss the cross-appeal.

The questions presented are: (1) whether the District Attorney (DA) failed or refused to prosecute this case; and (2) whether the two assistant AGs who presented the information to the grand jury were legally qualified to do so.

Koehler was the subject of a lengthy investigation initiated in 1978 by the AG regarding his creation of limited partnerships, solicitation of investment money and mismanagement and embezzlement of money.

The AG assigned the investigation to his white-collar crime division, an investigative unit uniquely qualified to probe investment fraud because of the expertise of its staff of auditors and specially-trained investigators. This unit gathered evidence, traced payments of money and witnesses, prepared flow charts and identified the role of participants in these activities.

After the investigation had been in progress for several months, the AG authorized his assistants to meet with the deputy DA and advise him of the investigation.

At the meeting, the deputy DA concurred in the AG's recommendation that the case should be prosecuted and expressed an interest in assisting the office of the AG and offered the services of his office for the purpose of presenting the case to the grand jury. He stated that the office of the District Attorney of the First Judicial District would be unable to take the primary responsibility to initiate the case against appellee because the DA lacked resources and expertise in prosecuting securities fraud cases.

The record shows that the deputy DA made a statement on another occasion that the policy of the office of the DA was to defer in such cases to the office of the AG where more expertise, capability and financial resources are available. He admitted that by virtue of the complexities of this case, the office of the DA would not be able to handle it.

On February 26, 1979 the deputy DA wrote to the assistant AG to advise that the DA felt that the case should be prosecuted; that they were interested in assisting with the prosecution; that he would make arrangements for swearing in the assistant AGs and make the grand jury available; that the deputy DA would be unable to make a total commitment to assisting and did not know if he would be able to personally participate in motion hearings or the trial; that "I look forward to working with you on this case." The DA took no further action.

The two assistant AGs who presented the information and submitted the indictment to the grand jury continued on their own initiative without requesting any further help from the DA and without keeping him informed of the grand jury presentation.

Koehler maintains that the two assistant AGs were not qualified to appear before the grand jury because they had not taken an oath pursuant to Article XX Sec-

tion 1 of the Constitution of New Mexico, which provides as follows:

> Every person elected or appointed to any office shall, before entering upon his duties, take and subscribe to an oath or affirmation that he will support the constitution of the United States and the constitution and laws of this state, and that he will faithfully and impartially discharge the duties of his office to the best of his ability.

We do not interpret this section to mean that an assistant AG, who is a subordinate appointed at the pleasure of the AG pursuant to Section 8–5–5, N.M.S.A. 1978 (Cum. Supp.1980), must undergo the identical formal swearing in ceremony required of the AG or other public official. The assistant AGs who presented the information to the grand jury swore to uphold the Constitution of the United States and the laws of this state when they took the attorney's oath at the time they were admitted to the Bar. They were administered the usual oath of secrecy by a judge of the First Judicial District before appearing to present the case to the grand jury. We rule they were qualified to appear before the grand jury.

Koehler contends that the AG had not complied with state law in commencing this criminal prosecution, that the powers of the AG are prescribed by statute and that he has neither common law nor constitutionally enumerated powers. *State v. Reese*, 78 N.M. 241, 430 P.2d 399 (1967); *State ex rel. Clancy v. Hall*, 23 N.M. 422, 168 P. 715 (1917).

Koehler states the DA has primary responsibility to prosecute all criminal cases in his jurisdiction, § 36–1–18, N.M.S.A. 1978 and § 31–6–7, N.M.S.A. 1978 (Cum.Supp. 1980), and that any prosecutorial powers the AG has by statute may be exercised only when the DA has failed or refused to act. Koehler alleges that the DA had not failed to act and charges that the AG usurped the authority and duties of the DA to be the law officer of the district.

Koehler's claim that the DA did not fail to act is but a conclusion. We view the conduct of the AG to be in accord with the authority conferred in Sections 8–5–2, 8–5–3 and 8–5–5, N.M.S.A. 1978 (Orig.Pamp. and Cum.Supp.1980). Section 8–5–2 provides authority for the AG to prosecute criminal cases in any court when the State's interest requires such action or when requested to do so by the Governor "except as otherwise provided by law." Section 8–5–3 specifies that upon the "failure or refusal" of any DA to act in any criminal case, the AG is authorized to act. Under Section 8–5–5, the AG may appoint assistant AGs, who shall have the same power and authority as the AG.

In *State v. Naranjo*, 94 N.M. 407, 611 P.2d 1101 (1980), we declared that this statute must be construed as a whole to ascertain the true meaning and the legislative intent.

> We interpret the statutes quoted above to mean that if a district attorney does not perform properly and adequately his legal duties of investigation and prosecution of civil and criminal cases, * * * then the attorney general not only has the power, but it is his duty, where conditions warrant, to perform these functions and to appoint assistant attorneys general as special prosecutors for the appropriate purposes.
>
> The language of this Court in *State v. Reese*, 78 N.M. 241, 430 P.2d 399 (1967) is particularly applicable here in reviewing the parallel statutory provisions defining the powers of the district attorney and the attorney general.
>
> > The language, in our view, permits the attorney general to bring an action on behalf of the state if no other provision has been made for it to be brought, or to step into litigation brought by another *where the interests of the state are not being adequately represented or protected.*
>
> *Id.*, 78 N.M. at 245, 430 P.2d at 403 (emphasis added).

Naranjo, supra, 94 N.M. at 410, 611 P.2d at 1104.

In this case the only common sense construction that can be placed on the negotiations between the AG and the DA is exhibited in the deputy DA's letter which, in

effect, said: "We cannot handle this case. You fellows proceed with it. If you need help, call on me, and maybe I can assist you."

It would be absurd to construe the legislative mandate, that the AG step in when the DA fails and refuses to act, to mean that the two could not make an agreement for the AG to take over a prosecution. In this case the DA "failed" to proceed with the case simply because he had made a clear-cut arrangement with the AG to handle it. Even the Deputy DA who did the negotiating expressed his opinion that his office failed to act on the case.

We hold that the DA delegated the prosecution to the AG and that the AG had an affirmative duty to proceed pursuant to the authority conferred upon him by Section 8–5–3.

The order of dismissal of the indictment is reversed, the indictment reinstated and the cross-appeal dismissed.

IT IS SO ORDERED.

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

629 P.2d 1225

TIFFANY CONSTRUCTION COMPANY, INC., Petitioner,

v.

BUREAU OF REVENUE of the State of New Mexico, Respondent.

No. 13290.

Supreme Court of New Mexico.

June 1, 1981.

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

Jeff Bingaman, Atty. Gen., Sarah Bennett, Gerald Richardson, Asst. Attys. Gen., Santa Fe, for respondent.

OPINION

FEDERICI, Justice.

The issue before this Court on certiorari is whether the State of New Mexico has a right to impose a gross receipts tax on a non-Indian contractor's activities on an Indian reservation. We discuss: (I) Whether the petitioner, Tiffany Construction Company, Inc., properly preserved its right to appeal, and (II) Whether respondent, the State of New Mexico, may constitutionally levy a New Mexico gross receipts tax upon petitioner.

Tiffany Construction Company, Inc. (Tiffany), an Arizona corporation, engaged in a construction project concerning grading and draining a section of road built and maintained by the Bureau of Indian Affairs. The road is located entirely within that portion of the Navajo Reservation which is within the State of New Mexico. Tiffany enjoyed the use of roads located on the reservation but maintained by the State of New Mexico. It also benefited from New Mexico pollution control regulations as well as the overall general protection afforded contractors by the laws of the State of New Mexico. The New Mexico Bureau of Revenue assessed gross receipts taxes, penalties and interest of $78,583.03 against Tiffany for its road building activities concerning this project.

Pursuant to Section 7–1–24, N.M.S.A. 1978 (Repl.Pamp.1979), Tiffany protested the penalty of $1,412.05 in an administrative proceeding on the basis that it did not negligently fail to pay taxes owed. The administrative decision against Tiffany was

affirmed on appeal in *Tiffany Const. Co., Inc. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct.App.1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977)—(*Tiffany I*). In September 1975, Tiffany paid $32,343.02 in gross receipts taxes, a penalty of $1,412.05 and interest of $343.19. Tiffany later paid $46,240.01 in monthly assessments.

Tiffany then commenced the present action under Section 7–1–26, N.M.S.A. 1978 (Repl.Pamp.1979), seeking a refund of all principal paid. The district court held that Tiffany was not entitled to a refund because Tiffany's previous protest of only the penalty constituted an election of remedies as to the earlier assessment pursuant to Section 7–1–23, N.M.S.A. 1978 (Repl.Pamp. 1979), and that, therefore, Tiffany could only protest the later self-assessment of $46,240.01. Further, the district court held that the assessment of the tax itself was proper. The decision of the district court was upheld on appeal in *Tiffany Const. Co. Inc. v. Bureau of Revenue*, 93 N.M. 593, 603 P.2d 332 (Ct.App.1979), *cert. denied*, 94 N.M. 629, 614 P.2d 546 (1979)—(*Tiffany II*).

Tiffany filed a petition for writ of certiorari in the Supreme Court of the United States. Tiffany contended that imposition of the gross receipts tax violated the Treaty of 1868, and infringed on the right of reservation Indians to make their own laws and be ruled by them. *In Tiffany Construction Co., Inc. v. Bureau of Revenue, State of New Mexico*, 448 U.S. 902, 100 S.Ct. 3041, 65 L.Ed.2d 1132 (1980), the United States Supreme Court granted certiorari and ordered that the judgment of the Court of Appeals of New Mexico be vacated and the case remanded for further consideration in light of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), and *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 100 S.Ct. 2592, 65 L.Ed.2d 684 (1980).

Tiffany then filed a motion for judgment in the Court of Appeals asking that judgment be rendered in accordance with the United States Supreme Court order. The Court of Appeals denied Tiffany's motion, finding that neither the issue of preemption nor the issue of infringement on Indian sovereignty was properly raised on appeal. The Court of Appeals also denied Tiffany's motion for reconsideration of its order. *Tiffany Const. Co., Inc. v. Bureau of Revenue, State of New Mexico*, 96 N.M. 304, 629 P.2d 1233, 19 N.M.St.B.Bull. 918 (1980). We granted certiorari and reverse the Court of Appeals in part and affirm in part.

I. *PRESERVATION OF RIGHTS ON APPEAL.*

The initial question to be determined is whether petitioner sufficiently raised the issues of federal preemption and state infringement on Indian sovereignty in the lower courts to allow consideration on appeal. A review of the record discloses that petitioner raised the issue of preemption in the district court. Further, petitioner discussed the issue of preemption as developed in *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965), in which the Court held that Congress had so comprehensively legislated and regulated concerning trading by non-Indians on Indian reservations that no room remained for states to legislate on the subject. Petitioner also argued that the imposition of a gross receipts tax on a non-Indian performing services for Indians on Indian land would violate the disclaimer clause of the New Mexico Constitution. N.M.Const. Art. XXI, § 2. Petitioner argued that the governmental disclaimer of any proprietary interest in Indian lands precluded this tax. Petitioner also requested findings of fact and conclusions of law in support of its preemption and infringement contentions. On appeal, petitioner again argued both the preemption and infringement issues.

Even if there is some question that petitioner did not sufficiently raise these issues on appeal, as the Court of Appeals held, this Court can consider them if the test in *DesGeorges v. Grainger*, 76 N.M. 52, 412 P.2d 6 (1966), is met. *DesGeorges* recognized three exceptions to the general rule that questions of law not raised in the trial court cannot be considered on appeal.

These exceptions are: (1) jurisdictional questions; (2) questions of a general public nature affecting the interest of the state at large; and (3) questions that must be determined in order to protect the fundamental rights of one of the parties. The second exception applies in this case. As in *Des-Georges*, we have before us a case involving questions of a general public nature affecting the interest of the state at large. Therefore, the issues of preemption and infringement will be considered by this Court.

II. *WHETHER THE STATE OF NEW MEXICO MAY CONSTITUTIONALLY LEVY UPON PETITIONER, TIFFANY CONSTRUCTION COMPANY, INC., A NEW MEXICO GROSS RECEIPTS TAX—FEDERAL PREEMPTION AND STATE INFRINGEMENT ON INDIAN SOVEREIGNTY AND SELF-GOVERNMENT.*

The federal preemption doctrine was developed in *Warren Trading Post v. Arizona Tax Comm'n, supra.* In that case, the Supreme Court struck down a gross receipts tax levied by the State of Arizona against a federally licensed non-Indian trader on its income from trading with Navajo Reservation Indians. The United States Supreme Court held that comprehensive federal regulation of Indian traders preempted that area of taxation. We note that in *Warren Trading Post*, the operator on whom a state income tax was levied by the State of Arizona maintained his trading post on the Indian reservation, *and Congress had broadly occupied the field of trading with Indians on reservations by all-inclusive regulations and statutes.* Therein lies the distinction between *Warren Trading Post* and the present case.

White Mountain Apache Tribe, supra, is distinguishable from the present case. In that case, the State of Arizona attempted to impose a motor carrier license and use fuel taxes on a logging company which was harvesting and hauling timber for an Apache tribe on its reservation. The roads used by the company were built, maintained and policed exclusively by the federal government, and the state could not point to any specific benefit the logging company received from it. A comprehensive federal regulatory scheme governed the harvesting and sale of the tribal timber, requiring day-to-day supervision by the Bureau of Indian Affairs. The objectives of this comprehensive scheme included encouraging tribal self-government.

Central Machinery Co., supra, is also distinguishable. In that case, the State of Arizona attempted to impose a transaction privilege tax on an Arizona corporation's sale of farm machinery to an Indian tribal enterprise. The sale took place on the reservation, and was subject to federal regulation. Because the Indian Trader statutes, 25 U.S.C. §§ 261–264, created a comprehensive regulatory scheme concerning transactions of this nature, federal preemption applied and the state could not impose its tax.

The second alleged barrier to imposition of the New Mexico gross receipts tax is that a state cannot infringe on Indian sovereignty. In *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), a federally licensed non-Indian trader attempted to pursue a civil suit against two reservation Indians in an Arizona court. The Supreme Court held that the Arizona court was not free to exercise jurisdiction because that would undermine the authority of the tribal courts and infringe on the right of the reservation Indians to govern themselves. The test enunciated there was "whether the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220, 79 S.Ct. at 270.

In the case now before us, there is no infringement on the Indians' right of self-government. The incidence of the New Mexico gross receipts tax is upon a non-Indian contractor who has benefited from state governmental activities and services and is now being taxed. If there is any burden on the Navajo Indians, it is indirect. The gross receipts tax for services performed is solely upon Tiffany for construction of roads. No federal statute or federal regulations or Navajo Indian tribal law has been called to our attention which indicates

that this tax in any way interferes with the enjoyment of self-government by the Navajo Reservation Indians.

In the case now before us, we are concerned with the New Mexico gross receipts tax. Section 7–9–4, N.M.S.A. 1978 (Repl.Pamp.1980), provides that the gross receipts tax is imposed "[f]or the privilege of engaging in business . . . in New Mexico." The legal incidence of this tax is on the seller or contractor, whether the contract is with the federal government, *United States v. State of N.M.*, 581 F.2d 803 (10th Cir. 1978), or with an Indian tribe, *Mescalero Apache Tribe v. O'Chesky*, 625 F.2d 967 (10th Cir. 1980), *cert. denied,* 450 U.S. 959, 101 S.Ct. 1417, 67 L.Ed.2d 383 (1981). This tax can be constitutionally imposed on contractors doing work on Indian reservations in the state. *Mescalero Apache Tribe v. O'Chesky, supra; United States v. State of N.M., supra; G. M. Shupe, Inc. v. Bureau of Revenue*, 89 N.M. 265, 550 P.2d 277 (Ct.App.1976), *cert. denied*, 89 N.M. 321, 551 P.2d 1368 (1976).

We note that *Mescalero Apache Tribe* was decided by the Tenth Circuit Court of Appeals on June 5, 1980. *Mescalero Apache Tribe* involved substantially the same issue and the identical state gross receipts tax which are now before us. The United States Supreme Court denied certiorari in *Mescalero Apache Tribe* on February 24, 1981. The *Mescalero Apache Tribe* case is most squarely on point with our present case. There, the State sought to impose its gross receipts tax on several contractors who had done construction work for the Mescalero Apache Tribe on a resort complex and other projects on reservation lands. The court found that no problem of preemption was present because it was not an area long regulated by Congress. The court did not find an infringement of rights of tribal self-government. The Tenth Circuit Court of Appeals held that the incidence of the tax was directly upon the non-Indian building contractors and only indirectly imposed on the Tribe. Concerning incidence of the tax, the Court quoted from *United States v. State of N. M., supra*, with approval:

This court considered the same tax in *United States v. State of N. M.*, 581 F.2d 803 (10th Cir.), and decided that the sovereignty of the United States did not prevent the imposition of this tax on a contractor providing services to the federal government on federal lands. We there also necessarily considered the incidence of this tax.

> "Thus, the decisive issue in this case is whether the legal incidence the challenged New Mexico taxes falls on the United States, regardless of where the economic burden ultimately rests. . . .
>
> . . . .
>
> "The Act specifically makes the gross receipts tax applicable in New Mexico without reference to whether that business is with the United States and, with uniformly applied exceptions, assesses the tax upon anyone receiving compensation. There is no evidence that the tax interferes with the performance of federal functions. The tax is not directly imposed on the United States and, although the contractors pass the tax on to the United States they are not required by the Act to do so."

The Court then continued on its own:

> The incidence of this tax cannot be different here just because Indians are involved. The tax is the same, the incidence remains the same, and it is clearly on the contractor. The Indians here are in no different position than was the federal government in *United States v. State of N. M.*, 581 F.2d 803 (10th Cir.).

The Court then concluded:

> Thus we are left with the non-discriminatory state gross receipts or privilege tax the incidence of which is on the building contractors. The contractors benefitted from state governmental activities and services during the time they performed the services taxed. It is obvious that the indirect burden is on the one for whom services were performed as recognized in *United States v. State of N. M.*, 581 F.2d 803 (10th Cir.). This indirect burden was not enough there, and it is

> not enough here. The only measure here is whether this indirect burden constitutes an interference with the internal affairs of the Mescaleros. It is a non-discriminatory tax levied on all contractors. It is something everybody pays. The indirect burden is, as we have said above, something to be again passed on as the Tribe engages in its resort and other business. It is the indirect consequences of taxes *on others* which reaches the Mescaleros as to all other costs, levies and taxes on persons with whom they do business. If this is an interference, all such taxes and levies on those doing business with them, the suppliers of such persons, the wholesalers and the manufacturers are likewise an interference. All these taxes affect the *money* of the Mescaleros the same way, and the money available for other purposes.

Id. at 969, 971–72.

Because of the language and the incidence of the New Mexico Gross Receipts Tax Act and of the particular facts in this case, and of established case law in New Mexico and in the federal courts, including the Supreme Court of the United States, we are of the opinion that the State of New Mexico can constitutionally levy upon Tiffany Construction Company, Inc., the New Mexico gross receipts tax.

The judgment of the Court of Appeals of New Mexico is reversed insofar as it holds that Tiffany Construction Company, Inc., has no standing in the appeal. The original judgment of the Court of Appeals of New Mexico which holds that the New Mexico gross receipts tax may be levied on Tiffany Construction Company, Inc., is affirmed.

IT IS SO ORDERED.

EASLEY, C. J., and PAYNE and RIORDAN, JJ., concur.

SOSA, Senior Justice, dissents.

SOSA, Senior Justice, dissenting.

I respectfully dissent from the majority's opinion. The gross receipts tax imposed by the State upon Tiffany is impermissible because the field of road construction and maintenance on Indian Reservations has been preempted by the federal government and, even if it has not been completely preempted, this tax infringes upon the Navajo Tribe's right to govern themselves by entering into private contracts with foreign corporations and by building tribal roads. Consideration of the doctrines of preemption and infringement is clearly within the United States Supreme Court mandate that the present case be reconsidered in light of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980) and *Central Machinery Co. v. Arizona State Tax Com'n*, 448 U.S. 160, 100 S.Ct. 2592, 65 L.Ed.2d 684 (1980).

Whenever the State attempts to exercise regulatory jurisdiction over the activities of non-Indians on Indian lands, careful consideration of the rights and interests of the parties is mandated.

> This inquiry is not dependent on mechanical or absolute conceptions of State or tribal sovereignty, but has called for a particularized inquiry into the nature of the State, Federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

White Mountain Apache Tribe v. Bracker, supra, 100 S.Ct. at 2584.

Chief Justice Marshall's view of tribal sovereignty that the laws of a state can have no force within reservation boundaries, *Worcester v. Georgia*, 6 Pet. 515, 8 L.Ed. 483 (1832), has now given way to the notion that the tribes are in

> a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

White Mountain Apache, supra, 100 S.Ct. at 2583, quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173, 93 S.Ct. 1257, 1262, 36 L.Ed.2d 129 (1973) and *United States v. Kagama*, 118 U.S. 375, 381–82, 6 S.Ct. 1109, 1112–13, 30 L.Ed. 228 (1886).

The semi-independent status of the tribes, combined with the Commerce Clause, has given rise to two independent but related barriers to the assertion of state regulatory authority: the federal preemption doctrine and the doctrine of infringement upon the Indians' right to self-government.

The first such barrier is the federal preemption doctrine, which was developed in *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965). In that case, the Supreme Court struck down a gross receipts tax levied by the State of Arizona against a licensed non-Indian trader on his income from trading with Navajo Reservation Indians. The United States Supreme Court held that comprehensive federal regulation of Indian traders preempted that area of taxation. If the federal government has preempted the field, then *any* interest which the State may have in taxation of this corporation, no matter how compelling or enormous that interest may be, must give way to the federal interest. The incidence of the tax is also irrelevant under a preemption analysis.

The rule expressed in *Warren* has now been expanded by *Central Machinery Co. v. Arizona State Tax Com'n, supra*, where the United States Supreme Court found that the Arizona gross receipts tax could not be assessed against a non-licensed, non-Indian vendor who sold tractors on the Gila River Reservation in Arizona. The Court, in *Central Machinery*, held that the transaction was clearly covered by the Indian trader statutes, 25 U.S.C. §§ 261–264 (1977). The Court also seemed to be saying that preemption occurs under these statutes regardless of where the burden of the tax falls, even though it took care to point out that the economic burden of the taxes would fall upon the Indian tribe. 100 S.Ct. at 2595, n. 3.

In *White Mountain Apache Tribe, supra*, the Court held that Arizona could not assess its motor-carrier license (assessed on the basis of gross receipts) and use fuel taxes (assessed on the basis of road use) against non-Indian logging corporations operating solely on the Fort Apache Reservation. The federal government's regulation of the harvesting of Indian timber and of Bureau of Indian Affairs roads was found to be so comprehensive as to preempt state taxation. The majority opinion in the present case attempts to distinguish *White Mountain Apache* on the basis of a "comprehensive federal regulatory scheme govern[ing] the harvesting and sale of the tribal timber." The opinion, however, fails to recognize that the United States Supreme Court also found the Arizona tax preempted by the extensive federal regulations governing roads developed by the Bureau of Indian Affairs. 100 S.Ct. at 2586. This is involved in our case.

> The Secretary [of Interior] has also promulgated regulations governing the roads developed by the Bureau of Indian Affairs. 25 CFR Part 162. Bureau roads are open to "[f]ree public use." § 162.8. Their administration and maintenance are funded by the Federal Government, with contributions from the Indian tribes. §§ 162.6–162.6a.

Id. We have in the instant case the identical federal regulations detailing the construction of the road by Tiffany on the Navajo Reservation. The existence of these federal regulations indicates a strong federal interest in the area of road construction on tribal lands sufficient to justify preemption of the State's tax on Tiffany's gross receipts derived from this project. This is so despite the implication by the majority's opinion in this case that Congress has not specifically preempted this field. As was stated in *White Mountain Apache*, 100 S.Ct. at 2587, "a claim that [the State] may assess taxes on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement to the contrary . . . is simply not the law."

If the regulations are not so pervasive as to preempt the field completely, then we must balance the interests to determine whether the State's interest is sufficient to overcome the federal interest. We find that in this case it is not. The imposition of a gross receipts tax on a foreign corporation not licensed to do business in this State, whose employees traveled and worked exclusively within the Navajo Reservation

pursuant to a contract with BIA and the Tribe is not such an overriding State interest. Contrary to the majority opinion in this case, Tiffany receives very little benefit from the State when compared with the strong federal policy of recognizing Indian sovereignty.

> [T]his is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall. Nor have respondents been able to identify a legitimate regulatory interest served by the taxes they seek to impose. They refer to a general desire to raise revenue, but we are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations conducted solely on tribal and Bureau of Indian Affairs roads.

White Mountain Apache, supra, at 2587.

The second barrier to state regulatory authority is that a state cannot infringe upon Indian sovereignty. Thus in *Williams v. Lee,* 358 U.S. 217, 220, 79 S.Ct. 269, 270, 3 L.Ed.2d 251 (1959), the test became "whether the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them." Analysis of the infringement doctrine involves a balancing of the State's interest in taxation against the right of Indians to govern themselves. I disagree with the majority opinion in the present case that the gross receipts tax imposed upon this corporation does not infringe upon the Navajo Tribe's right to self-government. The majority failed to recognize the rather tenuous connection between the State's benefits and Tiffany. Had they done so, the State's interest would have been subordinated to the overwhelming interest of the Navajo Tribe in performing its governmental function of contracting for the construction of tribal roads. Tiffany was not a New Mexico corporation nor was it licensed to do business in this State. Its employees were Arizona residents who lived at the construction site on the Reservation during the construction of the road. All of the materials for the construction were purchased in Arizona or from the Tribe and were brought to the construction site by way of roads located entirely within the Reservation. The argument made by the majority that Tiffany benefitted from New Mexico's air pollution control regulations and its employees were protected generally by the laws of this State is superficial and ignores the fact that citizens from other states also enjoy the benefit of our clean air traveling over their states without being subject to our taxation. The benefits to Tiffany were incidental arising only from the mere fact that the portion of the Reservation containing the construction site happens to lie within the territorial boundaries of New Mexico. This insufficient nexus between Tiffany and the State cannot justify imposition of the tax.

I also disagree with the majority opinion which attempts to apply *Mescalero Apache Tribe v. O'Cheskey,* 625 F.2d 967 (10th Cir. 1980), *cert. denied,* —— U.S. ——, 101 S.Ct. 1417, 67 L.Ed.2d 383 (1981) to this case. The *Mescalero* case is easily distinguished from the case at hand. There the contractors for the Inn of the Mountain Gods located on the Mescalero Apache Reservation were New Mexico contractors licensed to do business in the State; they traveled onto the Reservation by way of State owned and maintained roads; their employees paid New Mexico income tax; the contractors paid New Mexico unemployment compensation and workmen's compensation taxes. These contractors truly received State benefits. None of these factors apply to Tiffany.

The majority here upholds the State tax because it is a tax which falls directly upon the contractor and only indirectly upon the Tribe. They cite *Mescalero* for the proposition that an indirect tax on Indians is permissible, but fail to recognize that the indirect tax in *Mescalero* could be "passed on as the Tribe engages in its resort and other business" (625 F.2d at 972), whereas the tax in this case cannot be passed on to anyone except the Tribe itself. This, then, is the key distinction between the *Mescalero* case and this case since the Tenth Circuit Court of Appeals repeatedly emphasized the fact that the tax could be passed on to the consumer. In addition, the construction of a resort complex is in the nature of a pro-

prietary project of the Tribe for tourist consumption, whereas a road is in the nature of a public or governmental function which provides an essential service to the Tribe.

Imposition of the gross receipts tax on the proceeds of the contract between Tiffany and BIA and the Navajo Tribe is unsupported by the law. Under the doctrines of federal preemption and infringement, we should reverse the Court of Appeals and remand this case to the district court for entry of judgment consistent with this opinion.

629 P.2d 1233

TIFFANY CONSTRUCTION CO., INC., Plaintiff-Appellant,

v.

BUREAU OF REVENUE, State of New Mexico, Defendant-Appellee.

No. 3777.

Court of Appeals of New Mexico.

Aug. 12, 1980.

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

Jeff Bingaman, Atty. Gen., Sarah Bennett, Gerald Richardson, Asst. Attys. Gen., Santa Fe, for defendant-appellee.

ORDER

LOPEZ, Judge.

This case is on remand from the United States Supreme Court with instructions to reconsider it in light of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 160, 100

S.Ct. 2599, 65 L.Ed.2d 665 (1980) and *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 100 S.Ct. 2599, 65 L.Ed.2d 684 (1980). The cases involved the attempted imposition of various state taxes on non-Indian entities which were doing business with Indian tribes. In *White Mountain Apache Tribe*, the state of Arizona wished to impose its motor carrier license tax and its use fuel tax on activities of a non-Indian logging company working entirely on the Fort Apache Reservation for a tribal company. *Central Machinery Co.* involved the attempted application of the Arizona gross receipts tax to the sale on a reservation of farm machinery to a tribe by a corporation that did not reside on the reservation and was not licensed to trade with Indians. Both cases were decided on the basis of federal preemption. The issue of preemption was not, however, properly raised in this court on appeal.

It is well settled that on appeal, any errors claimed must be specifically briefed and argued. *Alfred v.Anderson*, 86 N.M. 227, 522 P.2d 79 (1974); *see, Petty v. Williams*, 71 N.M. 338, 378 P.2d 376 (1963). Tiffany never argued that federal laws and regulations had preempted the area of road building on an Indian reservation, and that, consequently, the State was powerless to tax a non-Indian entity engaged in road improvement there. On the contrary, Tiffany suggested that the doctrine of federal preemption did not apply to the case at bar. In its Brief-In-Chief, Tiffany said only the following concerning preemption:

> The federal preemption doctrine developed in the case of *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965). In that case the Supreme Court struck down a gross receipts tax on the income of a company which operated a trading post on the Navajo Reservation. *That case differs from the present case in that Congress has fully legislated and regulated concerning trading by non-Indians on Reservations and has thus preempted that entire area.* (Emphasis added.)

Tiffany's Brief-In-Chief in the New Mexico Court of Appeals, pp. 17–18. In the District Court, Tiffany failed to submit a finding of fact or conclusion of law regarding preemption. Even its Petition for Certiorari to the United States Supreme Court did not mention that issue. Not having been raised before, the issue of federal preemption cannot be considered by us now.

A state tax would also be invalid if it infringed on the Indians' right to make their own laws and be ruled by them. *See, White Mountain Apache Tribe; Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). In its Petition for Certiorari to the United States Supreme Court, Tiffany presented the question of whether the New Mexico taxation on Non-Indians, doing work to be financed by Indians, constitutes State infringement on the right of reservation Indians to self-government.

Tiffany's requested conclusions in the district court also presented the infringement issue. The district court denied these requested conclusions. The district court ruled that the imposition of the tax did not violate due process. In its appeal to this Court, Tiffany did *not* raise an infringement issue. Its claim, page 22 of Tiffany's Brief-In-Chief, was:

> Tiffany Construction Co. maintains that it has no 'nexus' or minimum contacts with the State of New Mexico for the purpose of taxation, and that it received no benefits entitling the state to levy its gross receipts tax upon it. Thus, the imposition of a gross receipts tax by the State of New Mexico upon Tiffany Construction Co. is a taking of its property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution.

The above claim is repeated at page 30 of Tiffany's Brief-In-Chief.

No infringement issue was presented for decision in this Court. Inasmuch as Tiffany's petition for certiorari to the United States Supreme Court raised questions as to the candor of Tiffany in identifying infringement as an issue, we point out that Tiffany's motion in this Court is based entirely on a theory of preemption. We have pointed out that Tiffany raised no preemption claim in its appeal to this court.

Having reconsidered our prior decision pursuant to instructions of the United States Supreme Court and having determined that reconsideration was directed to an issue not raised by Tiffany in its appeal to this Court, we reinstate our prior decision.

IT IS SO ORDERED.

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

629 P.2d 1235

Jose GARCIA, Plaintiff-Appellant,

v.

CO-CON, INC., and Mountain States Mutual, Defendants-Appellees.

No. 4548.

Court of Appeals of New Mexico.

Dec. 4, 1980.

Anthony F. Avallone, Las Cruces, for plaintiff-appellant.

William W. Bivins, Bivins, Weinbrenner, Regan, Richards & Paulowsky, P. A., Las Cruces, for defendants-appellees.

OPINION

SUTIN, Judge.

Plaintiff appeals from a judgment in a workmen's compensation case that plaintiff take nothing by his complaint and that it be dismissed with prejudice. We remand.

The trial court found:

Plaintiff sustained an accidental injury while in the scope and course of his employment on August 16, 1977, and, as a result, plaintiff sustained bilateral inguinal herniae which resulted in temporary total disability. It was surgically repaired and plaintiff completely recovered from his disability. Defendant insurer paid all plaintiff's medical, surgical and weekly benefits. Plaintiff suffers from osteoarthritis which antedated the date of the accident herein and plaintiff's disability, if any, as of the date of trial was not the direct and proximate result of the accident of August 16, 1977.

Defendants make much reference to the failure of plaintiff to challenge any of the court's findings. We find that plaintiff sufficiently and specifically challenged three of the pertinent findings.

Plaintiff claims that Dr. Cornish's deposition should not have been admitted in evidence without his signature, absent a stipulation waiving it, as provided for in Rule 30(E) of the Rules of Civil Procedure.

The deposition of Dr. Cornish was taken on November 15, 1978. Plaintiff was represented by Patrick H. Kennedy, a friend of the attorney of record, and defendant was represented by William W. Bivins. Mr. Bivins announced:

> For the record, this deposition is being taken according to the usual stipulations and the doctor waives signature.

The deposition was then taken without any objections. Mr. Kennedy participated in the examination of Dr. Cornish. The deposition was filed of record December 29, 1978, and trial was held May 18, 1979. At trial, defendant offered in evidence the deposition of Dr. Cornish. Plaintiff objected because no stipulation was entered into that Dr. Cornish's signature was waived by the parties. The trial court ruled that plaintiff should have alerted defendant if he intended to object to the lack of waiver. The deposition was admitted in evidence.

Rule 30(E) of the Rules of Civil Procedure reads in pertinent part:

> * * * When the testimony is fully transcribed the deposition *shall* be submitted to the witness for examination and *shall* be read to or by him, unless such examination and reading are waived by the witness and the parties. * * * The deposition *shall* then be signed by the witness, *unless the parties by stipulation waive the signing* * * *. [Emphasis added.]

Rule 30(E) should be read in conjunction with Rule 32(C)(4) which provides:

> * * * Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, *signed*, certified, sealed, indorsed, transmitted, filed, *or otherwise dealt with by the officer under Rules 30 and 31 are waived* unless a motion to suppress the deposition or some part thereof is made with reasonable promptness *after such defect is, or with due diligence might have been ascertained.* [Emphasis added.]

There are two methods under which a waiver of signature by the parties can be accomplished: (1) by stipulation of the parties that signature is waived; (2) absent a stipulation, by failure to file a motion to suppress with reasonable promptness after the lack of signature is, or with due diligence, might have been ascertained.

Mere physical presence alone of an opposing lawyer who cross-examined the witnesses does not constitute a waiver of signature. *Crabtree v. Measday*, 85 N.M. 20, 508 P.2d 1317 (Ct.App.1973); *Bernstein v. Brenner*, 51 F.R.D. 9 (D.C.1970). Nevertheless, we are confronted with the silence of Kennedy when Bivins announced that "the doctor waives signature." Does silence constitute a waiver by stipulation of the doctor's signature?

A stipulation is an agreement between lawyers respecting business before the court, and, like any other agreement or contract, it is essential that the parties or their lawyers agree to its terms. *McBain v. Santa Clara Savings & Loan Association*, 241 Cal.App.2d 829, 51 Cal.Rptr. 78 (1966); *First Sec. Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977); *First Nat. Bank In Dallas v. Kinabrew*, 589 S.W.2d 137 (Tex. Civ.App.1979). "Why require a stipulation unless some valuable right is being waived or given up?" *Bourne v. Atchison, Topeka and Santa Fe Railway Co.*, 209 Kan. 511, 497 P.2d 110, 114 (1972).

Silence amounts to assent when one lawyer says "it is stipulated and agreed," and the opposing lawyer remains silent. *Bloom v. Graff*, 191 Md. 733, 63 A.2d 313 (1949). McBain, *supra*, said:

> * * * However, *assent to a stipulation* need not be made in a formal manner and under the particular circumstances of a case, where a party's counsel remains silent and *makes no objection to the stipulation*, his passive acquiescence may con-

stitute an assent to it. * * * [Emphasis added.] [51 Cal.Rptr. 84.]

In the instant case, Bivins did *not* say:

"It is stipulated and agreed that the doctor waives signature."

Silence on the part of Kennedy did not constitute an assent by plaintiff to a stipulation.

The remaining question is:

Did plaintiff's lawyer fail to file a motion to suppress with reasonable promptness after such absent signature of Dr. Cornish is, or with due diligence might have been ascertained?

If plaintiff's lawyer did fail to so file a motion in time within the meaning of Rule 32(C)(4), the deposition was properly admitted in evidence. If plaintiff's lawyer's objections to Dr. Cornish's deposition use at trial were made with reasonable promptness and due diligence within the meaning of Rule 32(C)(4), *supra*, the deposition of Dr. Cornish was not admissible in evidence. *Crabtree, supra.* The admission or non-admission of Dr. Cornish's deposition is essential to a determination of this case.

This cause is remanded to the district court to hold a hearing and determine the following facts:

(1) On what date did plaintiff's attorney first know that Dr. Cornish's deposition was not signed?

(2) On what date could plaintiff's lawyer, with due diligence, have ascertained that the deposition was not signed by Dr. Cornish?

(3) Did plaintiff's lawyer fail to file a motion to suppress with reasonable promptness?

The court reporter shall then transcribe the testimony, with an original and two copies thereof, and include therein the decision of the district court and certify the record to this Court with reasonable promptness.

LOPEZ, J., concurs.

ANDREWS, J., dissents.

ANDREWS, Judge (dissenting).

I dissent. I disagree with the assertion that Mr. Bivins would have had to actually say, "it is stipulated and agreed that the doctor waives signature." Both parties were represented at the time the deposition was taken, and both representatives participated in the taking of the deposition after Mr. Bivins stated, "[t]hat this deposition is being taken according to the usual stipulations and the doctor waives signature."

This Court should not be willing to allow a participant, one who had the opportunity to take part in the deposition, to try to avoid its effects because of a problem in wording. The decision in *McBain v. Santa Clara Savings and Loan Association*, 241 Cal.App.2d 829, 51 Cal.Rptr. 78 (1966), does not support the proposition for which it is offered. Quite the contrary, the underlying rationale of that decision is that formality is unimportant in the face of apparent acceptance of the stipulations.

If the representative did not understand the phrase, "the usual stipulations" to be equivalent to "it is stipulated and agreed that the doctor waives his signature," then what did he understand the phrase to mean? He certainly acquiesced to that statement—thus, he is bound by that acquiescence. Logically, the only thing he could have been agreeing to was the waiver. I would hold him to that agreement and would decide the case on its merits.

629 P.2d 1237

Jose GARCIA, Plaintiff-Appellant,

v.

CO-CON, INC., and Mountain States Mutual, Defendants-Appellees.

No. 4548.

Court of Appeals of New Mexico.

May 26, 1981.

OPINION

SUTIN, Judge.

Plaintiff appeals from a judgment in a workmen's compensation case that plaintiff take nothing by his complaint and that it be dismissed with prejudice. We affirm.

The trial court found:

Plaintiff sustained an accidental injury while in the scope and course of his employment on August 16, 1977, and, as a result, plaintiff sustained bilateral inguinal herniae which resulted in temporary total disability. It was surgically repaired and plaintiff completely recovered from his disability. Defendant insurer paid all plaintiff's medical, surgical and weekly benefits. Plaintiff suffers from osteoarthritis which antedated the date of the accident herein and plaintiff's disability, if any, as of the date of trial was not the direct and proximate result of the accident of August 16, 1977.

Defendants made much reference to the failure of plaintiff to challenge any of the court's findings. We find that plaintiff sufficiently and specifically challenged three of the pertinent findings.

Plaintiff raises four points in this appeal, each of which will be discussed *seriatim.*

A. *Payment of disability benefits for three months after the accident was an admission of disability during that time, but not at the time of trial.*

Plaintiff was employed by Co-Con as a cement finisher. On August 16, 1977, plaintiff suffered an injury when a cement finishing machine tipped over on him. The employer sent plaintiff to Dr. P. G. Cornish III, a medical doctor in Albuquerque who specialized in general surgery. Dr. Cornish examined plaintiff on August 27, 1977 and found that plaintiff had a small hernia on the right side. There were no other complaints. Dr. Cornish approved his return to work and saw plaintiff again on September 6, 1977. An examination then showed that plaintiff had hernias on both sides and recommended repair at some point. No other complaints were made. On September 10,

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Anthony F. Avallone, Las Cruces, for plaintiff-appellant.

William W. Bivins, Bivins, Weinbrenner, Regan, Richards & Paulowsky, P. A., Las Cruces, for defendants-appellees.

1977, plaintiff advised Dr. Cornish that he wanted the hernias repaired in Las Cruces where he lived and Dr. Cornish referred plaintiff to a Las Cruces surgeon.

On September 15, 1977 plaintiff was admitted to the Memorial General Hospital in Las Cruces for surgical correction of the hernias which correction was performed the next day. The post-operative course was essentially uncomplicated and plaintiff was discharged on September 21, 1977, to be followed as an outpatient. Plaintiff remained an outpatient until the end of November 25, 1977. Thereafter, plaintiff did not return to work on the order of a third doctor. Plaintiff claimed disability thereafter.

Defendants furnished medical attention and paid workmen's compensation weekly benefits until November 23, 1977, during the healing period.

Plaintiff had developed osteoarthritis in the spine over a ten year period. Medical testimony was presented that plaintiff's back complaints were not related to his accidental injury of August 16, 1977; that post-operatively, it was distinctly unusual six weeks hence for someone to be unable to assume normal activities including heavy labor in an industrial setting. Both of the hernias had healed solidly. Plaintiff was able to return to work, including heavy labor, on November 23, 1977.

In the face of this strong and convincing evidence which supported the trial court's findings, plaintiff claims that the payment of benefits during his healing period was an admission that the disability was a direct and natural result of the workman's accident. If, by chance, plaintiff refers to disability subsequent to post-operative care, or at the time of trial, plaintiff was mistaken. This point, inadequately presented, is without any semblance of merit.

B. *Dr. Cornish's deposition was properly admitted in evidence.*

The deposition of Dr. Cornish was taken on November 15, 1978. Plaintiff was represented by Patrick H. Kennedy, a friend of the attorney of record, and defendant was represented by William W. Bivins. Mr. Bivins announced:

> For the record, this deposition is being taken according to the usual stipulations and the doctor waives signature.

The deposition was then taken without any objections. Mr. Kennedy participated in the examination of Dr. Cornish. The deposition was filed of record December 29, 1978, and trial was held May 18, 1979. At trial, defendant offered in evidence the deposition of Dr. Cornish. Plaintiff objected because no stipulation was entered into that Dr. Cornish's signature was waived by the parties. The trial court ruled that plaintiff should have alerted defendant if he intended to object to the lack of waiver. The deposition was admitted in evidence.

Rule 30(E) of the Rules of Civil Procedure reads in pertinent part:

> * * * When the testimony is fully transcribed the deposition *shall* be submitted to the witness for examination and *shall* be read to or by him, unless such examination and reading are waived by the witness and the parties. * * * The deposition *shall* then be signed by the witness, *unless the parties by stipulation waive the signing* * * *. [Emphasis added.]

Rule 30(E) should be read in conjunction with Rule 32(C)(4) which provides:

> * * * Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, *or otherwise dealt with by the officer under Rules 30 and 31 are waived* unless a motion to suppress the deposition or some part thereof is made with reasonable promptness *after such defect is, or with due diligence might have been ascertained.* [Emphasis added.]

There are two methods under which a waiver of signature by the parties can be accomplished: (1) by stipulation of the parties; (2) absent a stipulation, by failure to file a motion to suppress with reasonable promptness after the lack of signature is, or with due diligence, might have been ascertained.

(1) *There was no stipulation of the parties.*

Mere physical presence alone of an opposing lawyer who cross-examined the witnesses does not constitute a waiver of signature. *Crabtree v. Measday*, 85 N.M. 20, 508 P.2d 1317 (Ct.App.1973); *Bernstein v. Brenner*, 51 F.R.D. 9 (D.C.1970). Nevertheless, we are confronted with the silence of Kennedy when Bivins announced that "the doctor waives signature." Does silence constitute a waiver by stipulation of the doctor's signature?

A stipulation is an agreement between lawyers respecting business before the court, and, like any other agreement or contract, it is essential that the parties or their lawyers agree to its terms. *McBain v. Santa Clara Savings & Loan Association*, 241 Cal.App.2d 829, 51 Cal.Rptr. 78 (1966); *First Sec. Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977); *First Nat. Bank In Dallas v. Kinabrew*, 589 S.W.2d 137 (Tex. Civ.App.1979). "Why require a stipulation unless some valuable right is being waived or given up?" *Bourne v. Atchison, Topeka and Santa Fe Railway Co.*, 209 Kan. 511, 497 P.2d 110, 114 (1972).

Silence amounts to assent when one lawyer says "it is stipulated and agreed" and the opposing lawyer remains silent. *Bloom v. Graff*, 191 Md. 733, 63 A.2d 313 (1949). McBain, *supra*, said:

> * * * However, *assent to a stipulation* need not be made in a formal manner and under the particular circumstances of a case, where a party's counsel remains silent and *makes no objection to the stipulation*, his passive acquiescence may constitute an assent to it. * * * [Emphasis added.] [51 Cal.Rptr. 84.]

In the instant case, Bivins did *not* say:

> "It is stipulated and agreed that the doctor waives signature."

Silence on the part of Kennedy did not constitute an assent by plaintiff to a stipulation.

(2) *A motion to suppress was not filed by plaintiff.*

The remaining question is:

> Did plaintiff's lawyer fail to file a motion to suppress with reasonable promptness after such absent signature of Dr. Cornish is, or with due diligence might have been ascertained?

If plaintiff's lawyer did fail to so file a motion in time within the meaning of Rule 32(C)(4), the lack of signature was waived and the deposition was properly admitted in evidence. If plaintiff's lawyer's objections to Dr. Cornish's deposition use at trial were made with reasonable promptness and due diligence within the meaning of Rule 32(C)(4), *supra*, the deposition of Dr. Cornish was not admissible in evidence. *Crabtree, supra.*

To determine the answer to this question, this case was remanded to the district court for hearing to determine the following facts:

(1) On what date did plaintiff's attorney first know that Dr. Cornish's deposition was not signed?

(2) On what date could plaintiff's lawyer, with due diligence, have ascertained that the deposition was not signed by Dr. Cornish?

(3) Did plaintiff's lawyer fail to file a motion to suppress with reasonable promptness?

Prior to the hearing, defendant submitted a request for admission of facts. Avallone, plaintiff's attorney, admitted that Kennedy attended the Cornish deposition as plaintiff's attorney and that the deposition was delivered to Kennedy's office in Albuquerque on December 28, 1978. Avallone denied that Kennedy had access to the Cornish deposition since December 28, 1978; that Kennedy forwarded the copy received, a photocopy not signed by the court reporter, to Avallone in late December, 1978 or January, 1979; that the original deposition remained sealed until the day of trial and there was no intimation from defendants that the deposition would be used until defendant offered it at trial; that until the Cornish deposition was offered, there was no issue concerning it and there was no reason to inquire about it. Avallone also

denied that, at the deposition, the lawyers present and Dr. Cornish agreed to waiver of signature.

At the hearing, Avallone was asked these questions by the court to which he made these answers, omitting comments:

Q. What day did you or Mr. Kennedy first know that Dr. Cornish's deposition was not signed?

A. [T]here's a note from Pat Kennedy. * * * He wrote to me and he said the deposition didn't turn up much of anything. * * * I can honestly say that I wasn't concerned and it first became a conscious thing as far as I'm concerned a day or two before the trial when I was preparing for it * * *.

Q. On what date did Plaintiff's lawyer, with due diligence, ascertain that the deposition was not signed by Dr. Cornish?

A. I wasn't concerned, and consequently, when they first alerted me that they were going to offer this as evidence during the trial, I promptly alerted the court to the problem that the want of a stipulation, in the absence of a signature, caused the defendants—

The trial court found that plaintiff's attorney first knew that the deposition of Dr. Cornish was not signed a day or two before trial on May 18, 1979; that plaintiff's lawyer, Kennedy, with due diligence could have ascertained that the deposition was not signed by Dr. Cornish on or about the 28th of December, 1978, and that plaintiff's lawyers failed to file a motion to suppress with reasonable promptness. The court's findings are precise and correct.

Plaintiff relies upon a rule that he can sit idly by until defendant indicates that the deposition will be offered in evidence because it is defendant's deposition, not plaintiff's and plaintiff is non-interested; that at this point, plaintiff must file a motion to suppress or object to its admission; that this rule of suppression becomes applicable when the defect, the lack of signature is, or with due diligence cannot be, ascertained.

Plaintiff not only had ample time to ascertain the absence of the doctor's signature, plaintiff had actual knowledge within time to file a motion to suppress the deposition but failed to do so. Plaintiff waived the error. *Kawietzke v. Rarich*, 198 F.Supp. 841 (D.C.Pa.1961).

Mound Rose Cornice & S. M. Wks. v. H. Kalicak Const. Co., 454 S.W.2d 603 (Mo.App. 1970) held that when plaintiff had notified defendant by motion for summary judgment that plaintiff was relying on defendant's deposition, and defendant knew the deposition was unsigned but failed to invoke the rule requiring depositions to be signed, defendants waived the rule.

Crabtree, supra, relied on by plaintiff was a case in which signature had not been waived but plaintiff did not buy a copy of the doctor's deposition. At a pretrial conference on the day before trial, the envelope that contained the doctor's deposition was opened, and that night it was learned that the deposition was not signed. At commencement of trial, when defendant announced that the doctor's deposition would be read, plaintiff immediately objected. The objection was overruled and the deposition was read in evidence. In reversing, the court said:

> The objections made to the use of Dr. Breck's deposition were made with reasonable promptness and due diligence within the meaning of Rule 32(d), supra. Plaintiff had no duty before trial to take steps to open the deposition and inspect it. [Citations omitted.]

In *Crabtree*, the defect was discovered the night before trial. The next morning at the commencement of trial, immediately after defendant announced that the doctor's deposition would be read, Crabtree objected.

In the instant case, at the opening of trial, the court called for witnesses. Defendant announced that it was calling Dr. Cornish by deposition. Plaintiff made no objection. During the presentation of the defense, defendant offered the Cornish deposition and plaintiff objected for the first time. The failure to object at the com-

mencement of the trial constituted a waiver of plaintiff's rights. *Valdez v. United States*, 326 F.2d 598 (9th Cir. 1963).

Rules 30(E) and 32(C)(4) were designed to put the burden on the party who takes the deposition to comply with the rules to avoid problems of this nature. If the party who has the burden fails to comply with the rules, the duty shifts to the opposing party to comply with the rules in order to protect his rights. Lawyers should not use these rules lackadaisically, especially so when use of the deposition at trial is an essential ingredient.

Plaintiff failed to file a motion to suppress or to object in time to the admission of Dr. Cornish's deposition. The lack of signature was waived and Dr. Cornish's deposition was properly admitted in evidence.

Plaintiff raised two additional points: (1) the workman met his burden on proving his total disability and defendants chose not to address the issue; and (2) the hypothetical questions fail because of lack of proof of fact premises and also because they are not material. These points have been reviewed and merit no discussion.

The trial court's findings were sustained by strong and convincing evidence. Reliance upon minor episodes of the trial lose their significance in a search for relief in this appeal.

Affirmed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

ANDREWS, J., concurs specially.

ANDREWS, Judge (specially concurring).

I concur with the *result* reached in this opinion. I suggest that there is authority for the proposition that the voluntary payment of benefits over a period of time is not an admission by the employer that the disability was a direct and natural result of the workman's accident. *Romero v. S. S. Kresge Co.*, 95 N.M. 484, 623 P.2d 998 (Ct. App.1981), so holds. Judge Sutin's dissent in that case and his opinion in *Perea v. Gorby*, 94 N.M. 325, 610 P.2d 221 (Ct.App. 1980), are to the contrary.

629 P.2d 1242

STATE of New Mexico, Plaintiff-Appellant,

v.

Pete CHAVEZ, Defendant-Appellee.

No. 5013.

Court of Appeals of New Mexico.

May 12, 1981.

Certiorari Denied June 23, 1981.

Jeff Bingaman, Atty. Gen., Charles F. Noble, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

John B. Bigelow, Chief Public Defender, Andrea L. Smith, Asst. Appellate Defender, Santa Fe, for defendant-appellee.

OPINION

HENDLEY, Judge.

The defendant was charged with driving while intoxicated contrary to § 66–8–102, N.M.S.A.1978 (Supp.1980). The State appeals the trial court's granting of defendant's motion to exclude any evidence of defendant's refusal to undergo a blood alcohol test at the time of his arrest. We affirm.

We decide only the issue of relevancy of the refusal in light of our case law and statutes. The State in its Reply Brief states: "It is apparent from the issue given in the Docketing Statement that the trial judge refused to admit the refusal into evidence because he thought it to be testimonial evidence covered by the Fifth Amendment." However, in its Brief in Chief, the State's argument did not rest merely with the absence of a constitutional prohibition against the admission into evidence of one's refusal to take a blood alcohol test. The State briefed a broader spectrum:

> Taking these cases as a whole, it becomes manifest that there is no constitutional prohibition against admitting a refusal into evidence. The closer question is whether there is some statutory reason not to allow the refusal into evidence. The State submits that because the Legislature has not prohibited the admissibility of a refusal, there is absolutely no reason why it should not be admitted.

With the issue thus framed, we do not address the claim by the State that the Legislature has provided a penalty for refusal as relevant to show that a person does not have the right of refusal. *See*, §§ 66–8–105, *et seq.*, N.M.S.A.1978 (Supp.1980). This contention does not address the individual's duty, nor does it shed light on the relevance of one's refusal in light of the entire statutory scheme in New Mexico. Nor are we concerned with the assertion that the refusal is relevant as circumstantial evidence of the suspect's belief that the results of the examination would have been incriminating. *See*, Note, Constitutional Limitations on the Taking of Body Evidence, 78 Yale L.J. 1074 (1969). Such a pronouncement merely invites the contrary view that the admission of one's refusal is misleading, taking the jury too far afield because there might be independent reasons—for example, cost, religious scruples, distrust of the technicians, distrust of the results—motivating one's refusal. *See also*, the cases pro and con at Annotation, 87 A.L.R.2d 370 (1963).

Our decision in *State v. Steele*, 93 N.M. 470, 601 P.2d 440 (Ct.App.1979) was based on prior law. In *State v. Steele*, when the defendant refused to submit to a blood test the officers obtained a valid search warrant and extracted blood samples. This Court held that the Legislature gave the defendant more protection than was afforded by the Constitution and that, after his refusal, the result of the blood alcohol test taken by means of a valid search warrant was properly excluded. Thereafter, the Legislature amended the statute. However, the amendment only permits the State, after a refusal, to obtain a warrant upon a written affidavit showing probable cause.

In light of this history, we find no error in the trial court's exclusion of the defendant's refusal to take the blood alcohol test. Under § 66–8–111, N.M.S.A.1978 (Supp. 1980), the fact of the defendant's refusal would be no more a relevant circumstance to establish consciousness of guilt than the fact of the arresting officer's refraining from obtaining a warrant indicates that he believed that the defendant was not intoxicated. *See, State v. Barela*, 91 N.M. 634, 578 P.2d 335 (Ct.App.1978). Under the facts of this case, we find no abuse of discretion in the trial court's exclusion of defendant's refusal. It was simply not relevant evidence. N.M.R.Evid. 401 and 403, N.M.S.A.1978.

Affirmed.

IT IS SO ORDERED.

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

630 P.2d 267

Carrolyn L. GEDEON, now known as Carrie L. Rose, Petitioner-Appellee,

v.

William J. GEDEON, Respondent-Appellant.

No. 12937.

Supreme Court of New Mexico.

July 1, 1981.

Willard F. Kitts, Elizabeth E. Whitefield, Albuquerque, for respondent-appellant.

Robert D. Levy, Albuquerque, for petitioner-appellee.

OPINION

EASLEY, Chief Justice.

The former Carrolyn L. Gedeon, now known as Carrie Rose (Rose), sued to modify the child custody provisions of a Colorado divorce decree. William J. Gedeon was subsequently found in contempt of a Bernalillo County court order placing custody of the children in Rose. Gedeon appeals from several court orders reducing contempt fines to judgment, and from the denial of a motion for relief from judgment under Rule 60(b), N.M.R. Civ.P., N.M.S.A. 1978 (Repl.Pamp. 1980). We affirm.

The issues presented are: (1) whether the fine imposed by the trial court for contempt of court was excessive and unreasonable; and (2) whether Gedeon was entitled to relief under Rule 60(b).

The Colorado decree gave custody of a daughter to Rose and custody of a son to Gedeon. Rose brought suit in New Mexico to obtain custody of both children, based upon an alleged change of circumstances involving newly discovered evidence of sexual molestation of the children by Gedeon, and other alleged misconduct. The trial court issued a temporary restraining order granting temporary custody of both children to Rose.

The parties and their attorneys agreed on a settlement of the dispute. A settlement order was filed on December 13, 1978. The settlement order was signed by the attorneys, but not by the parties.

Pursuant to the terms of the settlement agreement, Rose returned the children to Gedeon for visitation over the 1978 Christmas holidays, but he failed to return the children to her on the date stipulated. The court issued an order to show cause why he should not be held in contempt.

Gedeon did not personally appear at the contempt hearing, but submitted his affidavit repudiating the agreement of the par-

ties entered December 13 on the ground that his attorney, David Kelsey, lacked authority to agree to that order. David Kelsey testified at length at the hearing, and his testimony was further corroborated by one of his law partners. Kelsey testified that Gedeon had agreed to the terms of the agreement and had authorized Kelsey to enter it on his behalf.

The trial court made findings of fact that David Kelsey had full authority to act for Gedeon in the matter; that Gedeon was present and participated in the negotiations which resulted in the stipulated order; that Gedeon had agreed to the material provisions of the order; and that Kelsey had the express and implied authorization of Gedeon to approve entry of the stipulated order. The court found Gedeon in contempt of the December 13 order and imposed a fine of $500 for each day until such time as he complied with the order by returning the children to their mother. Additionally, the contempt order provided that if Gedeon purged himself of contempt by returning both children, he could thereafter apply for a substantial reduction of any fines incurred.

Gedeon did not appeal from the contempt order, nor did he comply with its mandate. In May, 1979, he returned the daughter to Rose, but it appears from the record that he has never returned the son. Thus, since the January, 1979 contempt order, contempt fines have been accruing at the rate of $500 per day. From time to time the trial court has entered an order reducing portions of the accrued fines to judgment. These orders have provided that the largest portion of the contempt fines are subject to review, if and when Gedeon purges himself of contempt. Gedeon has appealed from several of these orders. The amount in controversy on this appeal, which has been reduced to final, non-reviewable judgment, is approximately $23,000.

In October, 1979, Gedeon filed a motion for relief from the contempt order and the stipulated order of December 13, 1978, under Rule 60(b). Gedeon alleged that these orders were void on the ground of mistake. Gedeon again asserted that no agreement had been reached between the parties during their negotiations and that his attorney, David Kelsey, lacked authority to enter the stipulated order on his behalf.

Gedeon also requested that the court allow his deposition to be taken in Colorado, since he might be arrested on an outstanding bench warrant, issued for his contempt of court, if he entered New Mexico to appear personally. The trial court denied this request but issued an order allowing him to appear without first purging himself of contempt. The order also provided that if he elected not to appear, then he should submit affidavits of potential witnesses as to what they know and can testify to concerning the authority of David Kelsey.

Gedeon elected not to appear personally and, instead, submitted the affidavits of his current wife and his Colorado attorney. The trial court found these affidavits inadequate to warrant a rehearing, and the Rule 60(b) motion was denied. Gedeon also appeals this order denying his Rule 60(b) motion.

1. *Whether the Contempt Fines Are Excessive.*

The fines imposed upon Gedeon were clearly intended to be coercive in nature. The fines were to cease upon compliance with the court's order. Furthermore, the total amount of fines imposed was subject to review and adjustment by the court if and when Gedeon purged himself of contempt. The contempt order was therefore in the nature of civil contempt. *See International Min. & C. Corp. v. Local 177, U.S. & A.P.W.*, 74 N.M. 195, 392 P.2d 343 (1964); *State v. Greenwood*, 63 N.M. 156, 315 P.2d 223 (1957); *Jencks v. Goforth*, 57 N.M. 627, 261 P.2d 655 (1953).

It has been stated that in civil contempt proceedings a court should never exercise more than "the least possible power adequate to the end proposed," in order to protect against the possibility of "an intemperate sentence on the part of a judge, momentarily outraged by the conduct of a

contemnor." *Jencks v. Goforth, supra* at 638, 261 P.2d at 662. The amount of the penalty for contempt rests within the discretion of the trial judge, absent an abuse of that discretion. *See State v. Our Chapel of Memories of New Mexico, Inc.*, 74 N.M. 201, 392 P.2d 347 (1964).

We find no abuse of discretion here. The gravity of the offense was serious, and the trial court may have felt a certain urgency in recovering the children from Gedeon, since he was being accused in this proceeding of sexual molestation of the children and other acts of misconduct towards them. The record shows that Gedeon was employed as an airline pilot with substantial income. Under these circumstances, we cannot say that the court abused its discretion in imposing a stiff penalty for continued non-compliance.

Though Gedeon contends the fines are excessive, they certainly do not exceed that "adequate to the end proposed." Indeed, the fines in this case have been inadequate for the end proposed. There is some irony in Gedeon's argument, considering that despite the heavy penalties, he continues to flaunt the authority of the court. As this Court stated in *State v. Our Chapel of Memories of New Mexico, Inc., supra* at 204, 392 P.2d at 349:

> The orderly process of law demands that respect and compliance be given to orders issued by courts possessed of jurisdiction of the persons and of the subject matter and one who defies the order of a court having jurisdiction does so at his peril.

The trial court is accorded a large discretion in the matter of imposing penalties for contempt. *See id.* We find no abuse of that discretion here.

2. *Denial of Rule 60(b) Motion.*

It is well established that a motion for relief from a judgment or order under Rule 60(b) is not intended to extend the time for taking an appeal and cannot be used as a substitute for an appeal. *Barker v. Barker*, 93 N.M. 198, 598 P.2d 1158 (1979); *Pettet v. Reynolds*, 68 N.M. 33, 357 P.2d 849 (1960). The grant or denial of the motion is discretionary with the trial court. *Perez v. Perez*, 75 N.M. 656, 409 P.2d 804 (1966).

In this case, Gedeon never appealed from the stipulated order granting custody to his former wife, or from the order finding that the stipulated order was entered with his consent and on his behalf, or from the order finding him in contempt of court. Despite the heavy fines imposed, Gedeon simply ignored the court and refused, and continues to refuse to comply with the court orders. Now, long after the time for appeal from those orders has passed, Gedeon brings a 60(b) motion challenging those orders. He raises nothing new, but merely reasserts a contention which was previously found against him by the court and from which he did not appeal. His 60(b) motion is nothing more than an attempt to appeal from rulings for which the time for appeal has long since passed. He shall not be heard to complain now of rulings which he found it convenient for so long to simply ignore.

Affirmed.

IT IS SO ORDERED.

FEDERICI and RIORDAN, JJ., concur.

630 P.2d 269

STATE of New Mexico,
Plaintiff-Appellee,

v.

Mark MABRY, Defendant-Appellant.

No. 13146.

Supreme Court of New Mexico.

July 2, 1981.

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

Jeff Bingaman, Atty. Gen., Heidi Topp Brooks, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

EASLEY, Chief Justice.

Mabry was convicted of first-degree murder. He was sentenced to life imprisonment as mandated by Section 31–18–3(A), N.M.S.A.1978 (now repealed). He appeals from his conviction and sentence. We affirm.

Mabry raises three issues: (1) whether the mandatory nature of the sentence imposed violates the doctrine of separation of powers or constitutes cruel and unusual punishment; (2) whether the question of Mabry's competency to stand trial should have been submitted to the jury; and (3) whether Mabry was entitled to a new trial in light of newly-discovered evidence.

Mabry was charged on an open count of murder for the death of his adoptive mother. A pre-trial hearing was held on the issue of his competency to stand trial. At the hearing, a court clinic psychiatrist testified to his opinion that Mabry was competent. The psychiatrist also testified that Mabry denied any memory of the offense, suffered from both psychological and alcoholic problems that would affect his memory, and had a marked capacity to block out or repress anything painful or distasteful. Based upon the psychiatrist's testimony, the trial court found beyond a reasonable doubt that Mabry was competent to stand trial, and thus this issue was not presented to the jury.

At trial, the defense did not deny or dispute that Mabry committed the act for which he was charged, but relied entirely on a defense of insanity. Evidence presented of insanity included specific instances of bizarre behavior by Mabry, evidence that he had been the victim of extreme physical abuse by his natural mother prior to his adoption at the age of five months, and the testimony of two court psychiatrists. One of the psychiatrists concluded that Mabry was probably psychotic on the day of the murder; the other concluded that he was suffering from schizophrenia which caused him to go into an uncontrollable rage at the time of the crime, as a result of which he did not know what he was doing, did not understand the consequences of his acts, and could not have prevented himself from committing those acts.

The State rebutted this evidence with the testimony of two psychiatrists. One testified that Mabry suffered from an anti-social disorder which caused him to have difficulty preventing himself from doing wrong, but still allowed him to distinguish right from wrong and to appreciate the consequences of his actions. The other psychiatrist testified that Mabry suffered from a schizoid personality which caused him to be detached and withdrawn and to think differently from the way others think. Although he did not believe Mabry was more subject to irresistible impulses than others, he recognized that Mabry had "a large reservoir of anger" and no vehicle to deal with it.

The jury returned a verdict finding Mabry guilty of first-degree murder. Prior to sentencing, Mabry was committed to the penitentiary for a sixty-day diagnostic evaluation. Sometime later, a sentence of life imprisonment was imposed.

Mabry thereafter filed a motion for a new trial on the basis of newly-discovered evidence. At the hearing on this motion, Dr. Marc Orner, head of psychiatric and psychological services at the penitentiary, testified that during the sixty-day diagnostic evaluation, Mabry told the staff that as a young child he had been sexually abused by his adoptive mother (the victim). The motion for new trial was denied by the trial court.

Mabry then brought a motion for reconsideration of sentence on two grounds. First, he contended that the mandatory nature of the sentence was unconstitutional as a violation of the separation of powers clause in the state and federal constitutions. Second, Mabry asserted that the sentence imposed, under the facts of this case, constituted cruel and unusual punishment. In support of this contention, he submitted affidavits from each of the four mental health experts who testified at trial. Each expert declared that Mabry has serious

mental and psychological problems that require treatment in a mental hospital, rather than the penitentiary. The State responded that Mabry had failed to show that adequate psychiatric treatment would not be available at the penitentiary.

The trial judge denied the motion, but expressed his personal belief that the mandatory nature of the sentencing statute violated the separation of powers doctrine and urged counsel to seek appellate review of the question. As to the second ground, he ruled that the facts presented were insufficient to establish cruel and unusual punishment.

I. CONSTITUTIONALITY OF SENTENCE

A. *Separation of Powers.*

Section 31–18–3(A), N.M.S.A.1978, provides that upon conviction for a crime constituting a first-degree felony, "the judge shall sentence such person to the term of life imprisonment in the penitentiary * * * *" Section 31–20–3, N.M.S.A. 1978, allows the trial judge to defer or suspend, in certain circumstances, the sentence prescribed by law for "any crime not constituting a capital or first degree felony." Under this statutory scheme, imposition of a life sentence for a first degree felony cannot be deferred or suspended by the trial judge.

Mabry's contention relies upon two propositions, both of which are minority views among American jurisdictions: (1) that the judiciary possessed, at common law, the inherent power to suspend sentence; (2) that this inherent power is an integral part of the judicial department and cannot, therefore, be abrogated by the Legislature consistent with the constitutional mandate of separation of powers contained in N.M. Const. Art. III, Section 1.

The vast majority of jurisdictions which have considered the question whether the courts have the inherent power to suspend sentences have answered in the negative. See cases collected in Annot., 73 A.L.R.3d 474, § 3 (1976). A leading case is *Ex Parte United States*, 242 U.S. 27, 37 S.Ct. 72, 61 L.Ed. 129 (1916), in which the Supreme Court held that federal courts do not have the power, absent authorization by Congress, to indefinitely suspend a sentence on good behavior. The Court examined common law authorities and found no support for the proposition that courts at common law had the inherent authority to suspend sentences indefinitely.

Some courts adopting the minority position have examined the same common law authorities reviewed in *Ex Parte United States* and reached the opposite conclusion, i. e., that courts at common law possessed inherent authority to indefinitely suspend sentence. *See State v. McCoy*, 94 Idaho 236, 486 P.2d 247 (1971); *People v. Court of Sessions*, 141 N.Y. 288, 36 N.E. 386 (1894).

The only New Mexico case which has considered this question, *In re Juan Lujan*, 18 N.M. 310, 137 P. 587 (1913), concluded without reviewing the common law history that the court was without power to suspend a sentence absent statutory authorization.

We need not enter the historical debate over the ability of common law courts to suspend sentences. Even assuming, *arguendo*, that our courts would have possessed such a power at common law, that power has long been defined and delimited by statute in New Mexico. *See, e. g.*, 1909 N.M.Laws, ch. 32, § 1. The dispositive question here is whether a legislative act making a sentence mandatory, and thus denying any right of the courts to suspend sentences, violates the doctrine of separation of powers. We hold that it does not.

Mabry cites *State v. McCoy*, 94 Idaho 236, 486 P.2d 247 (1971), which apparently stands alone, and against the great weight of authority in the United States, in holding that mandatory sentencing laws violate the constitutional doctrine of separation of powers. *See* Annot., 73 A.L.R.3d 474 (1976). The Idaho Supreme Court in *McCoy*, expounded at length on the desirability of mandatory sentencing laws:

> Our system of laws, indeed, hopefully our civilization, has undergone a persevering

> evolution toward enlightenment. A judge is more than just a finder of fact or an executioner of the inexorable rule of law. Ideally, he is also the keeper of the conscience of the law. It is for this reason that the courts are given discretion in sentencing, even in the most serious felony cases, and the power to grant probation. We recognize that rehabilitation, particularly of first offenders, should usually be the initial consideration in the imposition of the criminal sanction. Whether this can be better accomplished through the penal system or some other means, it can best be achieved by one fully advised of all the facts particularly concerning the defendant in each case and not by a body far removed from these considerations * * * * This statute * * * not only abrogates the power of the court to suspend sentence when the circumstances and good conscience might justify such action; it also removes any authority to impose a lighter sentence.

486 P.2d at 251.

These may be persuasive arguments against the wisdom of mandatory sentencing statutes that remove judicial discretion. However, this Court does not sit as a super-legislature with the power to uphold or strike down the laws of the state based upon our own judgment as to the wisdom and propriety of such laws. *See In re McCain*, 84 N.M. 657, 506 P.2d 1204 (1973). So long as the Legislature acts within the parameters of its constitutional powers and limitations, this Court is powerless to intercede. *Id.*

Thus the scope of our review is here limited to whether the Legislature had the power to enact these statutes. It has long been recognized in this state that it is solely within the province of the Legislature to establish penalties for criminal behavior. *See State v. Archibeque*, 95 N.M. 411, 622 P.2d 1031 (1981); *State v. Holland*, 91 N.M. 386, 574 P.2d 605 (Ct.App.1978). It therefore follows as a necessary incident of this power that the Legislature has the right to regulate or restrict the circumstances in which courts may suspend sentences in order to ensure the efficacy of those criminal penalties. *See Ex Parte United States, supra.* As noted by the Supreme Court in *Ex Parte United States:*

> [I]f it be that the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, it would seem necessarily to follow that there could be likewise implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced.

242 U.S. at 42, 37 S.Ct. at 74.

If the doctrine of separation of powers requires anything in this case, it is that the Legislature be allowed to place some restrictions on the ability of the judiciary to avoid imposing legislatively-mandated penalties for crimes by indefinitely suspending sentences. *See Ex Parte United States, supra; Neal v. State*, 104 Ga. 509, 30 S.E. 858 (1898); *Ex Parte Thornberry* 300 Mo. 661, 254 S.W. 1087 (1923); *State v. Eighth Judicial Dist. Court*, 85 Nev. 485, 457 P.2d 217 (1969).

We hold that the mandatory sentencing under Sections 31–18–3 and 31–20–3 does not violate the doctrine of separation of powers contained in Article III, Section 1 of the New Mexico Constitution.

B. *Cruel and Unusual Punishment.*

Mabry does not assert that a mandatory life sentence for conviction of first-degree murder is *per se* cruel and unusual punishment. Rather, he contends that it constitutes cruel and unusual punishment to condemn one who suffers from serious mental and psychological problems to incarceration in the state penitentiary, because he will not receive adequate treatment.

Mabry does not direct us to any authority for this proposition, and we have found none. Furthermore, Mabry has failed to prove the factual assertions of the premise. Although there is sufficient evidence that Mabry has mental and psychological problems that should be treated, he directs us to no evidence in the record that adequate treatment will not be forthcoming at the penitentiary.

II. COMPETENCY TO STAND TRIAL

The trial court ruled that there was no reasonable doubt that Mabry was competent to stand trial, and did not allow this question to go to the jury. We will not overturn this ruling except for an abuse of discretion. *State v. Noble*, 90 N.M. 360, 563 P.2d 1153 (1977).

Under *State v. Upton*, 60 N.M. 205, 290 P.2d 440 (1955), the defendant is competent to stand trial if he has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to the proceedings, and to make a rational defense. Mabry focuses on the last element and contends that, based upon the psychiatrist's testimony that he had psychological problems which affected his memory and his ability to recall the events in question, he could not adequately assist his counsel in preparing his defense. Mabry asserts that the trial court therefore erred in not allowing this question to go to the jury.

We have reviewed the record and find no abuse of discretion. The psychiatrist who testified as to Mabry's memory problems also testified that it was his opinion that Mabry was competent to stand trial under all elements of the *Upton* test. This testimony was uncontroverted.

The situation here is factually similar to that presented in *Upton, supra.* In *Upton*, a psychiatrist testified that though the defendant had a mental disease which caused him to be a pathological liar, he was sane and competent in the eyes of the law. Defense counsel contended that the defendant would be unable to conduct his own defense because he would be unable to tell the truth. The Court upheld the trial court's ruling that the defendant was competent beyond a reasonable doubt based upon the psychiatrist's unequivocal testimony that the defendant was sane.

Similarly, in the instant case, Mabry might be unable to fully apprise his counsel of the events and circumstances in question. Nevertheless, the uncontroverted testimony established that he had the capacity to understand the nature and object of the proceedings and his condition in reference to the proceedings, and to cooperate with defense counsel in preparing a rational defense. We find no abuse of discretion.

III. MOTION FOR NEW TRIAL.

A motion for new trial on the basis of newly-discovered evidence is properly denied unless the newly-discovered evidence is such that (1) it will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such that it could not have been discovered before the trial by the exercise of due diligence; (4) it must be material to the issue; (5) it must not be merely cumulative; and (6) it must not be merely impeaching or contradictory. *State v. Ramirez*, 79 N.M. 475, 444 P.2d 986 (1968). The discretion of the trial court will not be lightly interfered with, and the denial of a new trial will not be overturned but for a clear abuse of discretion. *State v. Fuentes*, 67 N.M. 31, 351 P.2d 209 (1960).

We find no abuse of discretion. The "newly-discovered" evidence in this case fails the *Ramirez* test on a number of points. Mabry's claim that he had been sexually abused by the victim, his adoptive mother, as a young child, can hardly be said to have been discovered since the trial or that it is evidence that could not have been discovered prior to trial by the exercise of due diligence. Presumably, Mabry possessed this information prior to trial, and simply did not reveal the information to defense counsel. To hold that such information constitutes newly-discovered evidence requiring a new trial would subject

every criminal trial to the possibility of reopening on the ground that the defendant "remembered" something after trial. It would work havoc on the system if we held that information possessed by the defendant during the trial is "newly-discovered" when revealed by him after the trial.

Furthermore, there is no indication that Mabry's allegation, if proven, would change the result. Mabry relied on a defense that he was insane at the time he killed his mother. The evidence here might indicate a possible reason for Mabry's psychological problems, but would not constitute additional evidence that he was, in fact, legally insane at the time he committed the crime.

The conviction and sentence of Mark Mabry for first-degree murder is affirmed.

IT IS SO ORDERED.

PAYNE and RIORDAN, JJ., concur.

630 P.2d 275

Fred JOHNSEN, Plaintiff-Appellee,

v.

Danny L. FRYAR, d/b/a Fryar Logging, Defendant-Appellant.

No. 4477.

Court of Appeals of New Mexico.

Oct. 2, 1980.

Writ Quashed June 25, 1981.

OPINION

WOOD, Chief Judge.

In the first appeal, *Fryar v. Johnsen*, 93 N.M. 485, 601 P.2d 718 (1979), the Supreme Court set forth the factors to be considered in awarding an attorney fee to plaintiff in a workmen's compensation case and remanded "to the trial court for consideration of the factors outlined . . . and for making findings of fact and conclusions of law on the issue of attorney fees awarded at trial." The trial court again awarded an attorney fee of $11,435.75. Defendant appeals. The issues group into: (1) procedural matters; (2) evidence presented to the trial court after remand; (3) sufficiency of the evidence; and (4) disposition of the appeal.

1. *Procedural Matters*

(a) The Evidence Requirement

In remanding for findings and conclusions, *Fryar v. Johnsen*, supra, stated: "[W]e reiterate the need for evidentiary support for fees awarded by a trial court." This is neither a new nor unusual requirement.

Bank of Dallas v. Tuttle, 5 N.M. 427, 23 P. 241, 7 L.R.A. 445 (1890) stated that when the amount of the fee was not fixed, proof was required to establish the reasonableness of the fee. Where a contract fixes the amount of the fee, the fee, nevertheless, is to be reasonable, not exceeding the amount agreed upon. *Budagher v. Sunnyland Enterprises, Inc.*, 90 N.M. 365, 563 P.2d 1158 (1977). On the basis that the judge was presumed to know something as to the value of an attorney's services, *Pearce v. Albright*, 12 N.M. 202, 76 P. 286 (1904) stated that the value could be found by the court in the absence of evidence. *Pearce*, however, was limited to "services . . . performed under the eye of the court" in *Jamison v. Shelton*, 35 N.M. 34, 289 P. 593 (1930). *Van Orman v. Nelson*, 78 N.M. 11, 427 P.2d 896 (1967) states: "It is fundamental that the attorney has the burden of proving the

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J. E. Casados, Gallagher, Casados & Martin, Albuquerque, for defendant-appellant.

Turner W. Branch, Branch, Perkal & Associates, P. A., Albuquerque, for plaintiff-appellee.

value of services rendered by him and for which he claims payment or credit." In determining the value of services, the court could consider the interest of the attorney in weighing the attorney's testimony and "could likewise apply the court's own experience and knowledge of the character of services involved." *Van Orman*, supra.

Jamison, supra and *Van Orman*, supra, are not inconsistent; the judge's personal knowledge as to the services rendered may be considered. This does not weaken the requirements that the trial court must make findings concerning the fee awarded and that there must be evidentiary support for the findings made.

(b) Whether Evidence Could be Taken at the Hearing After Remand

Fryar v. Johnsen, supra, reviewed the evidence in the trial record and held that the evidence did not support the fee awarded. Defendant contends that at the hearing after remand plaintiff presented no additional evidence. Plaintiff responds that the trial court had no jurisdiction to hold an evidentiary hearing after remand.

The trial court had only such jurisdiction as the opinion and mandate specified. *Genuine Parts Co. v. Garcia*, 92 N.M. 57, 582 P.2d 1270 (1978). The order of the Supreme Court returning the record to this Court stated that the cause had been remanded "to the District Court for proceedings on the issue of attorney fees . . . ." The mandate of this Court remanded for proceedings consistent with the Supreme Court's decision. Plaintiff is correct in asserting that neither the Supreme Court order nor our mandate recited that the trial court, upon remand, had jurisdiction to take evidence on the question of the attorney fee. We must, therefore, look to the Supreme Court's opinion. *Genuine Parts Co.*, supra.

The Supreme Court opinion does not specify that the trial court, upon remand, could take evidence on the question of the fee to be awarded. The opinion did, however, hold that the evidence in the record was insufficient and outlined the factors to be considered; it "reiterated" that there must be evidentiary support for the fee awarded. The Supreme Court remanded for consideration of the factors outlined and for entry of findings and conclusions. The meaning of the Supreme Court opinion is obscure, and must be construed to determine the intention of the Supreme Court. *Hollingsworth v. Hicks*, 57 N.M. 336, 258 P.2d 724 (1953).

We hold that the Supreme Court intended to, and did, confer jurisdiction upon the trial court to take evidence on the factors which the Supreme Court directed the trial court to consider. We find this intent in the holding that the evidence in the record did not support the fee award which had been made, the emphasis that there must be evidence to support the findings to be made, and the direction to consider the factors outlined by the Supreme Court in making findings. Inasmuch as the then existing evidence was held to be insufficient, it would not have been made sufficient by relating that evidence to the factors to be considered. If the trial court lacked jurisdiction to take evidence at the hearing on remand, then nothing has changed and the evidence held to be insufficient by the Supreme Court is still insufficient to support the fee awarded.

(c) Identification of Evidence Presented at the Hearing on Remand

Plaintiff submitted the affidavit of attorney Richard Ransom at the hearing on remand. Defendant contends this affidavit was improperly admitted. At this point we do not consider whether the admission of the affidavit was proper. Our point, simply, is that once the affidavit was submitted and admitted, it became evidence.

Plaintiff also requested the trial court to take judicial notice of three items and the trial court did so. At this point we do not consider whether judicial notice was proper and we do not consider the effect of the judicial notice taken. We note, simply, that an item judicially noticed is evidence.

Evidence Rule 201 provides for judicial notice of adjudicative facts. Our rules

were based on the proposed rules of evidence for United States courts. The Advisory Committee's Note to the proposed federal rules states, see 1 Weinstein's Evidence, page 201–4, that "[a]djudicative facts are simply the facts of the particular case." The Note continues:

> The usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of the testimony of witnesses. If particular facts are outside the area of reasonable controversy, this process is dispensed with as unnecessary. A high degree of indisputability is the essential prerequisite.

We consider this evidence in the second issue.

(d) The Trial Court's Findings

Plaintiff's requests for judicial notice were made known to the trial court by including them within plaintiff's requested findings and conclusions, and by reading the requested findings and conclusions to the trial court. During argument of counsel as to the sufficiency of the evidence to support an award of an attorney fee, defendant asked for an opportunity to submit requested findings and conclusions on behalf of defendant. After the arguments were concluded, the trial court remarked on the custom to award the fee on a percentage basis. The following then occurred:

> The Court will also adopt the Requested Findings and Conclusions submitted by the Plaintiff as the Court's own Findings and Conclusions.
>
> MR. CASADOS: May we have the opportunity to submit ... Findings and Conclusions?
>
> THE COURT: Certainly.

Thereafter, plaintiff submitted his written requested findings and conclusions in open court.

The foregoing shows that after plaintiff's requested findings were read to the trial court, before plaintiff's requests were submitted in writing, see R.Civ.Proc. 52(B)(1)(f), and before defendant had opportunity to submit requested findings, the trial court announced that it would adopt plaintiff's requests.

The document subsequently entered, entitled "Court's Findings of Fact and Conclusions of Law", is almost a verbatim copy of plaintiff's requested findings and conclusions.

In *Mora v. Martinez*, 80 N.M. 88, 451 P.2d 992 (1969) the trial court adopted the requested findings and conclusions of plaintiff. In remanding for proper findings and conclusions, the Supreme Court stated it would "insist on the exercise of an independent judgment on the part of the trial judge in making his own findings of fact rather than adopting those of one of the parties." We do not believe that the failure of the Supreme Court to refer to this requirement in *United Nuclear Corp. v. General Atomic Co.*, 93 N.M. 105, 597 P.2d 290 (1979) indicates that the requirement has been abandoned.

Jesko v. Stauffer Chemical Company, 89 N.M. 786, 558 P.2d 55 (Ct.App.1976) recognized that findings of the trial court "in the language submitted by the parties does not show an absence of independent judgment by the trial court." Here, there is more than findings in the language used in plaintiff's requested findings. The trial court announced it would adopt plaintiff's requested findings after hearing them read, but before either party had submitted written requested findings. The findings of the court show that this announcement was carried out.

■ There was no independent judgment of the trial court; our discussion in the third issue of Factors 1, 2 and 5 illustrates this absence of independent judgment. The findings of the trial court not being the independent judgment of the trial court, the fee award based on those findings cannot stand.

■ (e) In arguing the insufficiency of the evidence to support the fee awarded, defendant's brief-in-chief refers to evidence in the record of the first appeal. Surprisingly, plaintiff argues that this evidence cannot be reviewed because "Defendant did not request that the transcript of the trial

be included on this appeal ...." Plaintiff's argument is surprising because if this evidence is not to be considered, then there is less evidence to support the fee awarded. However, plaintiff's argument is without merit. The record of the first appeal is a part of the records of this Court; we judicially notice our own records. *State v. Deats*, 83 N.M. 154, 489 P.2d 662 (Ct.App. 1971); see *Wells Fargo Bank v. Dax*, 93 N.M. 737, 605 P.2d 245 (Ct.App.1979).

2. *Evidence at the Hearing on remand*

(a) Defendant objected to the admission of the affidavit of attorney Ransom because by introducing the affidavit rather than calling Ransom as a witness, "I have not had an opportunity to cross examine Mr. Ransom ...." We agree that the opportunity for cross-examination was denied. In addition, there is nothing showing a basis for admissibility of the affidavit. *See State v. Lunn*, 82 N.M. 526, 484 P.2d 368 (Ct.App. 1971).

The impropriety of admitting the affidavit does not aid the defendant because the trial court's remarks from the bench and the trial court's findings establish that the contents of the affidavit played no part in the fee award. Two illustrations: (1) The affidavit states Ransom's personal knowledge that attorney Branch devotes the majority of his practice to representing plaintiffs in personal injury cases and workmen's compensation cases, that attorney Branch belonged to and was active in lawyer organizations devoted to the claimant's side of the case, and that attorney Branch had attended numerous seminars and workshops. These comments had some bearing on the experience of Branch. The trial court's finding as to Branch's experience is not based on the affidavit, but upon judicial notice. (2) The affidavit expressed an opinion that the attorney fee should be a percentage of the present value of the award. Again, the trial court made no use of the affidavit. The trial court took judicial notice that a percentage award was a customary fee, it neither found nor concluded that a percentage award was, or should be, a basis for a fee award, only that it was customary.

We do not consider the affidavit further.

(b) The three items judicially noticed were (1) "the ability, skill, experience and representation of plaintiff's primary counsel, Turner W. Branch"; (2) "the fee customarily charged and obtained in workmen's compensation actions in this locale is between fifteen and twenty percent of the total present value of the award; and that it is the custom and practice in the Thirteenth Judicial District to award fifteen percent of the total present value in settlements, and twenty percent if the matter is tried"; and (3) "the present rate of inflation, as reflected in the increase in the consumer price index, of approximate[ly] 12% per annum." Defendant contends that none of these items were items that could be judicially noticed, as the items noticed are worded. We tend to agree, but do not decide this question. Evidence Rule 201(b) states:

> (b) *Kinds of facts.* A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the community, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, or (3) notice is provided for by statute.

The trial court could properly notice that attorney Branch represented the plaintiff, but is Branch's ability, experience and skill not subject to *reasonable* dispute? The trial court cold properly notice that the country is suffering from inflation. Assuming the rate of inflation, as shown by the consumer price index, is twelve percent per annum, is this rate not subject to reasonable dispute? Compare *Rozelle v. Barnard*, 72 N.M. 182, 382 P.2d 180 (1963). A fee customarily awarded in compensation cases may not be subject to reasonable dispute, but such adds nothing if the custom is contrary to law. *Ozier v. Haines*, 411 Ill. 160, 103 N.E.2d 485 (1952); *Mendetz v. Wood*, 86 Misc. 52, 148 N.Y.S. 92 (1914); see *Standley v. Knapp*, 113 Cal.App. 91, 298 P. 109 (1931).

We do not decide whether the items were properly noticed because defendant did not object to the request for judicial notice and did not ask to be heard on the question of whether judicial notice was proper. See Evidence Rule 201(e). The question is not whether judicial notice was proper; the question is the effect of the items judicially noticed.

■ The trial court noticed the ability, skill and experience of attorney Branch. What ability, what skill, what experience? We do not know. We do not know whether the trial court considered the ability and skill to be good, bad or indifferent. *Frost v. Markham*, 86 N.M. 261, 522 P.2d 808 (1974) states that "if judicial notice is taken . . . there should be a clear delineation in the record as to what is being noticed." *Weinstein*, supra, page 201–44 states: "The judge should include all facts that he has judicially noted in his findings of fact." Not knowing what ability, skill or experience was noticed, this item of judicial notice contributes nothing in support of the fee awarded.

■ The trial court noticed the custom of awarding an attorney fee of twenty percent of the total value of a compensation award if the matter was tried. This custom is contrary to law. Section 52–1–54, N.M.S.A. 1978 makes it unlawful to receive a fee in connection with a compensation claim "except as hereinafter provided". The provision applicable in this case is § 52–1–54(D) pertaining to the collection of compensation in court proceedings. Section 52–1–54(D) does not authorize a fee award based on the percentage of recovery; the authorization for an attorney fee in § 52–1–54(D) "is not based on the contingent fee standard." *Trujillo v. Tanuz*, 85 N.M. 35, 508 P.2d 1332 (Ct.App.1973).

Section 52–1–54(D) sets forth factors which "must" be considered in awarding an attorney fee, called mandatory factors in *Keyser v. Research Cottrell Company*, 84 N.M. 173, 500 P.2d 997 (Ct.App.1972), and called statutory requirements in Fryar v. Johnsen, *supra. The "except as hereinafter provided" language in the opening paragraph of § 52–1–54 suggests that the statutory requirements are exclusive, but they have never been so considered; instead* Fryar v. Johnsen, *supra, lists factors to be considered "in addition to the statutory requirements . . . ."*

None of the additional factors listed in *Fryar v. Johnsen*, supra, authorize the fee award to be based on a percentage of the recovery. The claim that the additional factor—"the fees normally charged in the locality for similar legal services"—authorizes an award based on a percentage of recovery is incorrect. The "fee normally charged" factor means the fee normally charged for services. The services are identified in *Fryar v. Johnsen*, supra. Thus, the fee normally charged factor means—how much is normally charged for filing a one page complaint, how much is normally charged for filing requests for admissions, how much is normally charged for a trial of less than one day, etc.

Because a fee based on a percentage of the award is not authorized either by § 52–1–54(D), supra, or by the additional factors listed in *Fryar v. Johnsen*, supra, judicial notice of a custom to award such a fee was judicial notice of a custom contrary to law. Accordingly, this custom contributes nothing in support of the fee awarded. In so holding we acknowledge that Judge Lopez, in *Marez v. Kerr-McGee Nuclear Corp.*, 93 N.M. 9, 595 P.2d 1204 (Ct.App. 1978), stated: "[W]e cannot say as a matter of law that the trial court abused its discretion merely because its award was based on a percentage figure." Neither Judge Sutin's special concurrence nor Judge Hernandez' dissent in *Marez*, joined in Judge Lopez' comment and that comment, therefore, was not a decision of the Court of Appeals. *Casias v. The Zia Company*, 616 P.2d 436 (Ct.App.1980).

The seeming support for a percentage award in *Elsea v. Broome Furniture Co.*, 47 N.M. 356, 143 P.2d 572 (1943); *Gallegos v. Duke City Lumber Co., Inc.*, 87 N.M. 404, 534 P.2d 1116 (Ct.App.1975); and *Salazar v. Kaiser Steel Corporation*, 85 N.M. 254, 511 P.2d 580 (Ct.App.1973), is an illusion. In

each of these three cases there was a reference to a percentage award; however, in each case, the award was upheld because of evidence going to factors outlined in *Fryar v. Johnsen*, supra.

At the conclusion of the hearing after remand, the only additional evidence to be considered on the issue of the fee award was the judicially-noticed fact of a twelve percent rate of inflation.

3. *Sufficiency of the Evidence*

In this discussion we correlate the factors to be considered pursuant to *Fryar v. Johnsen*, supra, the trial court's findings (there being no distinction between plaintiff's requested findings and the trial court's findings) and the evidence applicable either to the factor or the finding. We number the factors for convenience in summarizing this discussion.

Factor 1—the three offers identified in § 52–1–54(D), supra. The trial court found no offers were made. There is no evidence to support this finding, however, the finding is not challenged and therefore is a fact in this appeal. *H. T. Coker Const. Co. v. Whitfield Transp., Inc.*, 85 N.M. 802, 518 P.2d 782 (Ct.App.1974).

Factor 2—the statutory requirement to consider the present value of the award. The trial court found a present value of $59,623.92. There is no evidence to support this finding. "Present value" is first referred to in the answer brief of the first appeal. The present value found by the trial court, according to that brief, includes past benefits, medical expenses and the present value of future benefits.

The Supreme Court opinion stated that present value, exclusive of medical and incidental expenses, was $53,306.86. See 93 N.M. at 487, 601 P.2d 718. The Supreme Court figure seems also to have been taken from the answer brief of the first appeal. That answer brief arrived at present value by applying a five percent discount rate to the face value of 545 weeks of future benefits. Section 52–1–54(D), supra, says nothing as to how present value is to be computed. Having been enacted prior to the five percent reference in § 52–1–30(B), N.M.S.A. 1978, the determination of present value is not controlled by the five percent reference in § 52–1–30(B), supra.

Is a five percent discount rate factually correct in light of current interest rates? Is "present value" to be figured on the basis of the face value of an award which includes future benefits but which is subject to change every six months under § 52–1–56(A), N.M.S.A.1978? We do not answer these questions because the trial court's finding of present value is not challenged and, therefore, is a fact in this appeal. However, because of an absence of evidence as to "present value" we express neither agreement nor disagreement with Judge Lopez' views on present value stated in *Marez v. Kerr-McGee Nuclear Corp.*, supra. See 93 N.M. at 16, 595 P.2d 1204.

Factor 3—the chilling effect of miserly fees upon the ability of an injured workman to obtain adequate representation. The trial court adopted this factor as a finding. This is not a matter to be found as a fact, this is a matter of policy, as *Fryar v. Johnsen*, supra, makes clear. The policy applies to all the findings, but a finding as to this policy adds nothing, in itself, to whether the evidence supports the award.

Factor 4—the time and effort expended by the attorney. Plaintiff introduced no evidence directed to this factor. The trial court found that "substantial" time and effort were expended "[b]ases [sic] on the presentation of this action". *Fryar v. Johnsen*, supra, summarizes what the record shows as to time and effort—a one page complaint, two sets of requests for admissions, a motion directed to one of the admission requests, no depositions, no interrogatories, no requested findings and conclusions, a trial of less than a full day involving eight witnesses. This is evidence of some time and effort, but this time and effort cannot be characterized as substantial.

Factor 5—the extent to which the issues were contested. The trial court found that all issues, including the accident, notice, dis-

ability and causation were contested. This is not completely accurate. Plaintiff claimed a compensable injury occurred on January 14, 1977. The answer denied a compensable injury on that date. In answer to requests for admissions, defendant admitted an accidental injury on the January date, but denied a request to admit an additional injury on March 18, 1977. In his opening statement at trial, plaintiff stated he was "not specifically making a claim of a later accident". Thus there was no contest concerning the accident on which plaintiff relied for compensation.

At trial there was a small amount of testimony relating to actual notice and to plaintiff's average weekly wage. The testimony shows the basic contest, however, went to disability and to whether disability was caused by the January accident.

Although the trial court's finding is not totally correct, there is evidence to support the portion of the finding that notice, disability and causation were contested at trial.

Factor 6—the novelty and complexity of the issues involved. The trial court found: "Issues were presented, including the claim that the disability was cause [sic] by subsequent injury, which made trial herein more complex and novel than the majority of compensation actions before this Court." This finding is not supported by the evidence; the issues were neither novel nor complex. There was one medical witness who testified to the condition of plaintiff's back, who gave an opinion as to disability and causation and who justified the charges of various doctors. The total medical testimony is 45 pages. When a compensation suit is tried, disability and causation are standard and, commonly, the only issues litigated.

Factor 7—the fees normally charged in the locality for similar legal services. The trial court made no finding concerning normal charges for the services rendered. See the Factor 4 discussion for similar services rendered. See also the discussion concerning percentage awards in the second issue for the meaning of fees normally charged.

Factor 8—the ability, experience, skill and *reputation* of the attorney, see 93 N.M. 488, 601 P.2d 718. Defendant agreed that attorney Branch had a good reputation. The trial court made no finding as to reputation. The trial court judicially noticed that attorney Branch had some ability, experience and skill, but did not notice the quality of that ability, experience and skill. This finding is no more than a finding that Branch has ability, experience and skill of an undetermined degree.

Factor 9—the relative success of the workman in the court proceeding. The trial court found that plaintiff prevailed on all issues and obtained all results possible under the compensation act. This finding is not challenged.

Factor 10—the amount involved. We assume this means the amount involved in the attorney fee issue, else it would be a duplication of Factors 2 and 9. The amount of the fee does not correlate with a finding, but with the conclusion as to the amount of the fee. Thus this factor does not involve evidence but involves findings on which the conclusion is based. Compare Factor 3.

Factor 11—the rate of inflation. The trial court judicially noticed a twelve percent inflation rate per annum. Although this finding is challenged, the unobjected-to judicial notice, discussed earlier in the opinion, is sufficient support for this finding.

There was an additional finding which does not correlate with any factor; it involved judicial notice of a customary award of a percentage of the award, which was contrary to law.

We summarize; the numbers refer to factors. An attorney of good reputation (8), who presented no evidence of his ability, experience or skill (8) and no evidence, apart from the trial record of the time and effort he expended (4), recovered maximum compensation benefits (9) for the workman after a less than one day trial, involving eight witnesses (4). The trial had contested issues of notice, disability and causation (5), but these issues were neither novel nor complex (6). There is neither evidence nor

finding as to the normal charge for similar services which the record shows attorney Branch performed in this case (7). Defendant had made no settlement offers (1); the present value of the total anticipated award was $59,623.92 (2) at a time the inflation rate was twelve percent per annum. This evidence does not support an award of fees of $11,435.75.

4. *Disposition of the Appeal*

Defendant contends that because of the number of times the issue of an attorney fee has already been considered in this case, that we should hold that plaintiff has forfeited his right to an attorney fee. We disagree. The evidence shows that plaintiff is entitled to a fee award. See § 52–1–54(D), supra. Defendant also asserts: "One thing it [this Court] ought not to do is remand this case again." This raises the question of the appropriate disposition.

The fee award is to be fixed by "the court trying the same". Section 52–1–54(D), supra. Where, as in this case, the fee awarded is not supported by substantial evidence, the usual procedure is to remand the matter to the trial court. The reason is stated in *Keyser v. Research Cottrell Company*, supra:

> We do not, under the circumstances of this case, believe that this court should make such an attorney's fee award. Rather it is our function to see that the trial court considers those matters set forth in the statute and only then can we determine whether there was an abuse of discretion on the part of the trial court. *Ortega v. New Mexico Highway Department*, 77 N.M. 185, 420 P.2d 771 (1966). The matter should be left with the trial court since it has superior knowledge of the matters at hand. See *Scott v. Transwestern Tankers, Inc.*, 73 N.M. 219, 387 P.2d 327 (1963).

The Supreme Court, in the first appeal, remanded to the trial court for findings of fact as to the fee awarded. The findings of fact entered after an evidentiary hearing are not supported by substantial evidence. After two opportunities to present evidence in support of the fee award, plaintiff is not entitled to a third opportunity to do so. Under these circumstances it can no longer be said that the trial court has superior knowledge on the matter of the fee to be awarded, and the usual procedure is not applicable.

Inasmuch as the evidence does not support the award, and inasmuch as the trial court's finding concerning an award based on a percentage of the recovery shows a mistaken basis for the award, the appropriate disposition is to view the award in terms of excessiveness. See *Gonzales v. General Motors Corporation*, 89 N.M. 474, 553 P.2d 1281 (Ct.App.1976).

We summarized the evidence supporting a fee award in concluding our discussion of the third issue. In the light of that evidence, the award is excessive by $7,000. If, within ten days from the date of this decision, plaintiff will file a remittitur with the clerk of this Court in the sum of $7,000 from the award of $11,435.75, the fee award will be affirmed for $4,435.75 from February 7, 1978, which is the date of the judgment in the trial court. If the remittitur is not filed within the ten-day period, then the judgment on remand, which awarded attorney fees, will be reversed and the cause remanded for new findings and conclusions consistent with this opinion in connection with the attorney fee. If the cause should be remanded, no evidence, other than that presently contained in the record, is to be considered.

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

LOPEZ, J., dissents.

LOPEZ, Judge (dissenting).

I respectfully dissent.

The issue, as I view it, is whether the district court abused its discretion in awarding attorney's fees in the amount of $11,435.75, after a hearing. I believe that it did not.

The district court, in determining a reasonable attorney's fee in a workmen's com-

pensation case, is to consider: (1) the sum, if any, offered by the employer within a certain time period and (2) the present value of the award to the workman. Section 52–1–54(D), N.M.S.A.1978. In ordering remand in the case before us, the Supreme Court further elaborated criteria to be considered by the district court in setting the attorney's fee.

> [I]n 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.

Fryar v. Johnsen, 93 N.M. 485, 488, 601 P.2d 718, 721 (1979). The case was remanded for consideration of these factors and for making findings of fact and conclusions of law on the issue of attorney's fees.

The district court made findings and conclusions on the issue after a hearing. The record indicates that it considered all of the factors specified by the Supreme Court. Neither the record nor the briefs show that the district court abused its discretion.

The defendant argues that the Supreme Court remanded for an evidentiary hearing, and that since no new evidence was presented to the court, it failed to comply with the Supreme Court's order. I believe, however, that the Supreme Court did not intend for the parties to go to the time and expense of putting on opposing witnesses to determine the reasonableness of the attorney's fees. Rather, I think the Supreme Court merely wanted the district court to make findings and conclusions which would indicate the basis for its award, and to consider the award in light of certain factors. This the district court did. *See generally, Budagher v. Sunnyland Enterprises, Inc.*, 93 N.M. 640, 603 P.2d 1097 (1979).

The defendant objects that the district court erred in taking judicial notice of the present rate of inflation, of the fee customarily charged in workmen's compensation actions in the locale, and of certain other facts. However, no objections to the taking of judicial notice of these and other facts was made at the hearing. An issue raised for the first time on appeal will not be considered by this court. *Phillips v. United Service Automobile Ass'n*, 91 N.M. 325, 573 P.2d 680 (Ct.App.1977). These objections need not be considered.

The defendant also objects to the district court's admission of an affidavit by a workmen's compensation attorney practicing in the locale which stated that attorney's fees of between fifteen and twenty percent of the present value of the total award is customary in workmen's compensation cases. I believe that the affidavit was proper. *See*, 3 Am.Jur.2d *Affidavits* § 28 (1962). However, the issue need not be decided, since, even without the affidavit, the district court had substantial basis on which to make its award.

The defendant objects to the finding that substantial time and effort were expended by plaintiff's attorney. The objection is based on the attorney's failure to submit a time sheet detailing the number of hours he worked on the case. This court has stated before that the amount of work is not determinative of the size of the fees awarded the plaintiff's attorney in a workmen's compensation case. *Lamont v. New Mexico Military Institute*, 92 N.M. 804, 595 P.2d 774 (Ct.App.), *cert. denied*, 92 N.M. 675, 593 P.2d 1078 (1979); *Marez v. Kerr-McGee Nuclear Corp.*, 93 N.M. 9, 595 P.2d 1204 (Ct. App.1978), *cert. denied*, 92 N.M. 532, 591 P.2d 286 (1979); *see generally, Maes v. John C. Cornell, Inc.*, 86 N.M. 393, 524 P.2d 1009 (Ct.App.1974). The amount of work done is merely one factor to be considered. *Fryar*, 93 N.M. 485, 601 P.2d 718. The district court based its finding that plaintiff's counsel had expended substantial time and effort on the case on its own observation of counsel's presentation of the case at trial. This was a sufficient basis for the finding.

Based on its experience in presiding over the trial, the district court found that the issues presented made the trial more complex than the majority of compensation actions before it. I believe the experience of the judge is a sufficient basis for the finding. The opinion of the Supreme Court, *Fryar*, 93 N.M. 485, 601 P.2d 718, suggests, however, that that court does not believe this was a complex case. Thus, the district court's finding may be erroneous. Nevertheless, I would still affirm the judgment, because the other findings are sufficient to support it.

The defendant also objects because the district court adopted all of the findings of fact and conclusions of law submitted by the plaintiff. This practice has been held error only in the most extreme circumstances. *Sisneros v. Garcia*, 94 N.M. 552, 613 P.2d 422 (1980). It is not error here.

In essence, all of defendant's objections go to the fact that the trial court based its award of attorney's fees on a percentage of plaintiff's total award. This is not an abuse of discretion. The appellate court will not say, as a matter of law, that the district court abused its discretion in awarding attorney's fees merely because its award was based on a percentage figure. *Marez.*

I would affirm the judgment of the trial court and award plaintiff an additional $1,500 in attorney's fees for this appeal.

630 P.2d 285

John MALCZEWSKI, Plaintiff-Appellee,

v.

McREYNOLDS CONSTRUCTION COMPANY,
Defendant-Appellant.

No. 4813.

Court of Appeals of New Mexico.

April 9, 1981.

Walter J. Melendres, Montgomery & Andrews, P.A., Santa Fe, for defendant-appellant.

Solomon, Roth & VanAmberg, Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Due to the negligence of the operator of defendant's truck, plaintiff jumped off the Pojoaque bridge, landed in the sandy river bed below, and suffered extensive injuries. The jury awarded plaintiff $360,000.00 and defendant appeals from the judgment entered. We affirm.

The issues raised in this appeal relate to the award of damages. We will discuss each of the points *seriatim.*

A. *The trial court properly allowed Dr. Dillman, an economist, to testify as an expert on vocational evaluation and prognostication.*

In *Torres v. Sierra,* 89 N.M. 441, 445, 553 P.2d 721 (Ct.App.1976) we said:

> Dr. Everett G. Dillman, an economic statistician, testified on behalf of plaintiff on the subject of damages. He is recognized as a competent witness whose qualifications are unimpeachable. [Citation omitted.]

See also, *Wilson v. Wylie,* 86 N.M. 9, 518 P.2d 1213 (Ct.App.1973) in which Dr. Dillman testified as to the pecuniary value of decedent's earning capacity.

Defendant claims that the trial court erroneously allowed Dr. Everett G. Dillman, a noted economist, to testify as a vocational "rehabilitation" expert. Defendant has not defined the word "rehabilitation" nor pointed to any Dillman testimony related to that subject matter.

When Dr. Dillman was offered as an expert in making evaluations about impaired lost earning capacity and related matters therein, defendant had no objection to these qualifications. Defendant wanted to make it clear that Dr. Dillman was not holding himself out as a vocational or rehabilitation expert. On voir dire of Dr. Dillman by defendant, Dr. Dillman was asked this question to which he made this answer:

Q. You are not holding yourself out as an expert, as a vocational *or* rehabilitation expert? [Emphasis added.]

A. That is not true. I have an expertise in personnel and vocational evaluation and vocational prognostication.

"Vocational Rehabilitation Services" is provided for in § 52–1–50, N.M.S.A.1978 of the Workmen's Compensation Act. "Vocational rehabilitation arises after such partial disability has occurred that a workman is unable to return to his former job, yet he desires to *retrain* himself for suitable employment. * * * He wants to better himself by vocational rehabilitation." [Emphasis added.] *Ruiz v. City of Albuquerque*, 91 N.M. 526, 530–31, 577 P.2d 424 (Ct.App. 1978). See *Lane v. Levi Strauss & Co.*, 92 N.M. 504, 590 P.2d 652 (Ct.App.1979). It is "a means for *retraining* an injured employee in an effort to direct his limited physical capability into other useful channels of productivity." [Emphasis added.] *Bender v. Deflon Anderson Corporation*, 298 A.2d 346, 348 (Del.Super.1972).

Vocational rehabilitation involves methods to be used in retraining an injured person. Dr. Dillman did not testify in this field of activity.

First, defendant argues that the trial court allowed the jury to decide the preliminary question of Dr. Dillman's qualifications. Defendant is mistaken.

Whether a witness is shown to be qualified as an expert is a preliminary question for the court to decide. *Reid v. Brown*, 56 N.M. 65, 240 P.2d 213 (1952); *Apodaca v. Baca*, 73 N.M. 104, 385 P.2d 963 (1963). "The court has wide discretion in determining whether one offered as an expert witness is competent and qualified." *Jaramillo v. Anaconda Co.*, 71 N.M. 161, 164, 376 P.2d 954 (1962).

Defendant objected to Dr. Dillman's qualifications on the ground that Dr. Dillman "is not or has not been trained as a vocational expert in *rehabilitation*." The court said:

> I will [let] the jury decide that particular fact issue. *The witness will be deemed qualified to express opinions before this Court concerning the evaluation of impaired or lost earning capacity and related matters.* [Emphasis added.]

The court determined that Dr. Dillman was "qualified." Defendant places emphasis upon the first sentence that, on rehabilitation, the jury will be allowed to decide "that particular issue." This issue was not submitted to the jury to decide. A jury cannot decide whether Dillman was or was not a vocational rehabilitation expert unless the jury is instructed on the issue or special interrogatories are submitted. The statement made by the court was an inadvertent expression. The trial court, not the jury, determined Dr. Dillman's qualifications

Second, defendant claims that the court erred in allowing Dr. Dillman to testify as an expert in vocational rehabilitation because he was not qualified. *Third*, defendant claims the court's error regarding this "expert" witness was prejudicial to defendant. Inasmuch as Dr. Dillman did not testify as an expert in vocational rehabilitation, these points are without merit.

Perhaps, Dr. Dillman's testimony in some vague way, or by inferences drawn, may have approached the subject of rehabilitation. Even if it did, his testimony was admissible. We do not know where "vocational evaluation and vocational prognostication" ends and "vocational rehabilitation" begins. No objection was made to the admission in evidence of any testimony of Dr. Dillman before, during or after his examination, cross-examination or redirect examination. "Failure to object to the admission of evidence constitutes a waiver of objection, and in such case the objection cannot be raised for the first time on appeal." *McCauley v. Ray*, 80 N.M. 171, 176, 453 P.2d 192 (1968). Even though the testimony should have been excluded, it is not considered to be erroneous where no proper objection is made. *Ash v. H. G. Reiter Company*, 78 N.M. 194, 429 P.2d 653 (1967). Justice and fairness require that the trial court be alerted by proper objections to the admission of evidence, and the specific rea-

sons therefor, so that the court can pass upon the objections advisedly and intelligently. *Alvarado M. & M. Co. v. Warnock*, 25 N.M. 694, 187 P. 542 (1919). It has been said, however, that "[I]t cannot be expected that every objection must state with particularity each and every element involved." *Hanberry v. Fitzgerald*, 72 N.M. 383, 391, 384 P.2d 256 (1963). Nevertheless, we do not believe that objections to Dr. Dillman's testimony would have assisted defendant in this appeal. We hold that the trial court did not abuse its discretion in determining that Dr. Dillman was qualified to testify as an expert witness, and in allowing his testimony on vocational evaluation and prognostication. In any event his testimony was admissible because no objection was tendered as to its admissibility.

B. *Refusal of defendant's requested instruction of impaired earning capacity was not erroneous.*

Defendant claims that the trial court erred in refusing to give its requested non-UJI Instruction No. 36. It reads:

> The measure of damages for impairment of earning capacity is the difference between the amount which the plaintiff was capable of earning before his injury and that which he is capable of earning thereafter. As bearing on this question, it is proper to take into account not only the plaintiff's occupation at the time of the injury but also other occupations which he may pursue after injury.

The court instructed the jury in accordance with UJI 14.7. It reads:

> The value of earnings lost and the present cash value of the earning capacity reasonably certain to be lost in the future.

Also given without objection was UJI 14.22. It reads:

> If you have found that plaintiff is entitled to damages arising in the future, you must determine the amount of damages.
>
> If these damages are of a continuing nature, you may consider how long they will continue. If they are permanent in nature you may consider how long plaintiff is likely to live.
>
> As to loss of future earning ability, you may consider that some persons work all of their lives and others do not; that a person's earnings may remain the same or may increase or decrease in the future.

Our appellate courts have not yet discussed the issue of when UJI instructions on future damages should be used instead of non-UJI instructions. We do know that "* * * the UJI shall be used unless under the facts or circumstances of the particular case the published UJI is erroneous or otherwise improper, and the trial court so finds and states of record its reason." Rule 51(D) of the Rules of Civil Procedure.

Defendant argues that its requested instruction "was crucial" and should have been given.

Rule 51(D) alerts lawyers and district judges to the fact that the submission of non-UJI instructions to the jury can result in reversible error unless compliance therewith has occurred. See, *Williams v. Cobb*, 90 N.M. 638, 645, 567 P.2d 487 (Ct. App.1977), Sutin, J., specially concurring. Attorneys are allowed to request non-UJI instructions or modifications thereof, "where no applicable instruction *on the subject matter* is available." [Emphasis added.] *Mac Tyres, Inc. v. Vigil*, 92 N.M. 446, 449, 589 P.2d 1037 (1979). UJI 14.7 was available and covered the subject matter on that phase of damages.

The fact that defendant's requested instruction was "crucial" did not prejudice defendant. It was ably presented to the jury in final argument and adequately explained.

Oral argument was a substitute for the non-UJI instruction. The purpose for which UJI was introduced in New Mexico was to lessen, not increase, the use of instructions.

Refusal to give defendant's Requested Instruction No. 36 was proper. It was not erroneous.

C. *The judgment was not excessive.*

We are not impressed with defendant's argument concerning the amount of

the award as being excessive. If we believed the amount awarded were shocking, we would set forth all facts relevant to the issue of damages. This is unnecessary. From the evidence of damages suffered by reason of "pain and suffering" and "impaired earning capacity," the jury could have exceeded the amount awarded.

Cost of this appeal shall be paid by defendant.

Affirmed.

IT IS SO ORDERED.

HERNANDEZ, C. J., concurs.

WALTERS, J., dissents.

WALTERS, Judge (dissenting).

Witness Dillman, after stating his education and experience, was offered "as an expert in making evaluations as far as impaired lost earning capacity and related matters thereto [sic]." Defense counsel at that point stated to the court:

> I do not have any objections to his qualifications as stated. I want to be clear that Dr. Dillman is not holding himself out as a vocational or rehabilitation expert.

To which counsel for plaintiff again said:

> I have offered him as an expert in the area of giving expert opinions and evaluations of lost earning capacity or impaired earning capacity or earning capacity and related matters thereto.

Upon defendant's request to voir dire the witness, the entirety of the objection and the court's ruling referred to in the majority opinion was as follows:

> Q. Dr. Dillman, you recognize that aside from the field of economics, that there is a recognized field of rehabilitation and vocational training?
>
> A. I know that.
>
> Q. You are not holding yourself out as an expert, as a vocational or rehabilitation expert?
>
> A. That is not true. I have an expertise in personnel and vocational evaluation and vocational prognostication.
>
> MR. MELENDRES: I have no objection to him testifying as to the economics and to the statistics as to impaired earning capacity but it is my understanding of his background and training, that he is not or has not been trained as a vocational expert in rehabilitation.
>
> THE COURT: I will let the jury decide that particular fact issue. The witness will be deemed qualified to express opinions before this Court concerning the evaluation of impaired or lost earning capacity and related matters.

Thereafter, during Dillman's direct examination, he was asked if he had an opinion of plaintiff's present earning capacity. He responded:

> I feel that it would be very unlikely, given the physical condition, the experience and training and given the type of jobs for which he would have to compete in a very competitive labor market, it would be very unlikely that John would be able to obtain and retain any type of substantial gainful employment. He would be lucky, but I think that situation is very unlikely, anyway not in this area.
>
> * * * * * *
>
> For all intents and purposes at this time he has a zero residual earning capacity.
>
> * * * * * *
>
> [B]ased on what the medical depositions have revealed and what I understand from John to be his functional limitations, especially strong in areas of standing and sitting and lifting and carrying and walking around, there is no question whatsoever that he is completely, 100 percent totally disabled for any type of heavy work, and because of the functional limitations for standing and sitting where he cannot do either one of them for very long periods of time, the type of job for which he would be suited would be those which he has an opportunity to be a master of his own time. He can sit for awhile and stand for awhile, he can walk around for awhile and maybe lie down to rest his back or stand with his back against the wall, which is one way to rest it. These jobs are just not overly

in abundance. There are some jobs, however, such as a dispatcher for a taxi cab company, where a person would have alot more leeway. There are few jobs like that, possibly somebody who worked in a parking lot, like out at the airport. These jobs, however, there are two major drawbacks. There are lots of people trying to get them, people who are not injured, and it is very, very difficult to get them, but assuming that he could get one, these jobs are essentially minimum wage type jobs. They pay approximately the federal minimum wage, from then the upward movement is only when the minimum wage gets changed and the minimum wage at the present time is $3.10 per hour. So I feel that the best that he could do would be a minimum wage type position, but I really think even that would be tough to get.

Defendant's expert witness Mackler, whose career as "a certified disability evaluator and vocational rehabilitation counselor" in public, private, and self-employment spanned 24 years at time of trial, was asked whether plaintiff was disabled from doing heavy work, and he replied:

That has been determined by the physicians. They have restricted him to light and sedentary type of work activities. He is incapable of doing heavy work.

Concerning the information obtained from physician's examinations of plaintiff, and its relationship to evaluating plaintiff's vocational rehabilitation potentials, the witness testified:

What I am concerned with the physician's function to determine what is known as residual functional capacity. What exactly can the individual do in terms of sitting, standing, walking, lifting, carrying, pushing, pulling; all of the physical activities that are normally associated with the work activity. Then, on the basis of that, I make a determination as to what jobs are appropriate that he can do. Now, based on the opinion of the medical doctors and this is unanimous, he is capable of a full range of sedentary light work if he is able to make positional changes.

* * * * * *

* * * * Sedentary work is the ability to sit, to sit for eight hours a day, to lift five pounds frequently with a maximum lift of ten pounds. That also means the ability to get up and move around and move files, carry ledgers, walk up and down stairs, or if an individual sits but is required to use hand and foot levers frequently, this is put into the light work range activity. Light work is the ability to stand or sit eight hours a day, and the ability to lift ten pounds frequently with a maximum lift of twenty pounds.

Q. Now, based upon your interviews with Mr. Malczewski, the testing that was done and your review of the medical information; do you have an opinion whether Mr. Malczewski is able to do light or sedentary type work?

A. That has been determined by the doctors. He is able to do it.

Mackler then outlined work he knew was available and for which plaintiff was qualified or could be trained to do "and stop being unhappy about not being able to do what he did in the past." Some of the jobs the rehabilitation expert described were electronic assembler, mechanical assembler, casting bench jobs, office machine repairman, dental lab technician, and small appliance repairman. The scale of wages for those jobs ranged from the lowest starting salary of $3.83 per hour to the maximum skill rate of $18,000 per year.

The definition of vocational rehabilitation given in the majority opinion as "methods to be used in retraining an injured person" is incomplete. That is only a portion of vocational rehabilitation; as witness Mackler testified, in order to know which "methods" will be used, the vocational rehabilitation expert intensively examines the subject's educational and vocational histories in detail; he observes how the injuries sustained affected the person's activities in his daily life; he consults with the subject's physicians and reviews the subject's medical histories; he conducts intelligence, manual dexterity, and achievement tests; in con-

cert with field psychologists, he does personality testing; he counsels with the individual to help him choose a new career; he arranges teaching programs for retraining the injured person; he encourages job training where the trainee will be able to gain confidence and regain his self-image and self-esteem; and he maintains a currency in knowledge of job requirements, job availabilities, and job pay scales. "Rehabilitation is the restoration of an individual to his greatest potential—physically, mentally, socially and vocationally." *Jones v. Grinnell Corp.*, 117 R.I. 44, 362 A.2d 139 (1976). It is more than merely a method of "retraining" an injured person. There was nothing in Dr. Dillman's catalogue of education or experience remotely touching any training or background in the rehabilitation field.

The record shows further that Dillman talked to the plaintiff once, gave him no tests, did not read or hear the evidence of plaintiff's treating physician or of a noted examining physician; he did not observe plaintiff's home situation, and he did not "go into other things that might be related to his [plaintiff's] work situation or abilities." Yet Dillman gave an evaluation of plaintiffs' physical and functional limitations, he assessed the degree of disability suffered by plaintiff, and he determined the kinds of jobs suitable for and available to plaintiff. To say, as the majority does, that Dillman did not testify in the field of rehabilitation is to ignore that part of his testimony.

I do not dispute that Dr. Dillman is, as Judge Sutin wrote in *Torres v. Sierra, supra*, a recognized expert in the field of economic statistics. I do not agree, however, that a witness qualifies himself as "a vocational or rehabilitation expert" by the bare assertion that "I have an expertise in personnel and vocational evaluation and vocational prognostication." This is indeed a far cry from the list of credits Judge Sutin considered necessary before a polygraphist's qualifications could be considered as established, in *State v. Alderete*, 86 N.M. 176, 521 P.2d 138 (Ct.App.1974). Even so, self-endowed expertise does not satisfy the requirement for foundational evidence of professional, scientific or technical training, or sufficient practical experience, to prove a special knowledge in a particular subject or field of expertise not shared by persons in the ordinary walks of life. *See Lay v. Vip's Big Boy Restaurant, Inc.*, 89 N.M. 155, 548 P.2d 117 (Ct.App.1976) (meteorologist unable to testify as expert on stress caused by wind); *Sanders v. Smith*, 83 N.M. 706, 496 P.2d 1102 (Ct.App.1972) (non-lawyer incompetent to give opinion on legal standards); *State v. Padilla*, 66 N.M. 289, 347 P.2d 312 (1959) (no evidence of recognized qualifications by which to measure witness's "expertise").

The quoted portion of Dillman's testimony should not have been allowed; the judge, not the jury, should have determined whether there was a proper foundation for Dr. Dillman's "expert" opinion on plaintiffs' rehabilitation potential. *Winder v. Martinez*, 88 N.M. 622, 545 P.2d 88 (Ct.App. 1976).

Defendant objected, at the time Dillman was offered as an expert, to any testimony from him "as a vocational or rehabilitation expert." It was not necessary for defendant to object again when Dr. Dillman gave the objectionable testimony; the court had already ruled that the jury would "decide that particular fact issue [Dillman's rehabilitation expertise]." The law does not require a useless act. *Wells Fargo Bank v. Dax*, 93 N.M. 737, 605 P.2d 245 (Ct.App. 1979).

This case should be returned for a new trial because of error in allowing inadmissible "expert" evidence on the most crucial issue in the lawsuit. Dr. Dillman could testify on lost earning capacity based on a hypothetical prognosis or statement of plaintiff's physical, functional, mental, social and vocational rehabilitation; he was not qualified to make a prognosis or statement himself as a rehabilitation expert.

For the above reasons, I respectfully dissent.

630 P.2d 292

Joachim F. WIRTH and Elizabeth Wirth, Plaintiffs-Appellees,

v.

COMMERCIAL RESOURCES, INC., a New Mexico Corporation; Cabiwhiba, Inc., a New Mexico Corporation; Commercial-Cabiwhiba Joint Venture; William A. McGregor and Beverly B. McGregor, Defendants-Appellants.

No. 4797.

Court of Appeals of New Mexico.
May 7, 1981.

Writ of Certiorari Denied
June 23, 1981.

Paul R. Caldwell, Arthur B. Lofton, Caldwell & Lofton, P.A., Santa Fe, for defendants-appellants.

Jere C. Corlett, James E. Thomson, Santa Fe, for plaintiffs-appellees.

OPINION

LOPEZ, Judge.

Our previous unpublished Decision in this matter is withdrawn and this opinion is substituted therefor.

This case arises out of an allegedly fraudulent sale of real estate by defendants, who are land developers, to plaintiffs. A jury awarded $60,000.00 in damages to Mr. and Mrs. Wirth (hereafter Wirth). The defendants—two corporations in a joint venture and their shareholders, (hereafter collectively referred to as McGregor, the name of the stockholders)—raise five major points on appeal. Broadly the issues are: 1) whether plaintiffs proved they are entitled to compensatory damages; 2) whether withholding a certain adverse report concerning the availability of water could construe fraud under the circumstances; 3) whether punitive damages could properly be awarded; 4) whether the damages are excessive; and 5) whether there was error in admitting and precluding certain evidence, or error resulting from statements and conduct of plaintiffs' counsel.

Finding the defendants' contentions without merit, we affirm. We need not consider the motion to strike the Reply Brief, because we rule against defendants in any event.

Before turning to the issue, we note that the Statement of Proceedings in the Brief-in-Chief does not conform to N.M.R. Civ.App.P. 9(m), N.M.S.A.1978. Among other things, that rule requires that when the case was tried by a jury, the Statement of Proceedings must include a short statement of the undisputed ultimate facts necessary to an understanding of the material issues on appeal and a brief summary of any conflicts in evidence material to the appeal, along with appropriate transcript references.

On July 25, 1976, Wirth and McGregor entered into a real estate contract whereby Wirth agreed to purchase a tract of undeveloped land for residential use for $36,000. The land was part of a 160 acre plot on the foothills southeast of Santa Fe which McGregor planned to divide into twenty-four tracts. McGregor agreed to provide adequate water for Wirth's domestic use. The water was to come from a well which would be shared with the future owners of five other tracts. After the purchase, Wirth built a home on the land. The well used by Wirth, called the Steven Goodyear well, provided him with water for less than six months before running dry.

Wirth sued McGregor for breach of contract and for fraud. The fraud count was based in part on McGregor's failure to inform Wirth of a report by hydrologist Zane Spiegel, written in July 1973, that indicated there might not be sufficient water for the proposed subdivision. Other misrepresentations and omissions were alleged as well. The general verdict returned by the jury did not indicate the grounds on which they found liability.

Compensatory damages. McGregor argues that because of conflicting testimony concerning the availability of water on the property, Wirth has failed to show he suffered any damages. In considering the evidence, we are mindful that we must view the facts in the light most favorable to the prevailing party, indulge all reasonable inferences in support of the verdict, and disregard all inferences or evidence to the contrary. *Anaconda Co. v. Property Tax Dept.*, 94 N.M. 202, 608 P.2d 514 (Ct.App. 1979), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980); *Duke City Lumber Co. v. Terrel,*

88 N.M. 299, 540 P.2d 229 (1975). Mr. Gordon Veneklasen, an hydrologist, testified that the well was not supplying enough water for even one household, and that Wirth would be foolish to attempt to drill another well on his property. There was evidence that Wirth had ceased to use the Steven Goodyear well and was obtaining water temporarily from a neighbor. From this the jury could conclude that Wirth does not have an adequate supply of water and that he has been damaged.

McGregor next asserts that, even if Wirth has proven the existence of damages, he has not proven the amount. He argues first that Wirth had to prove the cost of obtaining an adequate supply of water on the property, which he failed to do, and second that Wirth's subjective evaluation that the property was worthless to him without water interfered with a proper determination of the amount of damage he suffered.

McGregor cites no authority for his first argument, and we have found none to support it. According to Dobbs, the difference between the actual value of a piece of land and the price paid for it is one of the proper measures for damages for deception. Dobbs, *Remedies* § 9.2 (1973). As will be discussed, Wirth introduced evidence to show this measure. He was not required to prove what it would cost him to remedy the existing situation in order to recover.

The second argument is equally without merit. Citing *Duke City Lumber Co.*, McGregor suggests that Wirth's subjective evaluation of the value of his property without water was misleading. *Duke City Lumber Co.* does not stand for the proposition that an owner can never testify as to the value of his property. Rather, the court stated that the market value of property is not dependent on the owner's financial ability to use the property. In that case, the property in question, a lumber mill, was useless to the owner because he did not have the funds necessary to operate it; but it would not have been a valueless acquisition for someone who could operate it. The instant case is different because Wirth's house would be worthless to anyone, as long as it had no water. More importantly, Wirth was not the only person to testify that the property was currently worthless. Mr. George Olcott, a real estate appraiser, testified that the value of the house and land with water was $194,100.00, and that without water it had no value. Mr. Charles Atwell, a real estate agent, testified he would not take a listing of Wirth's house, should he want to place it on the market, since it had no water. Wirth presented evidence of the amount he paid for the property and evidence that he had spent over $100,000.00 to construct the house. Such evidence is proper to establish damages for deception, *see generally*, Dobbs, *supra*, or for breach of contract. *See generally*, Dobbs, §§ 12.1, 12.3. From the evidence, the jury could arrive at an award. Where there is a legal right to recover damages, the amount need not be proven with mathematical certainty. *Robert E. McKee General Contractor, Inc., v. Insurance Co. of North America*, 269 F.2d 195 (10th Cir. 1959); *see Nosker v. Western Farm Bureau Mutual Insurance Co.*, 81 N.M. 300, 466 P.2d 866 (1970). The lack of certainty that will prevent a recovery is uncertainty as to the fact of damages, and not as to the amount. *Id.* As already stated, Wirth proved he was entitled to damages, and the record shows that he presented sufficient evidence for the jury to determine the amount of compensation that was his due.

Fraud. Wirth alleged that McGregor's failure to reveal the existence of a report by hydrologist, Dr. Zane Spiegel, which questioned the availability of the underground water in the area, constituted fraud. McGregor did reveal the existence of favorable hydrology reports, one by Mr. Charles Hagerman and the other by Mr. Gordon Veneklasen, as well as the evidence of an adverse report by Mr. W. K. Summers. McGregor presented Wirth with a copy of a report by H.U.D. which warned of the divergent opinions as to the availability of water in the area. Page eleven of the report states, however, that of the eleven

wells required and drilled for the McGregor subdivisions, all but one are deemed adequate. Consequently, Wirth maintains that the H.U.D. report is not adverse. He testified that he never saw the Summers report and that McGregor had told him that it was not something to worry about because the man was from the southern part of the State and didn't know much about the Santa Fe area.

To sustain an action for fraud it must be shown that a false representation was made, either knowingly or recklessly, with the intent to deceive, for the purpose of inducing the other party to act, and that the other party did rely and act on it to his own injury. *Sauter v. St. Michael's College*, 70 N.M. 380, 374 P.2d 134 (1962). While the elements of fraud must be shown by clear and convincing evidence, *id.*, the reviewing court will not weigh the evidence and will resolve all conflicting evidence in favor of the prevailing party. *Duke City Lumber Co.* An omission as well as an act, may constitute fraud. When one is under the duty to speak, but remains silent and so fails to disclose a material fact, he may be liable for fraud. *Everett v. Gilliland*, 47 N.M. 269, 141 P.2d 326 (1943). To reveal some information on a subject triggers the duty to reveal all known material facts. *Id.* Having discussed the availability of water with Wirth, McGregor was under a duty to disclose all material facts concerning this problem.

McGregor argues that the Spiegel report was not material for several reasons. First, he maintains that it was inaccurate. Evidence was offered to the contrary at trial, however. Wirth's expert hydrologist, Mr. Veneklasen, agreed at trial with the Spiegel report. Second, McGregor maintains that the report was not material because it did not pertain to the Steven Goodyear well, but to a preliminary test well. Wirth asserts the report indicated there was insufficient water for the entire subdivision. Since the report was entered into evidence, the jury could examine it and determine for itself what weight to give it. McGregor also argues that Wirth failed to show that he would have relied on the Spiegel report. He claims that since Wirth disregarded the Summers and H.U.D. reports, he would have ignored the Spiegel report as well. Wirth replies the H.U.D. report is not adverse, and at trial he explained that he ignored the Summers report on the advice of McGregor. He also stated that he would not have bought the property had he seen the Spiegel report. From the evidence presented, the jury could have found that the Spiegel report was material.

Citing *Krupiak v. Payton*, 90 N.M. 252, 561 P.2d 1345 (1977), McGregor asserts that there is no fraud in failing to warn of a possible future problem. *Krupiak* does not stand for such a proposition. In that case, a home builder sold homes to the plaintiffs without warning them that the city might levy a special assessment against the lots to improve an unpaved street on which they bordered. The builder had been told of that possibility when he himself purchased the lots, and received a discount on the price for that reason. The court held that his failure to warn the plaintiffs was not fraud, because he had no superior knowledge concerning the city's assessment plans. It was clear to everyone that the street was unpaved, and anyone could have surmised that someday the city might decide to pave it. In the case before us, it was not self-evident that the underground water supply would run out. Through the Spiegel report, McGregor had superior knowledge of the possibility of that event occurring. *Krupiak* does not abolish McGregor's duty to disclose all material facts concerning the property.

Finally, McGregor argues that since the Spiegel report was a matter of public record, Wirth had a duty to investigate and find it. In New Mexico, the vendee has no duty to investigate the statements of the vendor. *Steadman v. Turner*, 84 N.M. 738, 507 P.2d 799 (Ct.App.1973). Wirth had no duty to discover the report.

The jury could have found that, by itself, the failure to disclose the Spiegel report constituted fraud. There was, how-

ever, other evidence of fraud also. McGregor failed to inform Wirth that the Veneklasen and Hagerman reports were based upon facts about the subdivision that were no longer true, or that two dry holes had been drilled in the area of the Steven Goodyear well. McGregor told Wirth that the Steven Goodyear well was the best well in the subdivision, when, in fact, another well produced more than eight times as much water per minute. He misrepresented the driller of the Steven Goodyear well as saying that it was a good well, when he actually said that it was marginal and should have been drilled deeper. The record contains clear and convincing evidence of fraud which would support a jury finding to that effect.

Punitive damages. Of the total award of $60,000.00, $10,000.00 was for punitive damages. As set out in *Loucks v. Albuquerque National Bank*, 76 N.M. 735, 747, 418 P.2d 191, 199 (1966):

> Punitive * * * damages may be awarded only when the conduct of the wrongdoer may be said to be maliciously intentional, fraudulent, oppressive or committed recklessly or with a wanton disregard of the plaintiffs' rights.

There was substantial evidence from which the jury could have found that McGregor's conduct was fraudulent or committed recklessly or with a wanton disregard of Wirth's rights. The jury could properly award punitive damages.

Excessive damages. The reviewing court will not find an award of damages excessive except in extreme cases. *Lujan v. Reed*, 78 N.M. 556, 434 P.2d 378 (1967). On appeal, a jury award will not be set aside as excessive, unless: 1) the evidence, viewed in the light most favorable to the plaintiff, does not substantially support the award; or 2) there is an indication that the jury was swayed by passion or prejudice, or employed a mistaken measure of damages. *See, Gonzales v. General Motors Corp.*, 89 N.M. 474, 553 P.2d 1281 (Ct.App. 1976). None of the above circumstances are present in the instant case. Furthermore, the award is to be sustained if it is within the allowable limits of the evidence. *See, Robert E. McKee General Contractor.* The evidence presented by Wirth would support compensatory damages substantially greater than $50,000.00. The award of compensatory damages is not excessive.

Nor is there error in the amount of punitive damages awarded by the jury. The trier of fact has broad discretion in determining the amount of punitive damages, *Eslinger v. Henderson*, 80 N.M. 479, 457 P.2d 998 (Ct.App.1969), so long as it bears a reasonable relationship to the injury and actual damages of the plaintiff. *Marler v. Allen*, 93 N.M. 452, 601 P.2d 85 (Ct. App.1979). We find nothing wrong with the jury award of $10,000.00 in punitive damages.

Other error. McGregor claims that the court's failure to allow the testimony of Mr. John Patterson, McGregor's former attorney, was error. The court disallowed this witness because he was not included in the pretrial order. According to N.M.R.Civ.P. 16, N.M.S.A.1978, "[a pretrial] order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." The trial court does not abuse its discretion when it refuses to allow the testimony of a witness not included in the pretrial order, when that witness is not presenting rebuttal evidence. *Martinez v. Rio Rancho Estates, Inc.*, 93 N.M. 187, 598 P.2d 649 (Ct. App.1979). Although defense counsel tried to characterize Mr. Patterson's testimony as "rebuttal", it was not such. As suggested in the pretrial order, rebuttal witnesses are those persons "the necessity of whose testimony reasonably cannot be anticipated before the time of trial". Mr. Patterson's testimony was to discredit Wirth's credibility, generally. Being part of the planned defense, it was not rebuttal evidence. The court did not err in refusing to allow it.

McGregor's next contention, that plaintiff's continued references to McGregor's wealth was grounds for a mistrial, is without merit. Generally, evidence of the defendant's wealth is admissible for

the purpose of determining the amount of punitive damages. *Aragon v. General Electric Credit Corp.*, 89 N.M. 723, 557 P.2d 572 (Ct.App.), *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976). Punitive damages were awarded; the references to McGregor's wealth were not grounds for a mistrial. Equally weak is defendant's contention that the references to and evidence of his wealth constituted plain error.

The submission of stale financial statements from 1975, 1978, and 1979 to show McGregor's assets is also claimed to be error. Because counsel failed to specify the grounds of his objections at trial, however, the error, if any, is not preserved on appeal. *Hunter v. Kenney*, 77 N.M. 336, 422 P.2d 623 (1967).

We find no merit in defendant's remaining arguments concerning the closing argument by plaintiff's counsel and other misconduct. Evidence of McGregor's offers to help ease Wirth's problems was not kept from the jury, except for offers made after the commencement of the lawsuit. Evidence that the county had blocked further sales of land in the development was not objected to at trial. Moreover, McGregor brought up the subject twice himself. McGregor admits he may not have objected at trial to all the misconduct he now asserts, but argues we should apply the rule of *Griego v. Conwell*, 54 N.M. 287, 222 P.2d 606 (1950). In *Griego*, the Supreme Court warned that statements outside the record and inflammatory comments by counsel could result in the reversal of a judgment and the award of a new trial, even if objections were not made at trial. That rule was explained in *Grammer v. Kohlhaas Tank & Equipment Co.*, 93 N.M. 685, 604 P.2d 823 (Ct.App.1979), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980), where we established that we would not apply the *Griego* 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." *Id.* at 693, 604 P.2d at 831. Nothing in the remarks of Wirth's counsel even approach the glaringly improper or unethical. There were no misstatements of fact or other misconduct which would merit reversal.

Finally, McGregor asserts that, in light of the cumulative effect of all of the alleged error, the trial court's refusal to amend the judgment or grant a new trial is an abuse of discretion. When the court exceeds the bounds of reason, there is an abuse of discretion. *Acme Cigarette Services, Inc., v. Gallegos*, 91 N.M. 577, 577 P.2d 885 (Ct.App.1978). There is no abuse of discretion in sustaining a verdict when it is supported by substantial evidence. *See generally, id.* There is substantial evidence to support the jury's verdict and award of damages.

Finding no error in the proceedings, we affirm the judgment of the district court.

IT IS SO ORDERED.

HERNANDEZ, C. J., and ANDREWS, J., concur.

630 P.2d 299

STATE of New Mexico, Plaintiff-Appellee,

v.

Mary Tex PAYNE, Defendant-Appellant.

No. 4955.

Court of Appeals of New Mexico.

June 9, 1981.

John B. Bigelow, Chief Public Defender, Melanie S. Kenton, Asst. Appellate Defender, Santa Fe, Janet Clow, Peter Schoenburg, Asst. Public Defenders, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Charles F. Noble, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

Defendant, Mary Tex Payne, appeals her conviction of voluntary manslaughter with firearm enhancement. The victim was Betty Lou Telles. We discuss two issues: (1) the presentation to the grand jury, and (2) prosecutor misconduct. We reverse because of prosecutor misconduct.

Presentation to the Grand Jury

This issue involves the denial of defendant's pretrial motion to dismiss the indictment because of the prosecutor's failure to present exculpatory evidence to the grand jury. The motion was denied after an evidentiary hearing.

(a) The Effect of *Maldonado v. State*, 93 N.M. 670, 604 P.2d 363 (1979)

State v. Herrera, 93 N.M. 442, 601 P.2d 75 (Ct.App.1979), held that defendant is denied due process when the prosecutor knowingly withholds exculpatory evidence from the grand jury. *Herrera* also held that exculpatory evidence was evidence which reasonably tends to negate defendant's guilt.

State v. Herrera is consistent with § 31–6–11(B), N.M.S.A.1978 (1980 Cumm.Supp.), which states: "The prosecuting attorney assisting the grand jury shall present evidence that directly negates the guilt of the target where he is aware of such evidence."

The Attorney General's position is that *Herrera* and § 31–6–11(B) are not applicable if the only showing is that the prosecutor knowingly withheld exculpatory evidence from the grand jury. The Attorney General seems to assert that in such circumstances no consequences attach to the withholding of exculpatory evidence. The Attorney General relies on *Maldonado v. State* even though *State v. Lampman*, 95 N.M. 279, 620 P.2d 1304 (Ct.App.1980), held that *Maldonado*, supra, did not overrule *Herrera*, supra, and the Supreme Court denied certiorari in *Lampman*, supra, see 95 N.M. 426, 622 P.2d 1046 (1980).

The Attorney General states:

> The focus of the due process violation [and presumably a violation of § 31–6–11(B)] is on the effect *at trial*, not on the effect before the grand jury.... [T]he Supreme Court is of the opinion that a fair trial can cure improprieties in grand jury presentations. Any other reading renders the language of *Maldonado* meaningless. (Emphasis in original.)

The language in *Maldonado*, on which the Attorney General relies, is: "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." (Emphasis in original.)

The Attorney General misreads *Maldonado* in several respects.

(1) The issue in *Maldonado* was the alleged presentation of inadmissible evidence to the grand jury. *Maldonado* states:

> In the recent case of *State v. Herrera* ... 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* ... *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.* (Our emphasis, except for citation.)
>
> * * * * * *
>
> We hold that the indictment in this case is not void because of the introduction of inadmissible evidence ....

The Supreme Court, in *Maldonado*, supra, declined to extend *Herrera*, supra. *Maldonado* dealt with inadmissible evidence, and held that such evidence, before the grand jury, did not void an indictment. *Maldonado* did not deal with the knowing withholding of exculpatory evidence.

(2) *Maldonado* recognized the newly-enacted grand jury reforms which require that exculpatory evidence be presented to the grand jury. *Maldonado* did not hold that no consequence attaches to a violation of the newly-enacted statute unless additional facts are present.

(3) An indictment is to be dismissed if the prosecutor knowingly withholds exculpatory evidence from the grand jury. *State v. Herrera*; § 31–6–11(B), supra. Even if no claim is made that the indictment should be dismissed because of such a withholding, there still may be a consequence, adverse to the State, for such a withholding. As the Supreme Court stated in *Maldonado*, if exculpatory evidence is knowingly withheld in the presentation to the grand jury, and is either used or withheld by the prosecutor at trial, a denial of due process may result at the trial. This is the meaning of the *Maldonado* language relied on by the Attorney General.

■ The Attorney General is incorrect in contending that *State v. Herrera* and § 31–6–11(B) did not set forth the standard applicable to the pretrial hearing on defendant's motion to dismiss.

(b) Exculpatory Evidence Knowingly Withheld

A requirement for dismissal of the indictment is that the exculpatory evidence be *knowingly* withheld. The prosecutor's evidence at the motion hearing raises a question as to the meaning of *knowing*.

The prosecutor who presented the case to the grand jury was not the prosecutor originally assigned to the case, but a substitute; the substitution occurred the day before the presentation. There was a minimum of materials in the district attorney's case file; the prosecutor did not remember whether there were police reports in the file, although exhibits show police reports and a statement obtained from a witness a week prior to the presentation. The prosecutor did not remember when he first read the police reports, whether before or after the grand jury presentation. The prosecutor was vague about which witnesses he talked to prior to the grand jury presentation. The prosecutor did not remember at what point in time he learned of scratches and bruises on defendant's face.

The trial court considered the contents of the police reports and the witness's statement in denying defendant's motion; thus, considered that the prosecutor *knew* of the contents. Because of this procedure, a decision as to the meaning of *knowing* is not required in this case. We remind prosecutors of their duty to conduct themselves fairly; that their methods must accord with the fair and impartial administration of justice. See § 31–6–7, N.M.S.A.1978 (1980 Cum.Supp.); *State v. Chambers*, 86 N.M. 383, 524 P.2d 999 (Ct.App.1974). We caution that fair conduct on the part of the prosecutor does not occur if the prosecutor postures his handling of a case to avoid knowing of exculpatory evidence; that "knowing" may need to be construed to mean matters that the prosecutor should have known about. See *State v. Sanders*, 96 N.M. ——, 628 P.2d 1134 (Ct.App.) 1981. Keeping the contents of a case file to a minimum and failing to read police reports and the statements of witnesses prior to a grand jury presentation, suggest that such a ruling may be required in a future case.

(c) The evidence withheld was contained in police reports and the statement of a witness. Defendant claims that this withheld evidence negated defendant's guilt on the grounds of self-defense. We agree with the trial court's characterization of this evidence:

> THE COURT: How could these factors have any relevance whatsoever, unless there is somebody there to explain them. In other words, she supposedly told a witness, "Betty beat me up," without saying when, how or under what circumstances. He heard loud noises, which could be consistent with a number of things. I don't know, breaking windows in [sic] a prior occasion can be a prior aggressive act, which would not in any way justify a murder or a killing.
>
> . . . .
>
> THE COURT: How can they even—there would have to be the greatest speculation in the world for them to surmise that is a self defense, because she told somebody else she was beaten up and she had scratches on her face, for that to be a self defense under those circumstances to a Grand Jury.

Defendant failed to establish that exculpatory evidence was withheld; under the alleged exculpatory evidence, the trial court properly denied the motion to dismiss the indictment.

Prosecutor Misconduct

Defendant introduced evidence of the victim's aggressive and violent character; however, defendant did not put her character in issue. See Evidence Rule 404(a); *State v. Gutierrez*, 93 N.M. 232, 599 P.2d 385 (Ct.App.1979). The prosecutor attempted, in violation of Evidence Rule 404(a)(1), to interject defendant's character into the case. He did so by: (1) Asking a witness on redirect examination whether the witness testified on cross-examination that the *victim* was violent. The witness answered that the *victim* was abrasive and potentially violent. The prosecutor then asked wheth-

er the witness was asked the same question as to the defendant. The trial court told the prosecutor that the witness had not testified to defendant's character. (2) Examining another witness, the prosecutor asked if defendant had ever been aggressive to the witness. The defense objection was sustained. (3) The prosecutor asked defendant if she had put her gun to a certain witness's head. The defense objection was sustained.

Defendant contends the above efforts to improperly interject defendant's character into the case is an independent ground for reversal. We need not decide this contention. Certainly, by the time of closing argument, the prosecutor knew that defendant's character was not an issue. We consider the prosecutor's efforts to improperly interject defendant's character in deciding that the prosecutor's closing argument was misconduct requiring reversal.

The defense, in closing argument, stated:

> You heard no evidence from anyone saying that Mary Tex Payne picked fights, that Mary Tex Payne beat on Betty Telles. The only evidence that you heard was that Betty Telles beat on Mary Tex Payne. That Mary Tex Payne was the one that had bruises and scratches on her body throughout the relationship with Betty Telles. That Betty Telles was the one to point knives and to pull guns and to act out in a violent manner.

The prosecutor objected, stating:

> I'm going to object at this point. Counsel has indicated that we didn't put on any evidence of Mary Tex Payne's previous acts of violence—
>
> Defense counsel (interrupting): Your Honor, may we approach the bench.

At the bench conference, defense counsel referred to evidence on which the defendant's closing argument was based. The above-quoted argument by defense counsel did not go beyond the evidence in the case. The prosecutor's position was that the defense argument opened the door to a prosecution argument. The trial court ruled that the prosecutor could rebut the defendant's argument. This rebuttal, permitted by the trial court, went to the comment by the defense of "no evidence" that defendant picked fights or beat on the victim. Compare *State v. Ruffino*, 94 N.M. 500, 612 P.2d 1311 (1980). The prosecutor made no effort to refer to evidence in the case. The prosecutor's rebuttal argument was:

> Counsel said—and she made a mistake in closing argument—possibly a fatal mistake—she said we haven't tried to hide anything, we've tried to bring things out here, we've tried to bring everything out. Then she said there hasn't been any evidence presented on what Mary Tex Payne is like, what her character is like, but there has on the victim. But, let me tell you something—the rule is that we can't present
>
> . . . .

Defendant's objection was overruled; the prosecutor continued:

> We are not allowed to go into the defendant's history and present "on this date she beat somebody up, on this date she beat somebody up, etc.," down the line and say and therefore she acted in conformity therewith. And its obvious why we aren't allowed to do it because people would be convicted on their past and not on their particular acts. So we are not allowed to do that. But they are allowed to do that to the victim and it's called the prosecutor mercy rule. They are allowed to go into the character of the victim and unless they open up the defendant's character by having her take the stand and say something to the effect of "I'm a peaceful person," I can't touch it. So let's just let that issue stand right there, all right?

The essence of the prosecutor's argument was that the prosecution was not allowed to present evidence of the defendant's character, of how the defendant beat someone up, but the defense was allowed to introduce evidence of the victim's character. The impropriety of this argument is patent; it suggested that defendant did beat up people and was of bad character; it, in effect, admitted there was no such evidence, and

suggested that the jury would have heard such evidence, if the prosecution had been "allowed to do it."

The judge alone instructs the jury as to the law in a given case; where counsel instructs on the law, counsel invades the province of the court. *People v. Boyd*, 88 Ill.App.3d 825, 43 Ill.Dec. 798, 410 N.E.2d 931 (1980); see U.J.I.Crim. 50.00. The prosecutor instructed the jury as to the evidentiary law concerning character evidence and did so in a way to suggest that defendant was of bad character, and the jury would have known about that bad character but for the evidentiary law. Compare *State v. Shedoudy*, 45 N.M. 516, 118 P.2d 280 (1941).

In *People v. Miller*, 43 Cal.App.3d 77, 117 Cal.Rptr. 491 (1974), the trial court refused to instruct on a lesser included offense. The prosecutor argued to the jury that defendant had admitted the lesser offense, but because there would be no lesser offense instruction,

> "[t]he dice have been rolled so to speak and you will find either robbery in the first or second degree . . . or nothing at all. . . . I want at this time . . . to divorce you of any notions you might have that the People can later try this man on the Jamaican switch. This is it. I will not go into the legal rationale why we can't."

The California court held that the prosecutor's argument was highly improper, that the charges for which the defendant could be prosecuted were not a proper subject for the jury's consideration. Similarly, the evidentiary rule as to defendant's character was not a proper subject for the jury's consideration.

The prosecutor proceeded improperly by instructing the jury as to an evidentiary rule. The prosecutor used this improper procedure to suggest the availability of inadmissible evidence. The inadmissible evidence went to defendant's character. Inasmuch as the shooting was admitted, the only pertinence of this argument was to weaken the defense of accident or self-defense. The evidence of guilt was not overwhelming; the harmless error rule is not applicable. We cannot say there was no reasonable probability that the misconduct contributed to the conviction. Because of the misconduct, defendant did not receive a fair trial. *State v. Day*, 91 N.M. 570, 577 P.2d 878 (Ct.App.1978).

The judgment and sentence are reversed. Defendant is awarded a new trial.

IT IS SO ORDERED.

HERNANDEZ, C. J., and LOPEZ, J., concur.

630 P.2d 304

STATE of New Mexico, Plaintiff-Appellee,

v.

Omer J. OGLESBY, Defendant-Appellant.

No. 5104.

Court of Appeals of New Mexico.

June 11, 1981.

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

Jeff Bingaman, Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant appeals from a finding and sentence as an habitual offender, pursuant to § 31–18–17, N.M.S.A.1978 (Supp. 1980). This case was assigned to the summary calendar with affirmance proposed. Defendant has filed a timely memorandum in opposition in which he addresses the issue of a double jeopardy violation. We are bound to follow the dictates of our Supreme Court in this regard. That Court has held that the imposition of an enhanced sentence after defendant has already begun serving his sentence on the underlying felony conviction is not violative of constitutional double jeopardy provisions. *State v. Garcia*, 95 N.M. 260, 620 P.2d 1285 (1981); *State v. James*, 94 N.M. 604, 614 P.2d 16 (1980). *See also, State v. Stout*, 96 N.M. 29, 627 P.2d 871 (1981).

Defendant does not contest our proposed disposition on the basis of the *ex post facto* laws. However, this issue merits a brief comment. The Habitual Offender Act is not an *ex post facto* law since it is procedural in nature. *State v. Bevelle*, 527 S.W.2d 657 (Mo.App.1975). Moreover, it does not punish criminals for earlier offenses, but merely increases the penalty for the repetition of criminal conduct. *Beland v. United States*, 128 F.2d 795 (5th Cir. 1942); *People v. Stone*, 159 P.2d 701, 69 Cal.App.2d 533 (1945).

Accordingly, defendant's conviction as an habitual offender is affirmed.

IT IS SO ORDERED.

HERNANDEZ, C. J., and LOPEZ, J., concur.

630 P.2d 753

(The Way It Was, Inc.) T.W.I.W., INC., Plaintiff-Appellee,

v.

Steven J. RHUDY, Defendant-Appellant.

No. 13194.

Supreme Court of New Mexico.

June 29, 1981.

Santiago R. Chavez, Taos, for defendant-appellant.

Robert S. Skinner, Raton, for plaintiff-appellee.

OPINION

FEDERICI, Justice.

Suit was brought in the District Court of Colfax County by appellee, The Way It Was, Inc. (T.W.I.W.) for unlawful detainer and nonpayment of rent and gas utility expenses on a rental unit located in Eagle Nest, New Mexico. The court found for T.W.I.W. in the amount of $1,148.72, plus costs, for back rent and a utility bill. Appellant (Rhudy) appeals. We affirm in part and reverse in part.

The premises were rented to Rhudy in August of 1979 under an oral month-to-month lease. The parties agree that rental was $175 per month. They disagree as to whether T.W.I.W. was to supply Rhudy with a heater in the rental unit. They also disagree as to whether Rhudy was to pay the gas utility bill. Finally, they disagree as to whether any of several notices to quit from T.W.I.W. to Rhudy were effective. The issues we discuss on appeal are:

I. Whether T.W.I.W. was required to provide reasonable heat for the premises;

II. Whether any of the notices to quit from T.W.I.W. to Rhudy were effective;

III. Whether there is substantial evidence to support the trial court's finding and conclusion that Rhudy owed T.W.I.W. $273.72 for gas; and

IV. Whether the trial court exercised independent discretion in preparing its findings and conclusions.

I.

Rhudy contends that the implied warranty of habitability is in effect in this State and he had a right to abate the rent because T.W.I.W. did not supply reasonable heat for the rental unit.

This Court held in *Barham v. Baca*, 80 N.M. 502, 458 P.2d 228 (1969), that there is no implied warranty of habitability in New Mexico. However, the Legislature enacted the Uniform Owner-Resident Relations Act, by 1975 N.M. Laws, ch. 38, §§ 1–54 (§§ 47–8–1 to 47–8–51, N.M.S.A.1978), which encompasses the issues presented on appeal. The section applicable to Rhudy's complaint of lack of heat is Section 47–8–20. That section provides:

A. The owner shall:

(1) substantially comply with requirements of the applicable minimum housing codes materially affecting health and safety;

(2) make repairs and do whatever is necessary to put and keep the premises in a safe condition as provided by applicable law, and rules and regulations as provided in Section 23 [47–8–23 NMSA 1978] of the Uniform Owner-Resident Relations Act;

(3) keep common areas of the premises in a safe condition;

(4) maintain in good and safe working order and condition electrical, plumbing, sanitary, heating, ventilating, air conditioning and and other facilities and appliances, including elevators, if any, supplied or required to be supplied by him;

(5) provide and maintain appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish and other waste incidental to the occupancy of the dwelling unit and arrange for their removal from the appropriate receptacle; and

(6) supply running water and a reasonable amount of hot water at all times and reasonable heat except where the building that includes the

dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the resident and supplied by a direct public utility connection.

B. If there exists a minimum housing code applicable to the premises, the owner's maximum duty under this section shall be determined by Paragraph (1) of Subsection A of this section. The obligations imposed by this section are not intended to change existing tort law in the state.

Under Subsection (B), if there exists a minimum housing code, the owner must at least substantially comply with it under Subsection (A)(1). We have not been directed to any applicable housing code by either of the parties, though it was stated at trial that there was no housing code in Eagle Nest.

While there may be no local housing code, we are aware of a state building code, adopted by the Construction Industries Division, which sets "minimum standards to safeguard . . . health [and] property . . . by regulating and controlling the . . . use and occupancy, . . . and maintenance of all buildings and structures within this jurisdiction. . . ." Uniform Building Code (U.B.C.) § 102 (1979 ed.). Section 47–8–3(C) defines "codes" within the Act as including building codes.

This Court may take judicial notice of agency rules and regulations. *See Eastern Navajo Ind., Inc. v. Bureau of Revenue*, 89 N.M. 369, 552 P.2d 805 (1976), *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976), *cert. denied*, 430 U.S. 959, 97 S.Ct. 1610, 51 L.Ed.2d 810 (1977). We need not determine whether this is such a situation since there was not a sufficient development of the facts in the trial court to determine the applicability of the U.B.C. We therefore remand this question to the trial court to determine whether any housing codes or building codes apply to the premises involved here. If any code does apply, T.W.I.W. is required to substantially comply with it for purposes of the Uniform Owner-Resident Relations Act.

If no housing code or building code applies to the premises, T.W.I.W.'s obligations to Rhudy are set forth in Subsections 47–8–20(A)(2) through (6). Subsections (2) through (5) require the owner to provide certain minimum conditions in the dwelling. Subsection (6) requires the owner to "supply . . . reasonable heat *except where the building that includes the dwelling unit is not required by law to be equipped for that purpose.*" (Emphasis added.)

The underlined language above may be reasonably interpreted to mean that unless there is a law requiring the owner to supply reasonable heat, the owner need not supply it. On the other hand, it may mean that the owner is required to provide reasonable heat unless there is some law specifically exempting him from providing it. Under the first construction it appears the burden of demonstrating a law requiring reasonable heat is upon the resident, while under the second construction, the burden of showing a law exempting the dwelling from the general requirement of reasonable heat is upon the owner.

The statute is ambiguous and we must resort to rules of statutory construction. We start with the proposition that a statute should be interpreted to mean what the Legislature intended it to mean and to accomplish the ends it sought to accomplish. *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 568 P.2d 1236 (1977). In this case, the statute is part of an Act encompassing several statutes. Legislative intent is determined by looking to the Act as a whole. *Arnold v. State*, 94 N.M. 381, 610 P.2d 1210 (1980). The Legislature has expressed its intent in this Act. Section 47–8–2 states:

The purpose of the Uniform Owner-Resident Relations Act [47–8–1 to 47–8–51 NMSA 1978] is to simplify, clarify, modernize and revise the law governing the rental of dwelling units and the rights and obligations of owner and resident, and to encourage the owners and the residents *to maintain and improve the*

quality of housing in New Mexico. (Emphasis added.)

State law prior to enactment of this Act did not require owners to provide those items listed in Section 47–8–20. *See Barham v. Baca, supra.* Section 47–8–20 lists some of the "improvements" the Legislature required, including providing reasonable heat.

The Act is remedial and in derogation of the common law. It clearly modifies the common law concerning certain standards of quality which must be maintained in rental housing. Its application must be liberally construed. *Albuquerque Hilton Inn v. Haley,* 90 N.M. 510, 565 P.2d 1027 (1977). We hold that the Legislature intended to require owners to provide reasonable heat unless they could show some specific law exempting them from the requirement.

We are further persuaded that this is the proper interpretation of Section 47–8–20(A)(6), because the alternative interpretation renders Subsection (6) mere surplusage.

Subsections 47–8–20(A)(1) and (B) require owners to comply with housing and building codes. Subsections 47–8–20(A)(2) through (6) remain as minimum standards if there is no applicable code. It does not make sense to read Subsection (A)(6) as not requiring reasonable heat unless there is a law requiring it. The only law which would require heat, other than this Act, is a housing or building code. If a housing or building code applies, we would never get to Subsection (A)(6) because Subsection (A)(1) would apply. This would make Subsection (A)(6) mere surplusage. Statutes must be construed so that no part of the statute is rendered surplusage, if possible. *Stang v. Hertz Corporation,* 81 N.M. 69, 463 P.2d 45 (Ct.App.1969), *aff'd.,* 81 N.M. 348, 467 P.2d 14 (1970).

For these reasons, we construe Subsection 47–8–20(A)(6) as placing the burden upon the owner to show that a law exists which exempts him from providing reasonable heat for the resident. Since the trial court did not impose this burden upon the owner, the owner did not have an opportunity to present evidence on this issue. We reverse and remand to the trial court on this issue so that evidence can be taken upon which to decide whether reasonable heat was required in this case, and whether it was provided.

II.

In deciding whether a notice to quit is effective, we must first establish the periodic rental dates. The trial court made the following finding: "On and prior to November 4, 1979, [Rhudy] occupied as a residence premises owned by [T.W.I.W.] located in Eagle Nest, New Mexico, on a month-to-month tenancy." This finding is sufficiently clear for us to conclude that the trial court found that the periodic rental date commenced on the fourth day of each month. We have reviewed the record and this finding is supported by substantial evidence.

Appellant contends that none of the notices to quit were effective because they were not given at least thirty days prior to the periodic rental date as required by Section 47–8–37(B), which states:

> B. The owner or the resident may terminate a month-to-month residency by a written notice given to the other at least thirty days prior to the periodic rental date specified in the notice.

The first notice appellee sent appellant was a letter dated October 22, 1979. Appellant contends that unless a notice is given at the beginning of the rental period, it is ineffective, and the only remedy is to give new notice. This is a matter of first impression in New Mexico. Other jurisdictions have held that if a notice for the termination of a tenancy is for any period shorter than the monthly period, it is ineffective. *See* Annot., 86 A.L.R. 1346 (1933). However, when addressing the question of whether the notice is effective to terminate the tenancy upon the expiration of the following month, many jurisdictions are in apparent agreement that it is. *Id. See also* 50 Am.Jur.2d *Landlord and Tenant* § 1211 (1970) and cases cited therein.

In *Kester v. Disan Engineering Corp.,* 591 P.2d 344, 348 (Okl.App.1979), the court ad-

dressed a factual situation similar to the one here. There, the tenancy period commenced on the first day of each month. The court said:

> If ... notice is given on the third of March the 30 days could not elapse without starting April and, therefore, the tenancy would terminate at midnight, the last day in April.

This rule is logical since such notice provides the tenant with information sufficient to inform him that the landlord wishes him to quit the premises, and the only question is how soon that must be done. We note that the applicable statute, set out above, requires notice to be "*at least* thirty days prior to the periodic rental date." (Emphasis added.) We hold that a notice to quit which is ineffective because it does not give the month-to-month tenant the requisite thirty days prior to the periodic rental date is nonetheless effective for the next ensuing rental date.

Appellant argues that the October 22 notice was ineffective because it did not sufficiently notify him that he must terminate the tenancy, as required by Section 47–8–37.

To be effective, notice must be sufficiently definite to inform the tenant of the landlord's desire that the tenant vacate the premises. *Lund v. Ozanne*, 13 N.M. 293, 84 P. 710 (1906).

The notice here advised Mrs. Rhudy that "it would be the best for all concerned if you would vacate the property .... In the event you do not deem it possible to move at the present time, you are now advised that your rent will be raised to $612.00 per month beginning November 1, 1979."

Where a notice to quit is coupled with an option to the tenant to remain at an increased rental, it is insufficient to terminate the tenancy. *Flanagan v. Lazerine*, 175 Mo.App. 188, 157 S.W. 824 (1913). *See* 51(C) C.J.S. *Landlord & Tenant* § 150(4) (1968).

This notice was not sufficiently definite to inform the tenants of the landlord's desire that they vacate, because it was equivocal. They could have construed the notice to mean that they could remain at an increased rental. Therefore, it was not effective notice. *Spencer v. Faulkner*, 65 Misc.2d 298, 317 N.Y.S.2d 374 (Civ.Ct.N.Y. 1971). We need not consider whether appellee was entitled to the increased rental, since this issue was not before the trial court.

The second notice to quit was delivered to Rhudy on November 3, 1979. It stated: "To comply with legal requirements, this is your official notice to vacate the T.W.I.W. property immediately for the following reasons: ...." This notice was unequivocal. Though it did not specify a proper date of termination, it was nonetheless effective for the reasons discussed above. The tenancy was terminated on midnight, December 3, 1979. Rhudy abated the rent for the month of November, which he was entitled to do under Section 47–8–29, if T.W.I.W. failed to perform its obligations, as required by Section 47–8–20. The abatement must be reasonable. There is substantial evidence that sufficient notice was given to allow Rhudy to abate the rent. On remand, if the trial court finds that Rhudy is entitled to abate the rent for the month of November, it must then determine whether the amount Rhudy paid, under the circumstances, was reasonable for that month. This amount should be the fair market value of the premises without heat for that month.

After midnight on December 3, 1979, the rental agreement was terminated.

Under Section 47–8–37(C),

> [i]f the resident remains in possession without the owner's consent after expiration of the term of the rental agreement or its termination, the owner may bring an action for possession and if the resident's holdover is willful and not in good faith the owner, in addition, may recover the damages sustained by him and reasonable attorney's fees.

The trial court here must determine whether Rhudy's holdover was willful and not in good faith, and if so, the date upon which it became so. T.W.I.W.'s damages and right to attorney fees will accrue from that date.

In addition, the owner is entitled to rent during the holdover period. § 47–8–35. Since there was no rental agreement after December 3, 1979, Rhudy is required to pay the "fair rental value" of the premises as they existed during these months under Section 47–8–15. "Fair rental value" is defined in Section 47–8–3. The trial court must determine this value for the months Rhudy was in possession without a rental agreement. For all practical purposes, we see no difference in the computation of this amount and in determining the amount of rent Rhudy must pay after abatement. However, the amount may fluctuate from month to month, since a lack of reasonable heat may reduce the fair rental value more in some months than others.

The trial court is reversed on this issue and directed to take additional evidence where necessary to set damages and rental amounts following the above guidelines.

III.

Rhudy next argues that there is no substantial evidence to support the trial court's finding of an agreement by him to pay the gas utility bill. The evidence concerning this is conflicting. There is evidence that the agreement required Rhudy to pay the gas bill. Other evidence contradicts this. There is some evidence that an initial gas meter reading was never taken. There is also evidence that there had been no other tenant in the apartment, so what showed on the meter was solely Rhudy's gas reading. We set forth the elements of the substantial evidence test in *Toltec Intern. Inc. v. Village of Ruidoso*, 95 N.M. 82, 619 P.2d 186 (1980). There we said that substantial evidence means sufficient relevant evidence which a reasonable mind might accept as adequate to support a conclusion. We also stated that on appeal, all disputed facts are resolved in favor of the successful party, with all evidence and inferences to the contrary disregarded. Finally, although contrary evidence is presented which may have supported a different verdict, the appellate court will not weigh the evidence. *See also Duke City Lumber Company, Inc. v. Terrel*, 88 N.M. 299, 540 P.2d 229 (1975). Here, there was substantial evidence to support the judgment of the trial court.

IV.

Finally, Rhudy contends that the trial court adopted the findings of fact and conclusions of law requested by T.W.I.W., thereby failing to exercise its independent judgment and prepare its own decision. However, in two instances, the court added to the requested conclusions of T.W.I.W. One of T.W.I.W.'s requested conclusions required the trial judge to determine the amount due for the gas utility bill, which he did. We do not think that these facts are sufficient to find that the trial judge failed to exercise independent discretion. *See State, Etc. v. Rio Rancho Estates, Inc.*, 96 N.M. 560, 624 P.2d 502 (1981).

We reverse and remand to the trial court on Issues I and II above and affirm on Issues III and IV.

IT IS SO ORDERED.

EASLEY, C. J., SOSA, Senior Justice, and PAYNE and RIORDAN, JJ., concur.

630 P.2d 758

Betty Mae HARTMAN and Charles W. Williams and his wife, Carolyn L. Williams, Cross-Defendants-Appellants,

v.

Olive SHAMBAUGH and First National Bank in Albuquerque, Third-Party Plaintiffs-Appellees,

v.

USLIFE TITLE INSURANCE COMPANY OF DALLAS, a foreign corporation, Third-Party Defendant and Intervenor-Appellee.

No. 12639.

Supreme Court of New Mexico.

June 29, 1981.

Thomas L. Bonham, Albuquerque, for cross-defendants-appellants.

Harry O. Morris, Albuquerque, for third-party defendant and intervenor-appellee.

Hunter L. Geer, Albuquerque, for third-party plaintiffs-appellees.

OPINION

FEDERICI, Justice.

Plaintiff, Valle Grande Real Estate Development Corporation (Valle Grande), commenced this action to quiet title to certain realty and was awarded a partial final decree against the defendants, Betty Mae Hartman, Charles W. Williams and his wife, Carolyn L. Williams (Williams), against the defendant Olive Shambaugh (Shambaugh), and against certain other defendants not parties to any further proceedings.

Thereafter, defendant Shambaugh, joined by the defendant First National Bank as Trustee for Olive Shambaugh, filed a cross-claim for a declaratory judgment against Williams and a third-party complaint against USLife Title Company of Dallas (USLife Title), alleging that by agreement Shambaugh had sold to Williams, and USLife Title had insured the title in Williams to a portion of the realty, which realty the trial court subsequently determined was owned by Valle Grande; that title to an additional parcel sold by Shambaugh to Williams, and also insured by USLife Title, was in doubt. Shambaugh sought a declaratory judgment concerning the liability, if any, of Shambaugh to Williams and the amount of insurance coverage afforded by USLife Title.

USLife Title then filed a complaint in intervention, naming Williams and Shambaugh as parties, asking the court to determine and establish the respective rights, duties, obligations and liabilities of the parties, and enter judgment accordingly.

After answers and various other pleadings had been filed and the depositions of Williams and Shambaugh had been taken, the court entered a declaratory judgment, holding that the title to the lands remaining in Williams had value equal to or in excess of the difference between the amount paid to Shambaugh by Williams and the amount received from other sources by Williams. The court ordered that Williams be granted title to the land remaining in Williams' name free of any security interest of Shambaugh but without any warranty of title from Shambaugh. The court also ordered that the balance of the debt from Williams to Shambaugh be cancelled.

Williams filed an affidavit setting forth that 1.1064 acres upon which title had failed and which acreage was insured by USLife Title had a value of $35,000 at the time he acquired the property; $50,000 when he first discovered any adverse claim; and $80,000 at the time the affidavit was filed. No counter-affidavits were offered or filed nor do any of the pleadings by USLife Title or any of the other parties allege or refer to any other evidence of value of the property upon which title failed.

Based upon the record and the evidence in the case, the trial court found that the value of the land was established at the date of the sale by the purchase price of $22,000. It further found that Williams had suffered no loss and therefore was not entitled to judgment against USLife Title. Williams appeals. We reverse.

The issues we discuss on appeal are:

I. Whether Williams is entitled to a judgment against USLife Title upon its policy of title insurance in an amount equal to the value of the property upon which title failed, up to the amount of the policy limits of $30,000.

II. Whether the value of the property lost should be determined as of the date of purchase, the date of discovery of the title defect by the owner, or at date of trial.

I.

Williams contends that if title fails as to any portion of insured property, the insured is entitled to receive payment from the insurer for his actual loss up to the limits of the policy.

It is undisputed that the rights and liabilities of the parties are fixed by the contract of title insurance. *See Safeco Ins. Co. of America, Inc. v. McKenna*, 90 N.M. 516, 565 P.2d 1033 (1977).

The policy involved here states:

> USLIFE TITLE * * *, insures * * *, against loss or damage, not exceeding the amount of insurance * * * which the Company may become obligated to pay hereunder, sustained or incurred by the insured by reason of:
>
> 1. Title to the estate * * * being vested otherwise than as stated * * *.

Paragraph 6 states:

> (a) The liability of the Company under this policy shall in no case exceed the least of:
>
> (i) the actual loss of the insured claimant; or

(ii) the amount of insurance stated [$30,000].

Here, it is undisputed that title to a portion of the insured property failed. It appears to be uniformly held that where title to a portion of insured property fails, the insured is entitled to recover upon the loss up to the amount of insurance coverage under the policy. Annot., 60 A.L.R.2d 972 (1958). *See Burks v. Louisville Title Ins. Co.*, 95 Ohio App. 509, 121 N.E.2d 94 (1953). Here, Williams was entitled to recover for his "actual loss" up to $30,000.

In *Demopoulos v. The Title Insurance Company*, 61 N.M. 254, 298 P.2d 938 (1956), plaintiff had insured property for more than its value, and this Court held that the measure of his damages was the value of the real estate, keeping in mind there was no claim of negligence on the part of the insurer.

The value of the real estate has been determined in other jurisdictions in two primary manners. Annot., 60 A.L.R.2d 972, (1958). One is simply to determine the value of the property to which title failed. *Kentucky Title Co. v. Hail*, 219 Ky. 256, 292 S.W. 817 (1927). This solution may apply where the value of the entire tract is not diminished, except by the percentage loss, such as with open ranchland. It is not proper where the value of the entire tract may be disproportionately diminished, such as with urban property. As an example, in the latter situation, an entire lot may become virtually valueless because of a discovered easement bisecting the lot. In such a case, the proper measure of damages requires consideration of impairment of the value to the entire lot. This may be calculated by determining the actual value of the lot if there were no impairment and subtracting its value as impaired. The difference between the two figures is the amount of damages. *See Fohn v. Title Ins. Corp. of St. Louis*, 529 S.W.2d 1 (Mo.1975); *Buquo v. Title Guaranty & Trust Co.*, 20 Tenn.App. 479, 100 S.W.2d 997 (1936), *cert. denied*, January 27, 1937. The measure of damages also includes incidental damages "reasonably supposed to have entered into the contemplation of the parties." *Buquo, supra.* 100 S.W.2d at 1000 and citations listed therein. The value of land may be determined by the purchase price in the proper situation, but where a party maintains the value is different than that amount, the trial court should consider additional evidence. To restrict evidence on this issue to the amount paid could eliminate any beneficial bargain one of the parties might have made at the time of purchase. The actual value of property may be more or less than the purchase price. *See Fohn v. Title Ins. Corp. of St. Louis, supra.*

The trial court did not consider this possibility and is reversed. We remand with directions to take additional evidence upon the question of Williams' loss caused by the failure of title, and to determine the amount of his loss according to the above guidelines. Once this amount is determined, the court should enter judgment against USLife Title for that amount. Upon a new trial, the court should also consider any subrogation rights which USLife Title may have against Shambaugh.

II.

It is necessary to pass upon the date which should be used by the trial court to determine the value of the property. It is a matter of first impression in New Mexico. The jurisdictions which have considered this question are not in agreement. It has been stated that the date the value of the property should be determined is the date of purchase, the date of the discovery of the defect, or the date of a bona fide contract of sale by the insured or present value. *See* 15 Couch on Insurance 2d § 57:186 (1966).

The cases which hold that the value must be determined as of the date of purchase do not explain the basis for their reasoning. The seminal case adopting this rule is *Glyn v. Title Guarantee & Trust Co.*, 132 App. Div. 859, 117 N.Y.S. 424 (1909). This case cites as authority for its holding, *Kidd v. McCormick, et al.*, 83 N.Y. 391 (1881). *Kidd* did not involve title insurance and is only tangential authority for the holding in

Glyn. Glyn was followed by *Beaullieu v. Atlanta Title & Trust Co.*, 60 Ga.App. 400, 4 S.E.2d 78 (1939). Again, no reasoning behind the decision was given. The date of purchase was again used by the court in *Securities Serv., Inc. v. Transamerica Title*, 20 Wash.App. 664, 583 P.2d 1217 (1978). In that case, the court recognized the general rule that if the defect insured against is a lien or encumbrance, the owner's loss is measured by the cost of removing the lien or encumbrance. Normally, such a cost would increase over the time subsequent to purchase. Yet, the court required recovery for failure of title to be determined from the date of purchase. No reasoning or authority was cited for this distinction.

Finally, *Murphy v. United States Title Guaranty Co.*, 104 Misc. 607, 172 N.Y.S. 243 (1918), adopted this rule, reasoning that title insurance was analogous to a covenant against encumbrances. Since the measure of damages for breach of a covenant against encumbrances was set at the date of purchase, the same rule should be used in a title insurance case.

One case looks to the date of a contract by the insured to sell the property or present value. It is *Kentucky Title Co. v. Hail, supra.* There, title to a portion of insured property failed. The court apparently determined that the terms of the policy looked to the future, and actual value was not determined at the time of purchase, but rather at the time of a recent contract of sale. The court was apparently using the contract as an indication of present value.

The remainder of the cases we have found which consider this question hold that the value of the property should be determined as of the date of discovery of the defects in the title. The reasoning behind this conclusion is best stated in *Overholtzer v. Northern Counties Title Ins. Co.*, 116 Cal.App.2d 113, 253 P.2d 116, 125 (1953):

> When a purchaser buys property and buys title insurance, he is buying protection against defects in title to the property. He is trying to protect himself then and for the future against loss if the title is defective. The policy necessarily looks to the future. It speaks of the future. * * * The insured, when he purchases the policy, does not then know that the title is defective. But later, after he has improved the property, he discovers the defect. Obviously, up to the face amount of the policy, he should be reimbursed for the loss he suffered in reliance on the policy, and that includes the diminution in value of the property as it then exists, in this case with improvements. Any other rule would not give the insured the protection for which he bargained and for which he paid.

Other authorities following this rule are: *Happy Canyon Inv. v. Title Ins. Co. of Minn.*, 38 Colo.App. 385, 560 P.2d 839 (1976), *cert. denied*, March 7, 1977, and *Sullivan v. Transamerica Title Insurance Company*, 35 Colo.App. 312, 532 P.2d 356 (1975).

We are convinced that the reasoning stated in these latter cases is more appropriate. It allows the insured to protect himself prospectively. We reject the reasoning in those cases which state value should be determined as of the date of purchase. It is an oblique analogy to compare title insurance to a grantor's covenant and use that measure in determining damages.

We also reject the reasoning in the case which holds that value should be determined as of the date of a bona fide contract to sell, or alternatively, by present value. Once a defect is discovered, the insured should be required to move with reasonable haste to resolve the problem. If he becomes aware of a defect but does nothing while the value of the property continues to change, he should not be allowed to reap any benefit by his inactivity. If the defect is discovered subsequent to a bona fide contract to sell, the insured should still be allowed to recover for value up to the date of discovery, since he is unaware of any defects up to that point, and has no reason to take any steps toward resolving the problem.

We do not believe that by the terms of the contract, the parties intended to have

the actual value of the property determined at some indefinite future date, set at the discretion of the insured, according to the time he makes a claim upon the policy. Here, Paragraph 3(b) of the policy states:

> The insured shall notify the Company promptly in writing * * * (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, as insured, and which might cause loss or damage for which the Company may be liable * * * *

The purpose of this clause is primarily to afford the company an opportunity to mitigate its damages under the claim, and to provide certainty as to the extent of outstanding claims it may be required to pay. In order to fulfill the intent of the parties in looking to the future, yet provide certainty as to liability, it is proper to determine actual value as of the date of discovery of the defects by the owner.

Here, the trial court set the value of the property as the date of purchase of the property. We reverse it on this issue and direct it to take further evidence to determine the actual value of the property on the date of discovery of the defects in the title, and to adjust the rights and liabilities of the parties accordingly.

Appellant raises other issues on appeal concerning out-of-pocket losses, evidentiary matters, and an alleged breach of duty by the Williams' corporation to Shambaugh in the transactions. The first two of these issues have been resolved in our disposition of the issues above and need no further discussion. The latter issue will not be addressed because the trial court made no findings upon it, nor was Williams' corporation a party to this suit. If Shambaugh has a cause of action against Williams' corporation, that issue is not properly addressed in this suit.

IT IS SO ORDERED.

SOSA, Senior Justice, and RIORDAN, J., concur.

630 P.2d 763

STATE of New Mexico, Petitioner,

v.

Richard Arnold DURAN, Respondent.

No. 13409.

Supreme Court of New Mexico.

July 2, 1981.

Jeff Bingaman, Atty. Gen., Carol Jean Vigil, Asst. Atty. Gen., Santa Fe, for petitioner.

Martha A. Daly, Appellate Defender, Santa Fe, for respondent.

OPINION

EASLEY, Chief Justice.

Duran was convicted of second-degree murder. Prior to trial, he moved to dismiss or preclude presentation of fingerprint evidence on the ground that the investigating officers improperly destroyed a Coke can found at the scene of the crime from which a fingerprint matching Duran's was lifted. The trial court denied the motion. The Court of Appeals placed the case on its summary calendar and reversed by memorandum opinion without allowing briefing or filing of the record. We reverse the Court of Appeals.

The sole question on certiorari is whether the destruction of the Coke can constituted the improper and prejudicial suppression of material evidence.

Officers investigating the scene of the crime lifted more than ten fingerprints from objects found at the scene. Prints were lifted from inside and outside a door, a glass mug, a table, a water pipe, and a Coke can found in a trash receptacle. After the fingerprint was lifted off of the Coke can, the can was returned to the trash receptacle. At the time the officers lifted the prints, they did not know to whom they belonged and they did not know that Duran was a suspect. Subsequent investigation revealed that some of the fingerprints, including the print obtained from the Coke can, matched Duran's.

The Court of Appeals, in reversing the conviction, relied on its opinion in *State v. Lovato*, 94 N.M. 780, 617 P.2d 169 (Ct.App. 1980). *Lovato* held that the suppression of evidence by the State requires reversal of the conviction if (1) the State either intentionally deprived the defendant of evidence, or, by inadvertence, breached a duty to preserve the evidence; (2) the suppressed evidence was material to the guilt or innocence of the accused; and (3) the defendant was prejudiced by the improper suppression of the evidence.

Under this test, we cannot agree that the bare failure to preserve the Coke can requires reversal in this case. Preliminarily, we note that it would be impossible to determine that the Coke can was material and that Duran was prejudiced by its destruction without a review of the record. The Court of Appeals therefore improperly set the case on its summary calendar. The State has provided us with a transcript of the hearing on Duran's motion. Although we will not normally consider exhibits to briefs which attempt to supply omissions to the record on appeal, we will take judicial notice of the transcript in this case for the purpose of resolving this appeal and because Duran was not allowed to file the record on appeal since the case was set on the Court of Appeals' summary calendar. *See Kassel v. Anderson*, 84 N.M. 697, 507 P.2d 444 (Ct.App.1973).

From the testimony admitted at the hearing the trial court properly concluded that the Coke can was not material and Duran was not prejudiced by its destruction. Evidence is material in this context if it is material to the guilt or innocence of the accused. *State v. Morris*, 69 N.M. 244, 365 P.2d 668 (1961); *Chacon v. State*, 88 N.M. 198, 539 P.2d 218 (Ct.App.1975). While the *fingerprint* obtained from the can was undoubtedly material to the guilt or innocence of Duran, none of the testimony indicated that the can was of any further use to either the prosecution or defense after the fingerprint had been lifted from it. Duran's own expert testified that the possibility of obtaining a second lifting of the fingerprint from the can was "not very probable." The only object of any evidentiary value—the fingerprint—was preserved by the State and available to defense counsel for testing and analysis. There simply was no showing that the Coke can

was in any way material to the question of guilt or innocence once the fingerprint had been obtained from it.

Duran would have us adopt a totally untenable position. His contention means that all objects from which fingerprints are obtained should be preserved as evidence. If a fingerprint was obtained from a wall, then that portion of the wall should be cut out and preserved. One can imagine the victim of a burglary watching in horror as the team of investigating officers arrives with crowbars and saws. Holes are cut in walls; doors, doorknobs and windows are removed; refrigerators, tables, dishes and furniture are hauled off as "evidence." The hapless victim might justifiably decide that the investigation was worse than the crime. This would not end the absurd results. The tons of objects collected, say in Bernalillo County, would soon fill the Courthouse and City Hall, and demand the construction of more storage space.

The courts do not and should not operate in a vacuum, or an ivory tower. Common sense is a key ingredient in the administration of justice. Application of that ingredient in this case calls for a reversal of the ruling that every original fingerprint and the object on which it is found must be seized and preserved as evidence.

The cause is remanded to the Court of Appeals for consideration of other points of error raised by Duran.

IT IS SO ORDERED.

SOSA, Senior Justice, and PAYNE, FEDERICI and RIORDAN, JJ., concur.

630 P.2d 765

STATE of New Mexico, Plaintiff-Appellee,

v.

Christopher ERVIN, Defendant-Appellant.

No. 5085.

Court of Appeals of New Mexico.

June 9, 1981.

Writ of Certiorari Denied July 10, 1981.

John B. Bigelow, Chief Public Defender, Lynne C. Corr, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Reese Fullerton, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

HENDLEY, Judge.

Convicted of burglary of a dwelling house, defendant appeals. He contends the trial court erred in refusing to grant his motion for a directed verdict because the unoccupied house in question was not a "dwelling house" for purposes of § 30–16–3(A), N.M.S.A.1978.

Since this case was assigned to the legal calendar, we accept the facts recited in the docketing statement as true. *State v. Calanche*, 91 N.M. 390, 574 P.2d 1018 (Ct.App. 1978). There was testimony that for more than one year the burglarized house had not been occupied. Gas, water and electricity were not being supplied to the house. Mattresses were stacked against the dining room walls and windows. The owner of the house stated that her aunt, the previous occupant, was advanced in years and extremely infirm. There was no testimony that the aunt did not expect to return.

We agree with defendant that New Mexico has not expressly defined a "dwelling house". Our burglary statute merely differentiates between residential burglary and burglary of other structures. The common law definition of dwelling house holds that a building is not a dwelling before the first occupant has moved in; nor does it continue to be a dwelling after the last occupant has moved out with no intention of returning. Perkins on Criminal Law, p. 157 (1957); 3 Burdick, Law of Crime, § 694 (1946); Clark and Marshall, A Treatise on the Law of Crimes, § 13.02 (6th ed. 1958). *See also*, Annot., at 85 A.L.R. 428 (1933) and 78 A.L.R.2d 778 (1961).

Defendant contends that the facts of the prior occupant's age and infirmity indicated that "she would not re-occupy the house in the foreseeable future." Assuming this to be a permissible inference, it is not the common law test to establish whether a building is a residence. There was no evidence that the occupant had abandoned the house or had no intention of returning. *Compare, Hobby v. State*, 480 S.W.2d 554 (Tenn.Cr.App.1972); *Hargett v. State*, 534 S.W.2d 909 (Tex.Cr.1976); *State v. Matson*, 3 Or.App. 518, 475 P.2d 436 (1970). *Contrast, Moss v. State*, 574 S.W.2d 542 (Tex. Cr.App.1978). Defendant was not entitled to an acquittal.

Finally, defendant contends that *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), requires evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. Reliance on *Jackson v. Virginia* is misplaced. The omission, if any in this case, was that of an amplification of the elements of the offense. Such an omission is not error. *State v. Padilla*, 90 N.M. 481, 565 P.2d 352 (Ct. App.1977). The jury was instructed, without objection, in the language of N.M.U.J.I. Crim. 16.21, N.M.S.A.1978: "A 'dwelling house' is any structure, any part of which is customarily used as living quarters." Under the facts recited in the docketing statement, this instruction adequately instructed the jury on the essential elements to return a verdict of guilty of burglary of a dwelling house. The defendant did not make a tender nor was there evidence which would make this amplification a critical determination. In light of the foregoing, we find no basis for defendant's claim. Accordingly, we affirm.

IT IS SO ORDERED.

LOPEZ and WALTERS, JJ., concur.

630 P.2d 767

Eddye TOMPKINS, Mother and Next Friend of Douglas B. Newby, Deceased, Plaintiff-Appellee,

v.

CARLSBAD IRRIGATION DISTRICT, James R. Craft, L. A. Johnson, L. N. Ferguson, Eugene C. Walterscheid and John Giovengo, Members of the C.I.D. Board of Directors, Defendants-Appellants.

No. 5068.

Court of Appeals of New Mexico.

June 16, 1981.

Carl J. Butkus, Civerolo, Hansen & Wolf, P. A., Albuquerque, Jay W. Forbes, McCormick & Forbes, Carlsbad, for defendants-appellants.

Tom Cherryhomes, Carlsbad, for plaintiff-appellee.

OPINION

WOOD, Judge.

Douglas, an infant approximately seventeen months old at the time, drowned in water standing in a culvert. The culvert carried irrigation ditch water underneath a highway. Plaintiff sought damages from CID (Carlsbad Irrigation District) and the directors of CID. Defendants moved to dismiss and converted that motion to one for summary judgment by the use of an exhibit showing the organization of CID and certain depositions. Rule of Civ. Proc. 12(b). The trial court denied the motion; we granted defendants' application for an interlocutory appeal. We discuss: (1) whether a governmental entity is involved; (2) § 41–4–6, N.M.S.A. 1978; (3) § 41–4–11, N.M.S.A. 1978; and (4) the legal sufficiency of the damage claim.

Governmental Entity

Governmental entities and public employees acting within the scope of duty are granted immunity from liability for tort except as provided in the Tort Claims Act, § 41–4–4(A), N.M.S.A. 1978 (1980 Cum. Supp.). Public employee is defined to include officers of a governmental entity, § 41–4–3(E), N.M.S.A. 1978. The status of the individual defendants as officers of CID is not challenged; the individual defendants are public employees for the purposes of this suit if CID is a governmental entity.

Section 41–4–3, supra,

1. in subsection B, defines governmental entity as the state or any local public body as defined in subsections C and G;

2. in subsection C, defines local public body as all political subdivisions of the state and their agencies, instrumentalities and institutions; and

3. in subsection G, defines state or state agency to mean the State of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions.

The organization of CID was completed upon entry of a court order approving organization in 1933. The organization was pursuant to Chapter 73 of the Compiled Laws, 1929, see Ch. 73, Articles 10 and 11, N.M.S.A. 1978. Irrigation districts so organized were validated by Laws 1934 (S.S.), Ch. 9, now appearing as §§ 73–13–43 to 73–13–46, N.M.S.A. 1978. There is no issue as to the valid organization of CID; our concern is with a provision in the 1934 validating law.

Section 73–13–44, supra, refers to irrigation districts organized under the irrigation law and states "the aforesaid irrigation districts are hereby created, established and organized and continued bodies corporate and politic . . . ." "[T]he legislature has power to create . . . political subdivisions for a public purpose." *Albuquerque Met. Arroyo Flood Con. A. v. Swinburne*, 74 N.M. 487, 394 P.2d 998 (1964).

The Legislature having established CID as a "body politic," the issue is whether a body politic is a political subdivision and, thus, a local public body under the Tort Claims Act. We do not consider whether CID is a state agency because of the decision in *Hooker v. Village of Hatch*, 66 N.M. 184, 344 P.2d 699 (1959), which held that the Elephant Butte Irrigation District was not an agency of the state.

Davy v. McNeill, 31 N.M. 7, 240 P. 482 (1925), states that irrigation districts are not municipal corporations, but public corporations for municipal purposes. See also *Daniels v. Watson*, 75 N.M. 661, 410 P.2d 193 (1966). We do not involve ourselves with the meaning of quasi-municipal because such is irrelevant in this case. See *Gallagher v. Albuquerque Metro., Etc.*, 90 N.M. 309, 563 P.2d 103 (Ct.App.1977). Whether CID is a quasi-municipal corporation is not an issue; the issue is whether CID is a local public body.

In re Dexter-Greenfield Drainage District, 21 N.M. 286, 154 P. 382 (1915), points out that irrigation districts are organized for the purpose of exercising a public function and not for private gain. *Gutierrez v. Middle Rio Grande Consv. District*, 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929), states that irrigation is a public use. *Gibbany v. Ford*, 29 N.M. 621, 225 P. 577 (1924), defined a political subdivision as "formed or maintained for the more effectual or convenient exercise of political power within certain boundaries or localities, to whom the electors residing therein are, to some extent, granted power to locally self-govern themselves." The provisions of Ch. 73, Articles 10 and 11, N.M.S.A. 1978, meet this definition. *Donalson v. San Miguel County*, 1 N.M. (Gild.) 263 (1859), held that a county, authorized by the Legislature, was a body "politic and corporate."

The authority cited in the immediately preceding paragraph would sustain a holding that CID is a political subdivision. In addition, we have a legislative declaration that an irrigation district, such as CID, is a body corporate and politic. Such a body is a political subdivision. *Gallagher v. Albuquerque Metro., Etc.*, supra; see *In re Garrison Diversion Conservancy District*, 144 N.W.2d 82 (N.D.1966). CID is a local public body as defined in § 41–4–3, supra, and is a governmental entity. Accordingly, the Tort Claims Act applies to the claims against defendants.

Section 41–4–6

This section reads:

41–4–6. Liability; buildings, public parks, machinery, equipment and furnishings.

The immunity granted pursuant to Subsection A of Section 41–4–4 NMSA 1978 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 or maintenance of any building, public park, machinery, equipment or furnishings. Nothing in this section shall be construed as granting waiver of immunity for any damages arising out of the operation or maintenance of works used for diversion or storage of water.

Defendants contend the last sentence of this section provides immunity from plaintiff's damage claim. According to the depositions, the ditch involved brought water from CID's canal; the culvert involved carried the ditch water underneath the highway; the water standing in the culvert resulted from the operation or maintenance of works used for the diversion of water.

Plaintiff does not contend that, factually, CID does not come within the last sentence of § 41–4–6, supra. Plaintiff's contention is: "Nowhere does the section use the term irrigation district and . . . if this were read into the bill, it would clearly be violative of Art. IV, § 16" of the Constitution of New Mexico.

Article IV, § 16 of our Constitution, states requirements concerning the title of legislative enactments. The titles to the New Mexico Tort Claims Act, as enacted by Laws 1976, Ch. 58, and to the amendatory act, Laws 1977, Ch. 386, are not involved. The title of both Acts refer to the liability of government in the State of New Mexico. Plaintiff's argument is not directed to the title of an act, but to a section heading.

Plaintiff's argument is directed to the legislatively-enacted section heading to § 41–4–6 which is quoted above. That section heading is of no assistance to plaintiff because there is no ambiguity in § 41–4–6. Immunity is waived for specified items in the first sentence of § 41–4–6; the second sentence limits that waiver of immunity when the claimed negligence is based on the operation or maintenance of works used for diversion or storage of water. The contents of § 41–4–6, being unambiguous, the use of a legislatively-enacted section heading to determine legislative intent is not involved. See *State v. Ellenberger,* 96 N.M. 287, 629 P.2d 1216 (1981); *American Automobile Ass'n, Inc. v. Bureau of Rev.,* 88 N.M. 148, 538 P.2d 420 (Ct.App.1975), rev'd on other grounds, 88 N.M. 462, 541 P.2d 967 (1975).

Under § 41–4–4(A), supra, a governmental entity is immune from liability except as provided in the Tort Claims Act. Section 41–4–6, supra, is not a waiver of immunity for damages arising out of the operation or maintenance of works used for diversion or storage of water; § 41–4–6 does not provide a basis for holding defendants liable to plaintiff.

Section 41–4–11

This section reads:

41–4–11. Liability; highways and streets.

A. The immunity granted pursuant to Subsection A of Section 41–4–4 NMSA 1978 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 maintenance of or for the existence of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area.

B. 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; or

(2) the failure to construct or reconstruct any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area.

Plaintiff contends that § 41–4–11 is a waiver of immunity for negligence in connection with the maintenance or existence of a culvert.

Defendants contend that the specific limitation of § 41–4–6 (the second sentence of § 41–4–6, discussed above), makes § 41–4–11 inapplicable. We disagree. The express language of the second sentence of § 41–4–6, supra, shows that the specific limitation applies to "this section"; thus, the specific limitation applies only to § 41–4–6. Compare § 41–4–13, N.M.S.A. 1978, which is a general provision excluding community ditches or acequias from all waivers of immunity.

Section 41–4–11, supra, literally read, states a waiver of immunity in connection

with "any culvert". In *O'Brien v. Middle Rio Grande, Etc.*, 94 N.M. 562, 613 P.2d 432 (Ct.App.1980), we pointed out that "any" means "one or more" or "all". The question is whether the waiver in § 41–4–11 literally applies to all culverts.

Webster's Third New International Dictionary (1966) defines "culvert" to mean "a transverse drain or waterway (as under a road, railroad, or canal)". See *Herrick v. Town of Holland*, 83 Vt. 502, 77 A. 6 (1910). A question arises as to whether "culvert" means "any" such transverse drain because cases have limited the meaning of culvert to drains running under a road, *Kowalka v. Village of St. Joseph*, 73 Mich. 322, 41 N.W. 416 (1889); *DiLorenzo v. Village of Endicott*, 70 Misc.2d 159, 333 N.Y.S.2d 456 (1972), and because of the context in which "culvert" is used in the statute.

The series of words used in § 41–4–11, supra, is "bridge, culvert, highway, roadway, street, alley, sidewalk or parking area." In this context, the Legislature used bridges and culverts as bridges and culverts used in connection with highways, roadways, streets, alleys, sidewalks and parking areas. See *American Automobile Ass'n, Inc. v. Bureau of Rev.*, supra. This resolution of the meaning of "any" culvert is supported by the legislatively-enacted section heading, "Liability; highways and streets." *State v. Ellenberger*, supra.

In this case, it is not disputed that the culvert is a transverse drain under a highway; the waiver of immunity in § 41–4–11, supra, is applicable in this case and provides a basis for liability against defendants.

The uncontradicted showing in the depositions is that the culvert was erected by either the State Highway Department, or its contractor, in expanding the highway from two lanes to four lanes. Thus, under the showing made, defendants are not to be held liable for the erection of this culvert.

There is no showing as to whether defendants were responsible for the maintenance of the culvert. Defendants not having made a showing as to maintenance of the culvert, they were not entitled to summary judgment on the basis that they did not maintain the culvert. *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972).

Sufficiency of the Damage Claim

The damage claim is ambiguously stated; it reads:

> Plaintiff has suffered and will continue to suffer physical and mental pain and suffering, her loss of earning capacity by her minor decedent, DOUGLAS B, [sic] NEWBY, her loss of her decedent's society, and her own personal grief and sorrow, all to the sum of $100,000.00 actual damages.

The briefs argue the damage claim as one for wrongful death and for "bystander recovery". We are not concerned with whether plaintiff, suing as mother and next friend, is the proper party to seek recovery of damages for wrongful death; no issue is raised as to that. Nor are we concerned with bystander recovery in New Mexico. See *Curry v. Journal Pub. Co.*, 41 N.M. 318, 68 P.2d 168 (1937); *Aragon v. Speelman*, 83 N.M. 285, 491 P.2d 173 (Ct.App.1971).

The waiver of immunity in § 41–4–11 applies "to liability for damages resulting from bodily injury, wrongful death or property damage . . . ."

The complaint does not claim property damage. The deposition of plaintiff contains an uncontradicted showing of no bodily injury. Compare *Higgins v. Hermes*, 89 N.M. 379, 552 P.2d 1227 (Ct.App.1976). Accordingly, the damage claim is limited to damages recoverable for wrongful death.

The denial of summary judgment is affirmed on the basis that there is a claim for damages for wrongful death based on defendants' asserted negligent maintenance of the culvert.

IT IS SO ORDERED.

HERNANDEZ, C. J., and LOPEZ, J., concur.

630 P.2d 1228

The CITIZENS BANK OF CLOVIS a corporation, as Personal Representative of the Estate of Jack Spencer, Deceased, Plaintiff-Appellant,

v.

Carl WILLIAMS and Anna Jean Williams, Defendants-Appellees.

No. 13082.

Supreme Court of New Mexico.

June 3, 1981.

Rehearing Denied July 22, 1981.

Lynell G. Skarda, Clovis, for plaintiff-appellant.

Dan B. Buzzard, Clovis, Pickard & Singleton, Lynn Pickard, Santa Fe, for defendants-appellees.

OPINION

FEDERICI, Justice.

This is an action brought by Citizens Bank of Clovis, plaintiff-appellant (Bank), as personal representative of Jack Spencer (Spencer) against defendants-appellants Carl Williams and Anna Jean Williams (Williams), asking for a partnership accounting. The trial court held that the land belonged to Williams subject to a lien in favor of Spencer's estate in the amount of one-half the value of the land less payments made by Williams. The judgment ordered Williams to pay Spencer $32,705.72 plus interest. The Bank appeals and Williams cross-appeals. We affirm.

Williams and Spencer were old friends of many years standing and, more recently, partners in a ranching business. As partners, they orally agreed to split profits and losses on a fifty-fifty basis. Spencer provided most of the capital and Williams did most of the work. Though Williams was the managing partner, he and Spencer kept separate records. In 1965, the partnership bought a section of property in Curry County for $80,000 with money provided mostly by Spencer. It appears that the partnership bought the land at a price less than other bids received by the seller because the seller wanted Williams to own the land. It was deeded solely to Williams, who concedes he held the land as a partnership asset. In 1969, the partnership dissolved amicably and all its assets were divided evenly except for the land, which, according to Williams, was then worth $144,000. A deed from Spencer to Williams and a note from Williams to Spencer for $150,000, secured by a mortgage on the land, were prepared at Spencer's direction, but none of the documents were delivered, signed by Williams, or recorded. At trial, testimony was introduced by Williams and his wife showing that he refused to sign the note and mortgage because they indicated Spencer owned three-fourths of the land while in fact Spencer claimed only one-half under a previous oral agreement with Williams to split the assets of the partnership evenly. As a result, Williams and Spencer agreed that Williams would pay Spencer $9,000 per year, though it is disputed as to how long this was to last, or exactly what the payments represented. Williams paid Spencer $9,000 per year until Spencer died in 1977, which money Williams called and designated on his tax return as "interest." The oral testimony indicates that this figure represented six percent of $150,000 (the value of the land), as claimed by the Bank and that Williams and Spencer orally agreed that if he made these payments until Spencer died, Williams would hold the land free from any claims by Spencer or his heirs. The two remained close friends until Spencer's death. Williams helped take care of Spencer in his last years. Spencer claimed the unsigned note as an asset in his will, executed in 1973, and directed that the note and mortgage not be foreclosed and that his estate be paid $9,000 a year until Williams and his wife both died.

The court below found that the partnership agreement between Williams and Spencer provided that upon dissolution, the assets of their partnership were to be divided evenly regardless of their respective capital contributions; that this agreement was valid even though it was oral; and that the land would have been divided this way except that the partners further agreed, as part of an attempted "wrap-up" of the partnership, that Williams would buy out Spencer's one-half interest in the land. The court rejected Williams' contention that he could accomplish this by paying $9,000 per year until Spencer's death. It found that there had been no meeting of the minds as to the total amount due Spencer, the interest due, or the time or method of payment. The court found that Spencer's interest in the land in 1969 was $72,000 (one-half the value of the land) and applied the annual payments to interest at six percent, the

legal and regular rate at that time (see Section 56–8–3, N.M.S.A.1978), and to the reduction of the principal amount owed, so that on December 31, 1977, the principal amount owed by Williams to Spencer had been reduced to $32,715.72. Accordingly, the court ordered that the land was to be owned by Williams subject to a lien in favor of Spencer's estate in that amount, plus interest from December 31, 1977 at six percent per annum. It gave Williams ninety days to pay. The Bank appealed, claiming that the amount of the lien should have been $114,067.65, the amount of Spencer's interest in the land based on his capital contributions to the purchase of the land plus his share of the increase in price since its purchase.

The court below appears to have found two separate agreements between the partners: that the assets of the partnership would be divided equally, and that Williams was to buy out Spencer's interest in the land. We note that under the Uniform Partnership Act, Sections 54–1–1 to 54–1–43, N.M.S.A. 1978, the assets of a partnership are distributed on dissolution in such a way that each partner receives back the capital he has contributed plus his share in the surplusage, *absent an agreement by the parties to distribute the assets in a different way.* § 54–1–40. The Bank claims that the first agreement has not been proved so the assets must be distributed according to capital contributions. The Bank also claims that the second agreement has not been proved and that the annual payments should not have been applied to the principal amount owed to Spencer, so that Williams still owes Spencer the same sum he owed him in 1969.

The Bank contends that Williams was the managing partner, he owed a fiduciary duty to Spencer, and he should have kept better partnership records. Because there were no records of the alleged oral agreements, there is a strong presumption against their existence. Williams can only overcome this presumption by "clear and convincing" evidence. It is true that partners occupy a fiduciary duty towards one another. *Cave v. Cave*, 81 N.M. 797, 474 P.2d 480 (1970); *Rogers v. Stacy*, 63 N.M. 317, 318 P.2d 1116 (1957). Perhaps Williams should have kept better records. But if, as he claims, the profits and assets of the partnership were to be divided evenly, the records would have been fairly simple. There is no evidence that Spencer ever complained that the records were inadequate while he was alive. On the contrary, he wanted to keep his own records and objected strongly when Williams tried to interfere. The fiduciary duties between partners do not necessarily raise the level of proof of partnership agreements from ordinary proof to one of "clear and convincing" proof. But whatever the measure may be, the trial court found, based upon substantial evidence, that the oral agreement was entered into by the parties. We cannot weigh the evidence on appeal, we can only review it in a light most favorable to the prevailing party. *Duke City Lumber Company, Inc. v. Terrel*, 88 N.M. 299, 540 P.2d 229 (1975). We have reviewed the record and it supports the findings of the trial court.

The Bank contends that, in any event, the partnership agreement should have been in writing since it involved land. Otherwise, the partnership agreement is void as violating the statute of frauds. Under the New Mexico Uniform Partnership Act, an interest of a partner in the partnership is personal property and not real property, even if land is one of the assets. § 54–1–26. *See* Annot., 80 A.L.R.2d 1107 (1961). Furthermore, the New Mexico Uniform Partnership Act applies only when the partners have not made a contrary agreement. *See generally* § 54–1–18. The trial court found that the transaction constituted a partnership transaction and enforced the oral agreement covering the assets, including the land. In this the trial court correctly applied existing law.

It is generally recognized that partnership agreements need not be formal. As one court has stated:

> [T]he terms of a partnership agreement need not be formally expressed, but may

> be inferred or established, in whole or in part, from the acts of the parties. (Citations omitted.)

Medd v. Medd, 291 N.W.2d 29, 34 (Iowa 1980).

This general principal applies with equal force to agreements to divide assets upon dissolution without repayment of capital contributions. *Petersen v. Petersen*, 284 Minn. 61, 169 N.W.2d 228 (1969). In *Petersen*, the court said:

> It is also clear from past cases that a contrary agreement of the type referred to above [one varying the statutory rules of settling partnership accounts] need not be in writing. Where it is not written it is in effect an implied-in-fact contract and may be established in the same manner as any other such contract. (Citation omitted.)

Id., 169 N.W.2d at 230. *See also Smiley v. Smiley's Adm'x*, 112 Va. 490, 71 S.E. 532 (1911); *compare Rossi v. Rossi*, 154 Colo. 21, 389 P.2d 191 (1963).

If there was ever a case which called upon the trial judge to exercise his discretion and apply equitable powers, it is this one. The record is replete with testimony that Spencer wanted Williams to be taken care of; that Spencer felt Williams eventually should own the ranch; that Williams and his wife took care of Spencer and the ranch for many years; that the monies in the Bank were divided when the partnership bank account was closed; and that payments of some type were made each year by Williams based on the agreement, even though the greater portion of the payments may have been interest. On the other hand, some very imposing arguments are made by the Bank. However, we feel that as an appellate court, we should not retry this case. The trial judge hears the witnesses in person and has the opportunity to observe their demeanor and manner of testifying and has a much better grasp of the evidence in its entirety than we have. Based upon a cold record on appeal and absent an erroneous application of the law, we will not interfere with the trial court's decision. Under the circumstances and facts in this case, we believe the trial court arrived at a correct result.

We take this opportunity to compliment the attorneys for both parties for their clear and forceful presentation in oral argument, and for the excellent briefs submitted to this Court.

In view of the result we have reached on these issues, an opinion on the remaining issues is deemed unnecessary.

The trial court is affirmed.

IT IS SO ORDERED.

SOSA, Senior Justice, and RIORDAN, J., concur.

630 P.2d 1231

Herbert A. SCHOBER, Plaintiff-Appellant and Cross-Appellee,

v.

MOUNTAIN BELL TELEPHONE, Defendant-Appellee and Cross-Appellant.

No. 4383.

Court of Appeals of New Mexico.

Aug. 7, 1980.

Writ Quashed July 13, 1981.

Anne Kass, Albuquerque, for plaintiff-appellant and cross-appellee.

Ronald Segel, Sutin, Thayer & Browne, P. C., Albuquerque, for defendant-appellee and cross-appellant.

OPINION

LOPEZ, Judge.

This suit is the result of plaintiff's attempts to secure compensation under the Workmen's Compensation Act, §§ 52–1–1 to 52–1–69, N.M.S.A.1978. Plaintiff, formerly an engineer with Mountain Bell, collapsed at work, in November, 1976 and on January 24, 1977, allegedly as a result of his continued exposure to cigarette smoke in his work area. His recovery from the second collapse took four months, by which time he had lost his job.

The trial court awarded benefits for partial temporary disability. Plaintiff appeals, claiming 1) he has a total and permanent disability and 2) the court's $750 limit on expert witness fees was improper. Mountain Bell cross-appeals the court's conclusions that the accident arose out of Schober's employment, and that Schober was in any way disabled.

Considered in their most logical order, the issues on appeal are: 1) whether there is substantial evidence to support the conclusion that the workman suffers from a disabling allergy; 2) whether the injury suffered by a workman allergic to cigarette smoke who collapsed at work due to his continual exposure to that substance is one arising out of his employment for purposes of the Workmen's Compensation Act; 3) whether the trial court erred in considering that the workman was only temporarily disabled; 4) whether the trial court erred in finding only 30% disability; and 5) whether the court's $750 limitation on expert witness fees recoverable by the plaintiff was proper when the plaintiff's experts had charged him a total of $2,806.08, all of which fees the court found reasonable for necessary and relevant testimony. We affirm the trial court on all issues, except the third one.

Schober's background is in electronics. After completing high school, he received some training in electronics at what is now the Bell and Howell School in Chicago. In 1957 he went to work for AT & T in Chicago as a repairman. He was promoted to the position of engineering associate and became a switching machine expert in 1966. Because of his wife's health, he moved to Albuquerque in 1970 where he obtained a less lucrative job with Mountain Bell as a switching machine repairman. After three years, he was promoted to facility planner, responsible for long range planning of switching capacities in the Albuquerque metropolitan area.

In May of 1977, he was fired for excessive absences. The absences resulted from Schober's collapse at work in January 1977, allegedly due to his allergy to cigarette smoke. He started noticing this allergy when his work area changed from one in which there was relatively little tobacco smoke, because the area housed Mountain Bell's sensitive machinery, to an open office area in which about half the employees smoked. As this discomfort increased, he began consulting physicians. Dr. Wood-

ward, the phone company's physician, recommended that he see Dr. Field, an allergy specialist. Dr. Field determined that Schober was allergic to tobacco smoke, and recommended that he avoid the substance, avoidance being the only treatment known. Eventually, he consulted a psychiatrist, Dr. Hovda, and made three trips to National Jewish Hospital in Denver, all in the hope that someone could cure his allergy. The prescription was the same—avoidance of cigarette smoke. By prohibiting smoking in his home, installing a special filtration system there, and avoiding smoky public places, he could eliminate smoke from his personal environment; but he had no control over it at work where he was subjected to it every day. He offered to install a filter at work if Mountain Bell would provide him with a small enclosed space. They would not do so. In August of 1975, Schober took a demotion from engineering back to the plant in order to get out of the smoky area. By this time, however, he had become so sensitized to cigarette smoke, that even exposure to minute quantities triggered nose, throat, and chest pains. He continued to work until January 24, 1977, when he collapsed for the second time at work and was hospitalized. His first collapse at work was in the preceding November. His second recovery took four months, by which time he had been fired.

Because of the smoke problem, Schober was unable to find a job with electronics or communications firms where he could utilize some of his skills. He finally found a job in February of 1978 at Taro's Gardens, working out-of-doors and in a greenhouse, which paid $4.00 an hour. While there, he learned to install sprinkler systems. In January, 1979, he started his own sprinkler installation business. He now earns approximately $1000 per month from his business, which is seasonal, and operates about six months of the year. His salary with Mountain Bell was approximately $14,500 per year. Were he to return to a smoky environment for an eight hour work day, his condition would deteriorate to the same level it was at the time of his collapse.

1. *Disability from tobacco smoke.*

This court has already decided that an allergic reaction to tobacco smoke which causes a workman eventually to collapse is an accidental injury under the Workmen's Compensation Act. *Schober v. Mountain Bell Telephone*, 93 N.M. 337, 600 P.2d 283 (Ct.App.1978), *cert. quashed*, 92 N.M. 621, 593 P.2d 62 (1979).

Mountain Bell asserts, however, that there is no substantial evidence that tobacco smoke is an allergin. Rather, it is an irritant, which does not permanently alter the tissues of the body. Without some permanent physical alteration, Mountain Bell claims, there is no disability. Although defendant seems to argue the view that there must be permanent physical alteration of body tissues in order to qualify for permanent disability and relies on the North Carolina case of *Sebastian v. Mona Watkins Hair Styling*, 40 N.C.App. 30, 251 S.E.2d 872, *cert. denied*, 297 N.C. 301, 254 S.E.2d 921 (1979), defendant is mistaken in suggesting that such is the law in New Mexico. Even a purely psychological condition, if it results from a work injury, is compensable under our Workmen's Compensation Act. *Ross v. Sayers Well Servicing Co.*, 76 N.M. 321, 414 P.2d 679 (1966); *see, Martinez v. University of California*, 93 N.M. 455, 601 P.2d 425 (1979). There is no requirement that there be a physical tissue change for there to be a compensable disability. The distinction made by Mountain Bell between an allergin and an irritant is irrelevant for the purposes of our Workmen's Compensation Act. The condition of being physically affected by the presence of a certain substance is a permanent condition, if the susceptibility is permanent.

In any event, there is substantial evidence supporting the trial court's finding that Schober suffers from an allergic reaction to tobacco smoke. Substantial evidence is relevant evidence which a reasonable mind accepts as adequate to support the conclusion. *Marez v. Kerr-McGee Nuclear Corp.*, 93 N.M. 9, 595 P.2d 1204, *cert. denied*, 92 N.M. 532, 591 P.2d 286 (1979). The re-

viewing court will consider only the evidence which supports the trial court's findings. *Id.*

■ Mountain Bell further argues that there is not substantial evidence to support the conclusion that the collapse at work on January 24, 1977, was caused by exposure to cigarette smoke. The evidence is, Mountain Bell claims, that it was caused by hyperventilation. We disagree.

Dr. Casebolt, Schober's physician, testified that, although the collapse itself *might* have been due to hyperventilation, the lengthy incapacitation following it indicated that the underlying problem was something else, i. e. an allergy to cigarette smoke. Considering also the unanimous testimony of numerous physicians that Schober suffers a severe reaction to cigarette smoke, we find that the court's conclusion that the collapse resulted from Schober's exposure to cigarette smoke at work is supported by substantial evidence.

2. *Injury arising out of the employment.*

Disability is compensable only if it results from an accidental injury "arising out of" and occurring "in the course of" the worker's employment. Section 52–1–9(C), N.M. S.A.1978. Mountain Bell argues that Schober's collapse was due to idiopathic sensitivity to tobacco smoke and not to any risk inherent in his employment. Consequently, it asserts, the injury did not arise out of the employment.

The question of whether a fall from a motor scooter by a meter reader was an accident arising out of his employment was discussed in *Williams v. City of Gallup*, 77 N.M. 286, 421 P.2d 804 (1966). The court said:

> For an injury to "arise out of" the employment, there must be a showing that the injury was caused by a risk to which the plaintiff was subjected by his employment. The employment must contribute something to the hazard of the [injury]. . . . Compensation has been denied where the risk was common to the public, and where the risk was personal to the claimant. (Cites omitted.)
>
> The difficulty is not in defining the test, but in applying it.

Id. at 289, 421 P.2d at 806. *See also, Gutierrez v. Artesia Public Schools*, 92 N.M. 112, 583 P.2d 476 (Ct.App.1978).

In *Berry v. J. C. Penney Co.*, 74 N.M. 484, 485, 394 P.2d 996, 997 (1964), the Supreme Court wrote:

> There must not only have been causal connection between the employment and the accident, but the accident must result from a risk incident to the work itself.
>
> . . . .
>
> [A]n employee who has a pre-existing physical weakness or disease may suffer a compensable injury if the employment contribution can be found either *in placing the employee in a position which aggravates the danger due to the idiopathic condition*, or where the condition is aggravated by strain or trauma due to the employment requirements . . . . (Emphasis added.)

Id. at 486, 394 P.2d at 997. The parties recognize that whether any disability on plaintiff's part arose out of an accident depends upon the evidence. *See, Berry, supra; Christensen v. Dysart*, 42 N.M. 107, 76 P.2d 1 (1938).

Defendants contend: (a) the evidence shows that the cause of plaintiff's injury was not any hazard created by the nature of the employment; (b) every reasonable effort was made to accommodate plaintiff's peculiar sensitivity to tobacco smoke; (c) the air quality in the buildings where plaintiff worked was better than any other office building in town; (d) plaintiff was subjected to significantly less tobacco smoke than he would have encountered in the average office building.

■ We agree there is evidence to support defendants' contentions and evidence that would have supported a conclusion that the injury did not arise out of the employment. There is also evidence however, that the accident did arise out of plaintiff's employment; and it is the function of the trier of fact, and not of this court, to weigh the evidence. *See, Marez, supra.*

It is uncontroverted that the areas where Schober worked contained tobacco smoke. Any and everyone who worked there was subjected to the smoke and to the risk that they might be or become allergic to it. Although cigarette smoke exists other places than at Mountain Bell, the evidence indicates that Schober was continuously exposed to it there, and that he encountered a minimal amount of smoke elsewhere, due to extraordinary precautions on his part. For Schober, employment at Mountain Bell where others smoked contributed something to the hazard that he would ultimately collapse as his tolerance to cigarette smoke decreased. There were two causes of Schober's collapse; first, his allergic reaction to tobacco smoke; and second, that he was continuously exposed to that substance at work. Dr. Casebolt testified, to a medical probability, that plaintiff's working eight hours a day, five days a week, in an area that contained tobacco smoke 'was the major contributing factor to his problem today.' This evidence meets the test quoted above from *Berry, supra,* and supports the conclusion that plaintiff's accident and injury arose out of his employment.

Disability.

The statutes defining disability, §§ 52–1–24 and 52–1–25, N.M.S.A.1978, have been interpreted by this court to contain two tests to be used in determining disability under the Workmen's Compensation Act: (1) the workman must be totally or partially unable to perform the work he was doing at the time of the injury; and (2) the workman must be totally or partially unable to perform any work for which he is fitted and qualified. *Medina v. Zia Co.*, 88 N.M. 615, 544 P.2d 1180 (Ct.App.1975), *cert. denied*, 89 N.M. 6, 546 P.2d 71 (1976). A workman is disabled under the second test if he cannot perform some or all of the work for which he is fitted by age, education, training, capacity and experience. *Anaya v. New Mexico Steel Erectors, Inc.*, 94 N.M. 370, 610 P.2d 1199 (1980).

Schober's background, his work experience, training, and education were in a specialized area of electronics. Since his collapse, and because of his allergic reaction to tobacco smoke, he has been unable to obtain a job which would utilize his electronics skills. He is disabled under both the first and second tests in *Medina.*

The existence of post-injury employment does not necessarily disqualify the workman from disability benefits. *Aranda v. Mississippi Chemical Corp.*, 93 N.M. 412, 600 P.2d 1202 (Ct.App.), *cert. denied*, 93 N.M. 683, 604 P.2d 821 (1979); *Maes v. John C. Cornell, Inc.*, 86 N.M. 393, 524 P.2d 1009 (Ct.App.1974); *see, Anaya, supra; see also, Lozano v. Archer*, 71 N.M. 175, 376 P.2d 963 (1962). Post injury employment is evidence going to the question of whether a disability exists, but compensation for disability depends on the inability to perform some of the work for which the workman is fitted. *Anaya, supra*, not on whether or not the workman is employed.

The trial court concluded that Schober's disability was temporary and that it terminated when he became temporarily employed in February of 1978. This was error. Schober's current work installing sprinkler systems does not utilize his training and background experience, and so does not bar him from receiving disability benefits.

The trial on the merits took place three years after Schober's second collapse. At that time, the court found that, if he were exposed to tobacco smoke for a normal working day, his condition would again worsen to the extent it was at the time of his collapse in January 1977. The court further found that the only treatment for his condition was avoidance of tobacco smoke, and that his training and background required him to work in an office. These findings are uncontroverted and indicate that Schober is currently disabled. The trial court erred in finding that his disability terminated at the time he became re-employed.

4. *Total or partial disability.*

The trial court found that Schober's disability was 30%. The determination of the degree of disability in workmen's compensation cases is generally a matter for the trial court, and absent misapplication of the law or lack of substantial evidence, an appellate court should not substitute its judgment for that of the trial court. *Ideal Basic Industries, Inc. v. Evans,* 91 N.M. 460, 575 P.2d 1345 (1978). There is substantial evidence to support this finding of partial disability, and so we do not disturb it.

5. *The $750 limit on expert witness fees.*

Chapter 38 of the New Mexico Statutes, N.M.S.A.1978, regulates civil trials in general. Section 38–6–4 of that chapter allows the district court to tax the payment of an expert witness as costs, but limits the compensation to $750. That statute reads in pertinent part:

> *Per diem and mileage for witnesses.*
>
> . . . .
>
> B. The district judge in any case pending in the district court may order the payment of a reasonable fee, to be taxed as costs . . . for any witness who qualifies as an expert and who testifies in the cause. . . . The total expert witness compensation which may be allowed by the court to the prevailing party shall not exceed seven hundred fifty dollars ($750).

This statute is made applicable to cases arising under the Workmen's Compensation Act by § 52–1–35(B), N.M.S.A.1978 which states in part:

> No costs shall be charged, taxed or collected by the clerk except fees for witnesses [in workmen's compensation cases] who testify under subpoena. These witnesses shall be allowed the same fee for attendance and mileage as is fixed by law in other civil actions.

No claim is made that the expert witnesses did not testify under subpoena.

Despite Schober's expenses of $2,806.08 for expert witness fees, which the court found reasonable for testimony which was necessary to Schober's case, the court properly limited his recovery for these fees to $750. It was required by the Legislature to impose this limit, however inequitable it might seem in the circumstances.

The judgment of the trial court is affirmed in all respects, except in its finding and order that the disability payments cease on February 9, 1978. The cause is remanded and the court below is instructed to order payments for 30% disability to continue until and unless changed pursuant to § 52–1–56, N.M.S.A.1978. Plaintiff is awarded $1,500 for the services of his attorney on this appeal.

IT IS SO ORDERED.

WOOD, C. J., and ANDREWS, J., concur.

630 P.2d 1237

Frankie L. McKEE, Individually and as Personal Representative of the Estate of Mona V. McKee, Deceased, Plaintiff-Appellee,

v.

UNITED SALT CORPORATION, Gary W. Grice and Richard G. Patton, Defendants-Appellants.

No. 4463.

Court of Appeals of New Mexico.

Dec. 4, 1980.

James C. Ritchie, Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for defendants-appellants.

Thomas G. Fitch, Socorro, for plaintiff-appellee.

OPINION

HERNANDEZ, Judge.

Plaintiff brought suit as the personal representative of the estate of decedent, who was killed in an automobile accident. Plaintiff alleged that the two individuals in the other vehicle were liable for negligent operation of the vehicle. Plaintiff also alleged that the individuals were employees of defendant United Salt Corporation, and that United Salt was liable vicariously as employer and was liable for negligent entrustment of the vehicle. The two individual defendants failed to answer or appear, and default judgment was entered against them under New Mexico Rule of Civil Procedure 54(b). United Salt moved to set

aside the default judgment against the two other defendants. The motion was denied by the district court, and this court granted interlocutory appeal. We affirm.

The district court granted default judgment under Rule 54(b)(2), which provides as follows:

> (2) Judgment involving multiple parties. When multiple parties are involved, judgment may be entered adjudicating all issues as to one or more, but fewer than all parties. Such judgment shall be a final one unless the court, in its discretion, expressly provides otherwise and a provision to that effect is contained in the judgment. If such provision is made, then the judgment shall not terminate the action as to such party or parties and shall be subject to revision at any time before the entry of judgment adjudicating all claims and the rights and liabilities of all the parties.

The district court judgment is entitled "FINAL JUDGMENT (As to Some Defendants)," and states that "this judgment shall constitute a final judgment and order against Defendants Gary W. Grice and Richard W. Patton." Under Rule 54, the judgment then terminated the action as to Grice and Patton and was not subject to revision.

United Salt contends that the district court erred in refusing to set aside the default judgment against the individual defendants because the judgment materially prejudices the rights of United Salt in defending on the claims against it. This argument is based on what defendant calls the "*Frow* doctrine," from *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552, 21 L.Ed. 60 (1872). The *Frow* case involved a bill in equity to restrain defendants from claiming title to certain lands because of an alleged conspiracy. The Supreme Court held that a final decree on the merits could not be made separately against one of the defendants where a joint charge was still pending against the others.

> The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree *pro confesso* against him, and proceed with the cause upon the answers of the other defendants * * * *

Frow v. De La Vega, supra. Federal courts have expressed doubt whether the *Frow* holding is still applicable under modern rules of procedure. *See Redding & Company, Inc. v. Russwine Construction Corporation*, 463 F.2d 929 (D.C.Cir.1972). Nonetheless, the doctrine has been said to have a limited application in modern proceedings. "We think it most unlikely that *Frow* retains any force subsequent to the adoption of Rule 54(b). In any event, at most, *Frow* controls in situations where the liability of one defendant necessarily depends upon the liability of the others." *International Controls Corporation v. Vesco*, 535 F.2d 742 (2d Cir. 1976). This court has also held that a directed verdict against one of multiple defendants is not final and appealable under Rule 54(b) if the issues determined as to that one defendant "will or may affect the determination of the issues" relating to the other defendants. *Nichols v. Texico Conference Association of Seventh Day Adventists*, 78 N.M. 310, 430 P.2d 881 (Ct.App. 1967).

The question to be resolved, then, is whether the claims against the defendants are joint claims for which the default judgment "will or may affect" the trial to determine the liability of United Salt. If the liability of United Salt necessarily depends upon the liability of the individual defendants, the default judgment should not be final.

■ Plaintiff alleged as one basis of liability in his complaint the vicarious liability of an employer for the torts of employees acting within the scope of their employment. This claim is a joint claim against the defendants, because the liability of the employer necessarily depends upon a showing that a tort was committed by employees acting within the scope of their employment, and employees are liable upon the showing that they committed the tort. *See Samedan Oil Corp. v. Neeld*, 91 N.M. 599, 577 P.2d 1245 (1978). Thus, even though

the second claim against United Salt is not a joint claim [1], the fact that one is a joint claim is sufficient to apply the case law cited above. United Salt's position is technically correct under the rules of law cited, and a final default judgment should not have been ordered.

Plaintiff asserts, however, that United Salt has no standing to challenge the validity of the final judgment in this appeal. The general rule of law is that "[a] court of review will not entertain assignments of error which may be prejudicial or injurious to others but not as to him." 5 C.J.S. Appeal and Error § 1497. United Salt's contention on appeal is that the district court committed error which will be prejudicial to it at trial. In order to determine if United Salt has standing, then, we must examine the merits of that claim. No prejudice is shown by United Salt in its pleadings. The possibility of prejudice at trial can be prevented by a motion *in limine* to restrict testimony about the judgment, or by voir dire examination and correct jury instructions regarding any such testimony. There is no indication that the final default judgment will present any greater inducement for perjury by the individual defendants than might exist in any civil action. Because we find no substantial basis for believing that United Salt will be prejudiced or injured by the error, there is no standing for this appeal from that judgment.

Even if there were standing, however, the same result would be reached under the "harmless error" rule. The precise issue in this case is the alleged error of the district court in refusing to set aside the final default judgment. Setting aside a judgment under Rule 60(b) is discretionary with the trial court, and appellate courts will not interfere with the action of the trial court except upon a showing of abuse of discretion. *Phelps Dodge Corp. v. Guerra*, 92 N.M. 47, 582 P.2d 819 (1978). Discretion, in this sense, is abused only when the judge has acted arbitrarily or unreasonably under the particular circumstances. *Richins v. Mayfield*, 85 N.M. 578, 514 P.2d 854 (1973). Rule 61 necessarily confers discretion upon the trial court to refuse to set aside a judgment if this would not be "inconsistent with substantial justice." *See Adams & McGahey v. Neill*, 58 N.M. 782, 276 P.2d 913 (1954).

While the final default judgment was technically in error under the *Frow* doctrine, this court should not reverse the district court's decision not to set aside that judgment unless there is an abuse of discretion. There were sound reasons for the district court's decision. The final judgment will prevent delay in seeking to satisfy the judgment obligation of those defendants who did not appear and defend against the claim. The possibility of prejudice, as stated above, can be handled through regular trial procedures. Finally, it should be noted that United Salt has been represented by counsel in this action from the outset, and was given notice of plaintiff's application for default judgment. United Salt had the opportunity then to present its arguments against the default judgment or to take other steps to avoid such judgment, but it did nothing and final judgment was given. We do not believe, under these circumstances, that the district court's refusal to set aside the default judgment was arbitrary or unreasonable.

The judgment of the district court is affirmed.

IT IS SO ORDERED.

ANDREWS, J., concurs.

SUTIN, J., dissents.

1. The second claim against United Salt was for negligent entrustment of the vehicle. "The rationale of the 'negligent entrustment' cases is not founded upon the negligence of the driver of the automobile but upon the *primary* negligence of the entruster in supplying the chattel, an automobile, to an incompetent and reckless driver." *Upland Mutual Insurance, Inc. v. Noel*, 214 Kan. 145, 519 P.2d 737 (1974). This claim was not, then, a joint claim against United Salt because it did not necessarily depend upon the liability of the other defendants to find liability of United Salt.

SUTIN, Judge (dissenting).

I dissent.

Plaintiff's complaint alleged that "Defendant Gary W. Grice *or* Defendant Richard G. Patton, negligently drove a 1971 GMC diesel truck tractor owned by Defendant United Salt Corporation, which negligent operation proximately caused the death of *Mona V. McKee.*" [Emphasis added.]

The complaint also alleged that Grice and Patton individually were entrusted with the vehicle. No judgment was entered on the entrustment theory alleged in plaintiff's complaint.

The complaint also sought compensatory damages in the sum of $250,000.00 and punitive damages in the sum of $100,000.00.

The default judgment entered as a Final Judgment found that "Defendant Gary W. Grice *and* Defendant Richard G. Patton, negligently drove a 1971 GMC diesel truck tractor * * * which negligent operation proximately caused the death of Mona V. McKee"; "That the operation * * * by Gary W. Grice *and* Richard G. Patton was reckless, wanton, willful and with total disregard for the life and property of others, including *Mona V. McKee*"; "That the sole and proximate cause of the actions of Defendants Gary W. Grice *and* Richard G. Patton * * * and plaintiff * * * has been damaged in the sum of $250,000.00." [Emphasis added.] The same allegations were made with reference to punitive damages in the sum of $100,000.00 and special damages.

The judgment "ORDERED, ADJUDGED AND DECREED that Plaintiff have and recover of Defendants Gary W. Grice and Richard G. Patton, *and each of them*, the sum of $359,899.00 for which said Defendants are jointly and severally liable * * *." [Emphasis added.]

In *Gallegos v. Franklin*, 89 N.M. 118, 123, 547 P.2d 1160 (Ct.App.1976), this Court said:

> By virtue of the default, the defendants have admitted the allegations of the complaint. These averments are taken as true. *For those matters which require an examination of details, the plaintiff must furnish the proof.* [Emphasis added.]

What Grice and Patton admitted was that one or the other was driving the truck tractor. They did not admit that both drove the vehicle in a reckless, wanton and willful manner. Without proof of which one was operating the vehicle at the time of the collision, the default judgment cannot stand.

"The entry of a default judgment against a defendant is not considered an admission by the defendant of the amount of unliquidated damages claimed by plaintiff." *Gallegos, supra.* [Id. 123, 547 P.2d 1160.]

"A punitive damage claim is not admitted by a default." *Gallegos, supra.* [Id. 125, 547 P.2d 1160.]

It is obvious that if Grice and Patton had filed motions to vacate the default judgment, we would have reversed the district court. The law steps in and gives United Salt the benefit of this reversible error.

The trial court was without authority or power to enter a default judgment fixing the amount of recovery in the absence of evidence, and, if it does, such judgment is void and not merely erroneous or voidable. *Graves v. Walters*, 534 P.2d 702 (Okl.Ct. App.1975).

The rule appears to be uniform that "a judgment which is absolutely void is entitled to no authority or respect, and therefore may be impeached at any time, in any proceeding in which it is sought to be enforced or in which the validity is questioned, by anyone with whose rights or interests it conflicts." 49 C.J.S. Judgments § 401, p. 794 (1947); 46 Am.Jur.2d, Judgments, § 641, p. 800 (1969). United Salt was allowed to attack plaintiff's default judgment because of its relationship with Grice and Patton.

Rule 55(b) and (c) of the Rules of Civil Procedure provide for judgment by default and setting it aside under Rule 60(b). Grice and Patton were defaulting defendants. United Salt was an appearing defendant. When one of several defendants who is alleged to be jointly liable defaults, it is an abuse of discretion to enter a default judg-

ment against him until the matter has been adjudicated with regard to all defendants. *Reliance Ins. Cos. v. Thompson-Hayward Chem. Co.*, 214 Kan. 110, 519 P.2d 730 (1974). This rule flows from *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552, 21 L.Ed. 60 (1872); 10 C. Wright and Miller, *Federal Practice and Procedure*, § 2690 (1973); 6 Moore's Federal Practice, ¶ 55.06 (1976); *Exquisite Form Indus., Inc. v. Equisite Fabrics of London*, 378 F.Supp. 403 (S.D.N.Y. 1974). This doctrine typically arises where the party who has defaulted is appealing for relief. Grice and Patton did not appeal. However, the above rule should insure to the benefit of United Salt.

To avoid extending this opinion, I have refrained from setting out the innumerable legal problems that arise if the default is allowed to stand. Prejudice, confusion and inconsistent verdicts that may result to the appearing defendant would show that the doctrine should be applied in this case. See generally, Annot. *Successful defense by one codefendant, or a finding for "defendants" as inuring to benefit of defaulting defendant*, 78 A.L.R. 938 (1932). For example, if one joint debtor defaults, no separate judgment may be entered against him, since remaining joint debtors have the right to defend for all of them. *Diamond National Corp. v. Thunderbird Hotel, Inc.*, 85 Nev. 271, 454 P.2d 13 (1969); *State ex rel. Everett v. Sanders*, 274 Or. 75, 544 P.2d 1043 (1976). But in a suit by a city against owners of various tracts or land to foreclose paving liens, a plea of limitations by owners who appeared did not inure to the benefit of owners who defaulted. *City of Albuquerque v. Huddleston*, 55 N.M. 240, 230 P.2d 972 (1951).

To avoid multiple and complex legal problems, judicial history has shown that a good rule of law applicable in one factual situation will be applied to a comparable one under common sense principles. It is fair to withhold entry of judgment of defendants who default until the matter has been adjudicated with regard to all appearing defendants who are jointly liable. Appearing defendants should be entitled to the benefit of that principle in the defense of their case together with the right to appeal for relief when an abuse of discretion occurs. Common sense dictates that all defendants jointly and severally liable should be treated as one entity for procedural purposes to avoid vexatious results. If United Salt loses, plaintiff wins. If United Salt wins, plaintiff loses. A default judgment, disfavored in the law, should not be used as a crutch to support plaintiff's claim for relief.

Rule 54(b)(2) of the Rules of Civil Procedure set forth in the majority opinion is not applicable to default judgments. It reads in pertinent part:

> When multiple parties are involved, judgment may be entered *adjudicating all issues* as to one or more, but fewer than all parties. [Emphasis added.]

A default judgment absent a hearing is not an "adjudication of all issues." "Notice and hearing, or an opportunity to be heard, is essential to a decision upon the merits. Any other conclusion could well give rise to serious injustice and that without remedy." *Otero v. Sandoval*, 60 N.M. 444, 446, 292 P.2d 319 (1956). Grice and Patton did not receive notice of hearing on an application of plaintiff for judgment by default and no hearing was held. Evidence was not presented. If a trial court wants to adjudicate the issues, it can refuse to enter a default judgment and dismiss the action upon failure of plaintiff to offer evidence or demonstrate entitlement to judgment. *Wagner v. Hunton*, 76 N.M. 194, 413 P.2d 474 (1966).

An "adjudication" essentially implies a hearing by a court, after notice, of legal evidence on the factual issue involved. *Genzer v. Fillip*, 134 S.W.2d 730 (Tex.Civ. App.1939); *People v. Hugo*, 168 N.Y.S. 25, 101 Misc. 481 (1917); *People v. Sohmer*, 207 N.Y. 450, 101 N.E. 164 (1913); *Western Assur. Co. v. Klein*, 48 Neb. 904, 67 N.W. 873 (1896); *Rank v. (Krug) United States*, 142 F.Supp. 1 (D.C.Cal.1956); *State v. Hoffman*, 236 Or. 98, 385 P.2d 741 (1963).

It has long been held that default judgments are not favored in the law. Rule

55(b) of the Rules of Civil Procedure does not declare "open season" against defaulting defendants, especially where large sums of money are involved. When a defendant is served with process and fails to appear, inquiry should be made. A defendant should be notified that a default has been entered. If a hearing is held, based upon the facts, evidence and testimony, the trial court can determine in its discretion whether to grant or deny default judgments. This procedure is necessary to enable the court to enter judgment. *Herrera v. Springer Corporation*, 85 N.M. 6, 508 P.2d 1303 (Ct.App.1973), Sutin, J., dissenting, *rev'd*, 85 N.M. 201, 510 P.2d 1072 (1973). See also, *Gengler v. Phelps*, 89 N.M. 793, 558 P.2d 62 (Ct.App.1976), Sutin, J., specially concurring.

United Salt Corporation attacked the default judgment pursuant to Rule 60(b) of the Rules of Civil Procedure. Based upon the fact (1) that the default judgment went beyond the allegations of the complaint and held both Grice and Patton liable; (2) that the judgment was void due to a large judgment for compensatory and punitive damages without evidence in support thereof; (3) the trial court abused its discretion in awarding plaintiff a default judgment; and (4) United Salt Corporation interests were adversely affected; denial of its motion to set aside the default judgment was reversible error.

630 P.2d 1243

Jane Ann CHURCH, Plaintiff-Appellant,

v.

David Harlan CHURCH, Defendant-Appellee.

No. 4934.

Court of Appeals of New Mexico.

June 19, 1981.

Kathryn M. Wissel, Menig, Sager, Curran & Sturges, P. C., Albuquerque, for plaintiff-appellant.

Kenneth C. Leach, Popejoy, Leach & Silko, P. C., Albuquerque, for defendant-appellee.

OPINION

WOOD, Judge.

Plaintiff, wife, sued defendant, husband, for either legal damages or equitable relief on the basis of dealings between the parties while residing in Virginia. We identify the alleged factual basis for the claims in discussing the various issues. The trial court ruled there was a failure to state a claim upon which relief could be granted and dismissed plaintiff's amended complaint with prejudice. She appeals. We discuss: 1. the claims made; 2. the basis for dismissal; 3. the substantive law applicable; 4. defendant's "no basis" for relief contentions; and 5. elements of plaintiff's claims for which relief can be granted.

1. The Claims Made

Plaintiff's initial complaint sought to recover damages for fraud. The trial court dismissed this complaint on the basis that Virginia law applied and that Virginia law did not permit such a suit between spouses. Plaintiff was permitted to file an amended complaint. The amended complaint makes three claims—for fraud, for breach of contract, and for unjust enrichment. The trial court dismissed the amended complaint for failure to state a claim upon which relief could be granted. We do not know the basis for this dismissal.

Common to each of the claims is that plaintiff was employed and defendant was attending medical school.

The fraud claim is: (a) By agreement, defendant pursued his medical studies and plaintiff worked to support plaintiff and defendant, and pay defendant's educational expenses. (b) In the second year of medical school, defendant began an extramarital relationship which continued through the fourth year of medical school. (c) Defendant knew that if he revealed his extramarital relationship his marriage with plaintiff would probably end. (d) Defendant did not intend to continue his marital relationship with plaintiff once his medical studies were completed. (e) For the purpose of inducing plaintiff to continue the marital relationship and to continue supporting him until his medical studies were complete, "Defendant fraudulently concealed the existence of this extramarital relationship and continued to represent his medical education as an investment of the marriage . . . ." (f) Plaintiff, unaware of defendant's extramarital relationship "continued to provide financial and emotional support to Defendant for his medical studies, relying upon Defendant's false representation that Plaintiff and Defendant as husband and wife would share the benefits of his medical education." (g) Upon completing his fourth year

of medical school, defendant advised plaintiff of his desire for a divorce.

The contract claim is: (a) An oral contract was entered in Virginia approximately September, 1975. (b) Plaintiff was to furnish to defendant, from plaintiff's earnings, "all or a substantial part of the expenses of his medical education and his support and maintenance while pursuing same, so that it would not be necessary for him to borrow any money to finance his medical education." (c) In exchange, defendant promised plaintiff a one-half interest in defendant's increased earning capacity resulting from his medical education. (d) Plaintiff performed her part of the agreement. (e) Upon completing medical school, defendant refused to perform his part of the agreement and denies that plaintiff has any interest in defendant's earning capacity.

The unjust enrichment claim is that defendant obtained plaintiff's financial contributions toward defendant's support and medical education, and other services rendered by plaintiff to defendant, in a manner which is inequitable and, at a minimum, there should be restitution of the value of these services.

Damages were sought in connection with each of the claims.

Defendant asserts that Virginia law applies to these claims, but does not contend that fraud, breach of contract or equitable relief are not remedies in Virginia. See *Mears v. Accomac Banking Co.*, 160 Va. 311, 168 S.E. 740 (1933); *Greenbrier Farms v. Clarke*, 193 Va. 891, 71 S.E.2d 167 (1952); and *Leonard v. Town of Waynesboro*, 169 Va. 376, 193 S.E. 503 (1937). Nor does defendant contend that these remedies are *never* available, in Virginia, in suits involving the spousal relationship. *Humphreys v. Baird*, 197 Va. 667, 90 S.E.2d 796 (1956); *Vigilant Insurance Company v. Bennett*, 197 Va. 216, 89 S.E.2d 69 (1955); *Capps v. Capps*, 216 Va. 378, 219 S.E.2d 901 (1975); *Sundin v. Klein*, Va., 269 S.E.2d 787 (1980). Defendant's theories of "no basis for relief" are discussed hereinafter. Our reference to theories of relief is for the purpose of eliminating these general concepts from our discussion because defendant does not defend the trial court's dismissal on the ground that these concepts are not a basis for relief.

Cases concerned with the wife obtaining her "Ph.T." (putting hubby through school) are no longer uncommon. Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity*, 1978 Wisconsin L.Rev. 947, footnote 4. This fact situation and the resultant disputed claims have been resolved in terms of property or alimony awards in divorce proceedings. As examples, see *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978); *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978); *Prosser v. Prosser*, 156 Neb. 629, 57 N.W.2d 173 (1953); *Hubbard v. Hubbard*, 603 P.2d 747 (Okl.1979).

The pleadings refer to a divorce action pending between the parties to this suit; at oral argument, counsel informed us that the divorce action was in New Mexico and that it had been tried. We are informed that judgment was entered in the divorce case after oral argument in this case, and that the divorce case will probably be appealed. Plaintiff maintains that her claims are not dependent upon a divorce proceeding and may be brought as independent claims.

2. The Basis for Dismissal

This being a New Mexico suit, our procedural law applies to the dismissal of plaintiff's claims. See *Satterwhite v. Stolz*, 79 N.M. 320, 442 P.2d 810 (Ct.App.1968).

Rule of Civ.Proc. 12(b)(6) authorizes a motion to dismiss for failure to state a claim upon which relief can be granted. In considering the propriety of such a dismissal we accept, as true, all well pleaded facts. The motion is properly granted only when it appears that plaintiff is not entitled to relief under any state of facts provable under the claim made. *Burke v. Permian Ford-Lincoln-Mercury*, 95 N.M. 314, 621 P.2d 1119 (1981).

This procedural basis for dismissal, in this case, involves a substantive law question.

What state's law is to be applied in determining whether there can be relief under any facts provable under the claims made?

3. The Substantive Law Applicable

New Mexico permits suits between spouses based on tort. *Maestas v. Overton*, 87 N.M. 213, 531 P.2d 947 (1975); *Flores v. Flores*, 84 N.M. 601, 506 P.2d 345 (Ct.App. 1973). Virginia places restrictions on such suits. *Counts v. Counts*, 221 Va. 151, 266 S.E.2d 895 (1980); *Korman v. Carpenter*, 216 Va. 86, 216 S.E.2d 195 (1975). One of defendant's claims is that plaintiff's suit is barred by interspousal immunity. That question is eliminated from the appeal if New Mexico's substantive law applies.

Each party to a marriage in New Mexico has the duty of support. Section 40–2–1, N.M.S.A.1978. An issue is whether, in Virginia, a wife has a duty to support her husband. That question is eliminated from the appeal if New Mexico's substantive law applies.

New Mexico decisions as to choice of law are to the effect that Virginia's substantive law applies. As to the tort of fraud, see *Zamora v. Smalley*, 68 N.M. 45, 358 P.2d 362 (1961); *First Nat. Bank in Albuquerque v. Benson*, 89 N.M. 481, 553 P.2d 1288 (Ct.App.1976). As to the contract claim, see *Boggs v. Anderson*, 72 N.M. 136, 381 P.2d 419 (1963); *Sandoval v. Valdez*, 91 N.M. 705, 580 P.2d 131 (Ct.App.1978). As to choice of law for the unjust enrichment claim, neither party suggests it should be decided under New Mexico's substantive law.

The choice of law question is whether the public policy of New Mexico requires the application of New Mexico's substantive law. This question arises because the parties, while married, seek the resolution of interspousal claims in New Mexico. The events on which the suit are based took place in Virginia at a time the parties resided there. Although the fact of marriage is inextricably involved, the essence of plaintiff's claims is directed to property rights. New Mexico is involved in a resolution of the matter only because the parties became residents of New Mexico after defendant completed medical school. In summary, New Mexico became the forum for this lawsuit solely by the fortuity of New Mexico employment after the operative events had taken place. These facts sufficiently distinguish *Scanlon v. Scanlon*, 60 N.M. 43, 287 P.2d 238 (1955), and *Sandoval v. Valdez*, supra, so that the public policy discussion in those cases is not applicable. In the circumstances, the public policy of New Mexico does not require the application of New Mexico's substantive law to the claims made. Virginia's substantive law applies.

4. Defendant's "No Basis For Relief" Contention

(a) Failure to State a Claim

Defendant asserts the fraud claim fails to state a claim because

> [i]n essence, it is alleged that Dr. Church misrepresented the status of his medical degree under the law, that it would be a community asset and shared in the future by all parties. At most, this representation can be characterized as a misrepresentation of law. Misrepresentations of law are not a sufficient basis for fraud and deceit.

This contention is factually inaccurate. Plaintiff does not claim an interest in defendant's medical degree, and does not claim any misrepresentation as to the status of that degree. Plaintiff's claim is that defendant obtained financial and emotional support by the false representation that the parties would share the "benefits," that is, the increased earnings resulting from defendant's medical education. We consider the emotional support claim subsequently. The part of the claim considered here is that defendant obtained financial support through false representation.

Whether the alleged false representation to share in future earnings is a representation of fact or a representation of law need not be decided. During the time of this representation, the parties, married, occupied a relation of trust and confidence toward one another and were bound to act

fairly and in good faith in their dealings. In this situation, the obtaining of defendant's money by a false statement was actionable even if a representation of law. *Humphreys v. Baird*, supra.

Defendant argues that his promise, if false, was not actionable because it was no more than an expression of opinion. Defendant cites *Soble v. Herman*, 175 Va. 489, 9 S.E.2d 459 (1940), which states a general rule that fraud must relate to a present or pre-existing fact and cannot be based on a promise as to future events. The reason, according to the opinion, is that:

> [A] mere promise to perform an act in the future is not, in a legal sense, a representation, and a failure to perform it does not change its character. The very nature of a promise to do something in the future is such that its truth or falsity, *as a general rule*, cannot be determined at the time it is made. (Our emphasis.)

Immediately following the above quotation, the Virginia court defines actual fraud to be intentional fraud, consisting of deception intentionally practiced to induce another to part with property, and states that if a promise is accompanied by indicia of fraud, then the promise is not allowed to defeat the claim of the defrauded party. Plaintiff's claim is that defendant obtained financial support from plaintiff by a continuing representation that he knew to be false during the time he made the representation. We view the problem as to the fraud claim to be one of proof (indicia of fraud, falsity at the time the representation was made) at trial; however, a claim for relief was stated.

(b) Absence of Damages

Citing Prosser, Law of Torts, § 110 (4th ed. 1971), and assuming Virginia law is as stated in *Prosser*, defendant claims that plaintiff's fraud claim fails to state a basis for relief because there must be substantial damage for there to be a basis for relief. Defendant argues, as a matter of law, that plaintiff did not suffer substantial damage. We discuss this claim in issue 5(d).

(c) Interspousal Tort Immunity

Defendant contends the fraud claim is barred by the doctrine of interspousal tort immunity. The extent of this doctrine has been repeatedly litigated in Virginia; the issues, generally, were whether either statutes or public policy required modification of the common law rule of interspousal immunity. See *Counts v. Counts*, supra; *Keister's Adm'r v. Keister's Ex'rs*, 123 Va. 157, 96 S.E. 315 (1918). We are not concerned with Virginia's rationale or the sometimes strange results, at least to New Mexicans. See Note, *Intrafamily Tort Immunity in Virginia: A Doctrine in Decline*, 21 Wm. & Mary L.Rev. 273 (1979–80). Our concern is whether plaintiff's fraud claim is barred by the Virginia doctrine.

Vigilant Insurance Company v. Bennett, supra, held that certain statutory provisions "empower each spouse to maintain actions at law for wrongful invasions of their respective property rights as if they had never been married." The statutes are §§ 55–35, 55–36 and 55–37, Va.Code 1950 (1974 Repl. Vol. 8). Section 55–35 states:

> A married woman shall have the right to acquire, hold, use, control and dispose of property as if she were unmarried and such power of use, control and disposition shall apply to all property of a married woman which has been acquired by her since April four, eighteen hundred and seventy-seven, or shall be hereafter acquired.

Vigilant Insurance Company states that § 55–35 gives the wife full ownership and control of her property, including her choses in action, and provides the substantive right to a wife to sue her husband for tortious damage to her property.

Defendant recognizes that plaintiff has a right to sue her husband on a property claim, but asserts that no property is involved in plaintiff's claims. Defendant likens plaintiff's fraud claim to a suit for personal injury, defamation, malicious prosecution or false imprisonment; such suits are prohibited by the Virginia interspousal immunity rule. *Vigilant Insurance Company v. Bennett*, supra, cites an early edition

of Prosser, Law of Torts, where, in discussing the effect of the Married Woman's Acts, fraud is listed as one of the torts against property interests for which a wife may sue her husband. At oral argument defendant asserted that the interspousal immunity rule applies to intentional torts; the Virginia decisions do not determine the right of a wife to sue for a property tort on the basis of whether the tort is negligent or intentional.

Under Virginia law, a wife may sue her husband for fraud as to her property interests. *Vigilant Insurance Company v. Bennett*, supra. The parties agreed, at oral argument, that, in Virginia, a wife's earnings are her separate property. See *Harris v. Carver*, 139 Va. 676, 124 S.E. 206 (1924). The fraud claim asserts that plaintiff "worked" to support plaintiff and defendant, and to pay defendant's educational expenses. This sufficiently alleges that plaintiff used her earnings for defendant's support and education, and that these earnings were obtained by defendant through fraud. Virginia's interspousal immunity rule does not bar plaintiff's fraud claim.

(d) Virginia's Public Policy

Defendant contends that the fraud claim is "void" because of the public policy of Virginia. The public policy is either "preservation of marriage" or "against promoting marital disharmony." Defendant's argument is based on public policy discussion in interspousal personal tort cases, see *Counts v. Counts*, supra, as an example. Those cases set forth Virginia's explanation of why suits between spouses for personal torts are not permitted. Defendant's argument overlooks the public policy, stated in Virginia statutes, that spouses may sue one another for torts to a spouse's property. See § 55–35, supra, and *Vigilant Insurance Company v. Bennett*, supra. Defendant's argument is based on a public policy not applicable to property interest suits, and is without merit.

(e) Breach of Contract

Defendant states the alleged contract was for the wife "to furnish from her earnings all or a substantial part of the expenses of his medical education and his support and maintenance while pursuing his medical education and in consideration thereof Mrs. Church was to receive an interest in Dr. Church's increased earning capacity which he would receive as a result of his medical education." Defendant asserts that a contract of this type is void for lack of consideration or against public policy. This involves the elements of plaintiff's claims, and is discussed in 5(b) and (c).

(f) Independent Claim

Defendant contends that plaintiff's claims should not be considered independently of the divorce action. We understand defendant's argument to be that the adjustment of property rights, between spouses, properly occurs in actions either for divorce or for maintenance, but not independently of such actions. Defendant's reasoning, if we understand it correctly, is that Virginia's public policy of preserving marriage forbids suits based on property interests unless the marriage is coming to an end through divorce, or has deteriorated to such an extent that there is an action for support and maintenance.

Virginia, by § 55–35, supra, permits suits between spouses, based on property interests, as if they had never been married. *Vigilant Insurance Company v. Bennett*, supra. This statutory authorization is not dependent upon a divorce or a support and maintenance proceeding. Virginia has permitted suits between husband and wife which involved their property interests. *De Baun's Ex'x v. De Baun*, 119 Va. 85, 89 S.E. 239 (1916), states that a wife can sue her husband for money she loaned to him. *Humphreys v. Strong*, 141 Va. 146, 126 S.E. 194 (1925), states that a wife could sue in ejectment to recover possession of property he had given her; "As to her property rights during the coverture, they are as strangers." *Klotz v. Klotz*, 202 Va. 393, 117 S.E.2d 650 (1961), was a suit for dissolution

of the business partnership between husband and wife. The two *Capps v. Capps* suits illustrate that actions involving marital affairs are separate from property affairs. *Capps I*, 216 Va. 382, 219 S.E.2d 898 (1975), held that neither spouse was entitled to a divorce. *Capps II*, supra, considered the validity of an agreement between the spouses as to certain real property.

The foregoing Virginia authority is to the effect that the disposition of property disputes, between spouses, is not tied to divorce or maintenance proceedings. In the absence of the foregoing authority, we would not hold that the resolution of property disputes are tied to proceedings involving divorce or maintenance unless Virginia authority required such a result. Our point is that plaintiff claims a right to damages or equitable relief. The resolution of property disputes as a part of divorce or maintenance proceedings, which resolution involves the discretion of the trial court, is not a resolution of property disputes *as of right*. See § 20–107, Va.Code 1950 (1975 Repl. Vol. 4A, 1980 Supp.). The distinction between the right to relief and discretionary relief is aptly discussed in *Erickson*, supra.

5. Elements of Plaintiff's Claims

The elements of plaintiff's claims are discussed in this issue.

(a) Services as a Wife

Part of plaintiff's claims are based on her services during the time defendant attended medical school; the amended complaint refers to this aspect as "emotional support to Defendant for his medical studies" and "services to Defendant as a housewife."

Under Virginia law a wife has a duty to provide household services to her husband and the husband has a duty to support his wife. *Hall v. Stewart*, 135 Va. 384, 116 S.E. 469 (1923). The concurring opinion of Judge Burks in *Keister's Adm'r v. Keister's Ex'rs*, supra, states:

> It is the duty of the husband to support his wife and to shield, defend, and protect her in every way possible. It is the duty of the wife to reverence her husband, and to serve him. These duties grow out of the mere act of marriage. The husband may not present a bill against his wife for board and clothing, nor the wife present to her husband a bill for presiding over the household. The law will not imply a contract to pay such bills.

Keister is cited with approval in later cases. See *Korman v. Carpenter*, supra; *Furey v. Furey*, 193 Va. 727, 71 S.E.2d 191 (1952).

Having a duty to provide the services of a wife, those services are not a basis for relief for fraud, or breach of contract, or for an equitable award based on unjust enrichment. Compare *Hurley v. Hurley*, 94 N.M. 641, 615 P.2d 256 (1980).

(b) Support

Defendant seems to contend that a part of plaintiff's claim for providing financial support is based on plaintiff supporting herself while defendant attended medical school. This argument takes one phrase in the fraud claim out of context. Plaintiff's "providing financial support" assertion under each of the three general claims is that plaintiff supported defendant while defendant attended medical school. Plaintiff contends either that defendant obtained this support by fraud, or that the support she provided for defendant was consideration for the contract, or that under the circumstances it was inequitable for defendant to have obtained this support.

(1) Defendant contends that the support he received from his wife is to be treated no differently than the claim based on the services of a wife; that a wife has a duty to support her husband. Because of this asserted duty, defendant's position is that the support he received provides no consideration for the alleged contract and, apart from contract "consideration," provides no basis for a recovery under any of the three general claims.

Defendant does not claim that a wife had a duty to support her husband at common law. See *Eaton v. Davis*, 176 Va. 330, 10 S.E.2d 893 (1940); *Keister's Adm'r v. Keister's Ex'rs*, supra.

Defendant contends that § 20–61, Va. Code 1950 (1975 Repl. Vol. 4A, 1980 Supp.), requires each spouse to support the other. That statute provides, in part, that "[a]ny spouse who without cause . . . fails to provide for the support and maintenance of his or her spouse . . . shall be guilty of a misdemeanor . . . ." *Heflin v. Heflin*, 177 Va. 385, 14 S.E.2d 317 (1941), held that this statute did not provide a civil remedy, but was limited to criminal proceedings. Section 20–61, supra, not providing a civil remedy, did not impose an obligation for a wife to support her husband. See opinion of Judge Sims in *Keister's Adm'r v. Keister's Ex'rs*, supra.

(2) At oral argument, defendant asserted that a wife had a duty to support as a result of § 20–107, supra. This argument involved two steps. First, that under § 20–107, supra, a husband could obtain support and maintenance (formerly called alimony) from his wife. Second, that alimony was a continuation of the duty of support, see *Eaton v. Davis*, supra. Because a husband might obtain support and maintenance from his wife, defendant asserts a duty on the wife to support the husband during coverture. The fallacy of this argument is that § 20–107, supra, does not provide a "right" to support; under that statute support and maintenance is determined after consideration of the statutory factors therein stated and, ultimately, is a matter of what is required for an equitable solution in a particular case. Holt, *Support v. Alimony in Virginia: It's Time to Use the Revised Statutes*, 12 U. of Rich.L.Rev. 139 (1977–78).

Plaintiff's financial support contentions are not barred on the basis that the wife had a duty to support her husband.

(3) The right to support is not a property right. *Eaton v. Davis*, supra. Defendant contends: "Plaintiff's suit is not an invasion of her property rights for she is seeking return of money spent for support of her husband." This argument is specious, being based on a distortion of concepts. No right, or duty, to support is involved in plaintiff's claims; rather, plaintiff's "providing financial support" claims state a basis for relief because the wife had no duty to support. Because she did financially support her husband from her separate property, that support provides a basis for relief if the support was obtained by fraud, by contract, or in circumstances for which there may be equitable relief.

(c) Cost of Medical Education

Traditionally, the amount of an alimony or support award has been determined by need, ability to pay and the "station in life" of the parties. *Eaton v. Davis*, supra. The cost of a medical education does not come within this traditional approach. See *Rosner v. Rosner*, 202 Misc. 293, 108 N.Y.S.2d 196 (Fam.Ct.1951) where a Domestic Relations Court in New York stated that there was no legal obligation on the part of a husband to provide the funds required by his wife to attain a medical education. Thus, traditionally, the funds provided by a wife to pay for her husband's medical education would be considered an item separate from funds provided for his support. Educational funds supplied by a wife would provide a basis for relief if those funds were obtained by fraud, by contract or in circumstances for which there may be equitable relief.

This case being governed by Virginia's substantive law, a distinction between money for support and money for educational costs need not be made. The statutory factors set forth in § 20–107, supra, to be considered for support and maintenance, include the monetary contributions of a party to the well-being of the family. This would include contributions for traditional support and educational costs. Inasmuch as these contributions can be considered in an action under § 20–107, supra, they may also be considered in an independent action, such as this cause.

(d) Damages

Inasmuch as the trial court dismissed the amended complaint for failure to state a claim upon which relief could be granted, we consider damages only to the

extent they are necessary to state a claim for relief. We do not consider the extent of the damages that may be recovered, or the extent of any equitable relief. Defendant's contention, identified in issue 4(b), is that plaintiff cannot obtain relief for fraud in the absence of substantial damage. The complaint asserts that $20,000 of her earnings were used "to provide Defendant the costs of his medical education". That is substantial damage which, as a minimum, is recoverable under each of the three theories asserted.

Conclusion

We emphasize that the issue decided is whether plaintiff has stated a claim for which relief can be granted under the substantive law of Virginia. Defenses to plaintiff's claims and any impact the divorce trial and judgment may have on plaintiff's claims have not been considered. We hold that a claim for relief has been stated under fraud, breach of contract and unjust enrichment on the basis of plaintiff's separate funds obtained by defendant for his support and medical education.

Defendant contends that his attorney fees should be awarded to him as damages, see § 39–3–27, N.M.S.A.1978 and R.Civ.App. Proc. 20, on the basis that plaintiff's appeal was frivolous and not in good faith. Our discussion of the issues and the decision reached demonstrates that defendant's contention is frivolous; plaintiff's appeal was not frivolous.

The order dismissing the amended complaint is reversed; the cause is remanded with instructions to reinstate the amended complaint on the docket and to proceed consistent with the views expressed in this opinion.

Plaintiff is to recover her appellate costs.

IT IS SO ORDERED.

HERNANDEZ, C. J., and LOPEZ, J., concur.

631 P.2d 304

Mary Ann GUTIERREZ, et al., Plaintiffs-Appellees,

v.

CITY OF ALBUQUERQUE, David Rusk, Mayor of the City of Albuquerque, City Council, Marion Cottrell, President of the City Council, Defendants-Appellants,

v.

ELLIOTT ENTERPRISES, INC., a New Mexico corporation, Intervenor-Appellant.

STATE of New Mexico, ex rel. Rosie DE LA FUENTE, Petitioner,

v.

Hon. W. John BRENNAN, District Judge, Respondent.

Nos. 13419, 13264.

Supreme Court of New Mexico.

June 25, 1981.

Rehearing Denied July 22, 1981.

George R. "Pat" Bryan, City Atty., Barbara G. Stephenson, Beth McLellan, Asst. City Attys., Albuquerque, for defendants-appellants and respondent.

Robert H. Scott, Albuquerque, for intervenor-appellant.

Larry L. Lamb, Ray M. Vargas, Tito Chavez, Albuquerque, for plaintiffs-appellees and petitioner.

Sutin, Thayer & Browne, LaFel E. Oman, Kevin V. Reilly, Santa Fe, amicus curiae.

OPINION

EASLEY, Chief Justice.

Two cases are consolidated in this appeal. It is unnecessary to sort out the procedural morass by which these cases have come before us. Suffice it to say that in one case, brought by various citizens of Albuquerque (Petitioners), the district judge ruled that a meeting of the City Council of Albuquerque, at which the application of Elliott Enterprises, Inc. (Elliott), for permission to sell alcoholic beverages within 300 feet of a school was granted, did not comply with Section 10–15–1, N.M.S.A.1978 (Repl.Pamp.1980), of the Open Meetings Act. We reverse this decision. In the other case, brought by Elliott, another district judge ruled that the meeting complied with the requirements of the Open Meetings Act. We affirm this decision.

The sole issue presented by these cases is whether the fact that the Council Chambers were not large enough to accommodate all of the large crowd that appeared to attend the meeting, rendered invalid the approval of Elliott's application on the ground that it was not a public meeting.

Elliott's application for permission to sell alcoholic beverages within 300 feet of a school generated a great deal of public interest and controversy. An overflow crowd arrived to attend the City Council meeting of July 28, 1980, at which Elliott's application was considered. The Council Chambers were filled in excess of the maximum occupant load of 156 persons. The rest of the crowd (including Petitioners) had to remain outside the Chambers. As persons left the Chambers, others were allowed to enter. Loudspeakers were set up outside the Chambers and were operative during at least a portion of the meeting so that those outside the Chambers could listen to the proceedings. The meeting was broadcast on an Albuquerque radio station and received extensive media coverage. A motion was made to move the meeting to a larger room at the beginning of the meeting, but was denied for a variety of reasons, including inadequate sound systems at alternative locations. Members of the public who registered were allowed to present their views to the Council. Proponents of the agenda items were allowed one hour to present their views; opponents of the items were ultimately allowed one hour and fifteen minutes to present their views.

Petitioners contend that the meeting was not a public meeting as required by Section 10–15–1 of the Open Meetings Act on the ground that they were not allowed to attend and listen to the proceedings. Pertinent portions of Section 10–15–1 provide:

> A. The formation of public policy . . . shall not be conducted in closed meeting. All meetings of any public body, except the legislature, shall be public meetings and *all persons so desiring shall be permitted to attend and listen* to the deliberations and proceedings.

B. All meetings of a quorum of members of any ... policy-making body of any ... municipality ... held for the purpose of formulating public policy, discussing public business or for the purpose of taking any action ... are declared to be public meetings open to the public at all times, except as otherwise provided .... (Emphasis added.)

Petitioners focus upon the language "attend and listen" and contend that all must be in the room or in the presence of the Council members, regardless of the size of the crowd and the limitations of the meeting hall. This narrow view would permit invalidation of any action by a public body by the simple method of overflowing the Chambers. Thus, the Council, to be safe, would have to hire the football stadium or hold its meetings in a wide open space. Even then, *reductio ad absurdum*, if a tree or other obstruction stood between an individual and the Council, he could claim that he was not permitted to "attend".

To "attend and listen" is equally susceptible of an interpretation that persons desiring to attend shall have the opportunity to do so, that no one will be systematically excluded or arbitrarily refused admittance, and that the meeting will not be "closed" to the public. The circumstances of this case make manifest the reasonableness of such an interpretation. Everyone desiring to attend the City Council meeting was afforded an opportunity to do so, but once the hall was filled, no others could be admitted.

Since the phrase is susceptible of different interpretations by reasonable men, we turn to the rules of statutory construction in an effort to discern the intent of the Legislature. *N. M. State Bd. of Ed. v. Bd. of Ed., Etc.,* 95 N.M. 588, 624 P.2d 530 (1981). In ascertaining legislative intent, we will look not only to the language used in the statute, but also to the object sought to be accomplished and the wrong to be remedied. We will give effect to legislative intent by adopting a construction which will not render the statute's application absurd or unreasonable and will not lead to injustice or contradiction. *N. M. State Bd. of Ed. v. Bd. of Ed., Etc., supra; State ex rel. Newsome v. Alarid,* 90 N.M. 790, 568 P.2d 1236 (1977).

In *Raton Public Service Company v. Hobbes,* 76 N.M. 535, 417 P.2d 32 (1966), this Court examined a predecessor to the current Open Meetings Act which provided that "governing bodies of all municipalities ... shall make all final decisions at meetings open to the public." § 5–6–17, N.M.S. A.1953. The Court stated that the purpose of this statute "was to provide that governing bodies dealing with public funds be required to make decisions in the open where the interested public could observe the action." *Id.* at 543, 417 P.2d at 37. Though the statute has changed in certain particulars since that case, we see nothing to indicate any fundamental change in legislative purpose.

The Arizona Supreme Court, examining a statute quite similar in language to our Section 10–15–1, stated that "[t]he intent of the legislature was to open the conduct of the business of government to the scrutiny of the public and to ban decision-making in secret. (Citations omitted.) A meeting held in the spirit of this enunciated policy is a valid meeting." *Karol v. Bd. of Ed. Trustees, Etc.,* 122 Ariz. 95, 593 P.2d 649, 651 (1979).

The Minnesota Supreme Court has stated that "[t]he purpose of [the Open Meetings] statute is to prohibit action's [sic] being taken at a secret meeting where it is impossible for the interested public to become fully informed concerning board decisions or to detect improper influences. But while the statute orders that the public be given an opportunity to observe, it does not compel a board to conduct business in a place most advantageously suited for public viewing." *Lindahl v. Independent School District No. 306,* 270 Minn. 164, 133 N.W.2d 23, 26 (1965) (footnote omitted).

Section 10–15–1(A) prohibits "closed meeting[s]" and requires "public meetings" at which interested persons can "attend and listen to the deliberations and proceedings."

Like the Arizona and Minnesota statutes, the purpose of this statute is clearly to open the meetings of governmental bodies to public scrutiny by allowing public attendance at such meetings.

It can be said with equal assurance that in enacting the Open Meetings Act the Legislature did not intend to impair or impede the effective workings of the various political subdivisions of the state. Exceptions to the open meetings requirement are allowed in Section 10–15–1(E). Under Section 10–15–3, every action taken by such a governmental entity is presumed to have been taken in accordance with the requirements of the Open Meetings Act. These provisions make clear that the Legislature did not intend to unduly burden the appropriate exercise of governmental decision-making and ability to act.

This Court has stated that "[s]trict construction of a statute does not contemplate arbitrary or inequitable meaning which would give third parties an opportunity to take advantage of legal technicalities, but only such meaning as will require substantial compliance with the statute." *Rutledge v. Johnson*, 81 N.M. 217, 222, 465 P.2d 274, 279 (1970) (citation omitted).

Substantial compliance has occurred when the statute has been sufficiently followed so as to carry out the intent for which it was adopted and serve the purpose of the statute. *Smith v. State*, 364 So.2d 1 (Ala.Cr.App.1978). This doctrine has been applied to open meetings laws by the courts of several states. *See Karol v. Bd. of Ed. Trustees, Etc., supra; City of Flagstaff v. Bleeker*, 123 Ariz. 436, 600 P.2d 49 (Ct.App. 1979); *Houman v. Mayor and Council, Etc.*, 155 N.J.Super. 129, 382 A.2d 413 (1977); *McConnell v. Alamo Heights Ind. Sch. Dist.*, 576 S.W.2d 470 (Tex.Civ.App.1978); *Toyah Ind. Sch. Dist. v. Pecos-Barstow Ind. Sch. Dist.*, 466 S.W.2d 377 (Tex.Civ.App.1971); *see also Edwards v. City Council of City of Seattle*, 3 Wash.App. 665, 479 P.2d 120 (1970).

Construing the statute consistent with these policies, we conclude that the words used mean only that the governmental entity must allow reasonable public access for those who wish to attend and listen to the proceedings. We hold that the City Council meeting fully met the requirements of the Open Meetings Act as we have construed it. The meeting was held in a hall designed to accommodate a large number of spectators. When the size of the crowd exceeded the capacity of the hall, every effort was made to allow those who could not gain entrance to listen to the proceedings. The City Council even went beyond the requirements of the Open Meetings Act and allowed members of the public to address the Council and present their views for over two hours. A meeting could hardly be more open or more public.

The ruling in *State ex rel. Rosie de La Fuente v. Hon. W. John Brennan*, No. 13,-264 is affirmed, and the alternative writ issued by this Court in that cause is discharged. The ruling in *Gutierrez, et al. v. City of Albuquerque*, No. 13,419 is reversed.

IT IS SO ORDERED.

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

631 P.2d 307

Tomey Jean MURPHY, aka Tomey Jean Swan, Petitioner-Appellee,

v.

William James MURPHY, Respondent-Appellant.

No. 12683.

Supreme Court of New Mexico.

July 21, 1981.

Fred Standley, Santa Fe, Georgina Landman, Tulsa, Okl., for respondent-appellant.

Sigmund L. Bloom, Albuquerque, for petitioner-appellee.

OPINION

RIORDAN, Justice.

William Murphy (respondent) appeals from the trial court's order entered after a contempt proceeding was instituted by Tomey Jean Murphy (petitioner). We affirm in part and reverse in part.

The issues on appeal are: (1) whether the trial court had jurisdiction to conduct a contempt proceeding; (2) whether an Oklahoma divorce decree involving the parties is entitled to full faith and credit; (3) whether the trial court had the authority to enjoin the respondent from instituting visitation or child custody proceedings in any other jurisdiction; (4) whether the trial court erred in finding the respondent and his attorney in contempt of court and summarily sentencing each to twenty-five minutes in jail; (5) whether the trial court erred in temporarily suspending the respondent's visitation privileges; and (6) whether the court abused its discretion in ordering him to pay the petitioner's attorney fees and costs.

The parties were married in Oklahoma in 1969. In July 1976, the petitioner filed a petition in Colfax County for dissolution of marriage stating that both parties were bona fide residents of New Mexico for six months. The respondent filed a general entry of appearance and waiver of service. The district court entered a decree of divorce based upon the pleadings.

In September 1976, respondent filed a petition for modification of the final decree. After a hearing on this petition at which neither the respondent nor his attorney appeared, although both were notified of the date and time of the hearing, the trial court entered an order in December 1976 modifying the final decree. One of the findings made by the trial court was that the respondent, by filing his petition for modification, submitted himself to the continuing jurisdiction of the Colfax County District Court. There was no appeal from this order, which continued the custody of the parties' two minor children in the petitioner and provided for a property settlement, visitation rights and support. In addition, the court held the respondent in contempt of court for having failed to return the parties' son to the petitioner after exercising visitation as provided by the original decree. The respondent later purged himself of contempt by delivering the child.

In November 1976, respondent filed an action for divorce in Oklahoma. He obtained an ex-parte order granting him custody of his minor son who was visiting him at the time. On December 30, 1976, respondent obtained a default divorce from the Oklahoma court, granting custody of the minor son to respondent and finding that the New Mexico divorce was invalid, apparently for lack of jurisdiction. Shortly after being entered, this default divorce was set aside by agreement of the parties and the Oklahoma court agreed to rule on the question of whether it had jurisdiction to grant a divorce and custody or whether the New Mexico decree was entitled to full faith and credit. On April 14, 1977, the Oklahoma district court ruled that it was required to give full faith and credit to the New Mexico decree and that it could not look behind the

New Mexico decree to determine whether New Mexico had jurisdiction to grant the divorce. That case was appealed to the Oklahoma Court of Appeals, *Murphy v. Murphy*, 581 P.2d 489 (Okl.Ct.App.1978) which reversed the trial court, stating that a hearing would have to be held to determine if in fact New Mexico had jurisdiction to grant the divorce.

The respondent then filed a motion in the District Court of Colfax County to set aside the dissolution of marriage decree entered in July 1976. On October 26, 1978, a hearing was held in New Mexico on the motion to set aside the New Mexico final divorce decree on the grounds that neither party met the six-month residency requirement of our divorce statute. At the hearing, the district court set aside the portion of the decree that granted a divorce as void for lack of jurisdiction. It was determined by the court that neither party had resided in New Mexico for the six months required by our divorce statute prior to the entry of this decree. The court, however, relying on *Heckathorn v. Heckathorn*, 77 N.M. 369, 423 P.2d 410 (1967), ruled that even though it had originally lacked subject matter jurisdiction to grant a divorce, it did have jurisdiction over the child custody, visitation rights and property settlement provisions contained in the original New Mexico decree. The court also stated that if either party had any objection to the ruling they could submit briefs in opposition within ten days. Neither party did so. Rather, shortly after the October 1978 hearing, the parties met in Denver, Colorado, and worked out a compromise hoping to bring this litigation to an end. An integral part of the settlement, in which petitioner stipulated to the parties being granted a divorce in Oklahoma, was the inclusion of a provision in the Oklahoma decree stating that the New Mexico court would have continuing jurisdiction over all issues of custody and visitation of the minor children of the parties. The agreement also provided that no portion of it would have force and effect unless the entire agreement was accepted by the parties and the court. However, when the divorce decree was presented to the court in Oklahoma, the judge struck the provision relating to custody and visitation. Neither petitioner nor her attorney were ever notified of this nor provided with a copy of the Oklahoma decree by respondent or his attorney until after May 25, 1979 when the pleadings that give rise to this appeal were filed.[1]

On May 25, 1979, petitioner filed a petition for an order to show cause in Colfax County District Court alleging that respondent had violated the previous order of the New Mexico district court and the stipulation that was attached to the Oklahoma divorce decree reserved jurisdiction over custody and visitation matters to the New Mexico court. Petitioner asked the court to find respondent in contempt; to enjoin him from pursuing any other custody or visitation proceedings other than those allowed in the signed stipulation; to suspend visitation; and to pay petitioner's attorney fees. The factor that prompted this action was respondent's obtaining a writ of habeas corpus from the Oklahoma court ordering petitioner to come to Oklahoma with the minor children on June 8, 1979 for a hearing.

The order to show cause was set for June 22, 1979 and notice of hearing was mailed to New Mexico counsel of record and the respondent's Oklahoma counsel that had previously been authorized to represent respondent in the New Mexico action. At the hearing, the court ordered the respondent's attorney to produce the stipulated order drawn up as a result of the October 1978 hearing and signed by the parties six months previously. The court also found both the respondent and his Oklahoma attorney in contempt of court and sentenced

1. When the petitioner did learn of the deletion of that provision by the judge, she filed a motion in Oklahoma to vacate the divorce decree on the grounds that the change nullified the entire agreement and that the mother was denied due process when the Oklahoma court changed the stipulation without notice to her and without her presence and an opportunity to be heard. The record reflects that a hearing on this motion was held in Oklahoma in March 1980, but no order has ever been entered ruling on her motion.

each to twenty-five minutes in jail, which they served then and there. In addition the court permanently enjoined the respondent from bringing any proceedings involving child custody and visitation in any court not within its jurisdiction, awarded the petitioner $1,700.00 for attorney fees and costs, and temporarily terminated the respondent's visitation rights, pending a further hearing. It is from this decision that the respondent appeals.

1. *Jurisdiction.*

The respondent challenges the Colfax County District Court's order on jurisdictional grounds. The respondent contends that the court had no personal jurisdiction over him because: (1) the contempt proceeding was a new proceeding requiring issuance and personal service of process, and that the certificate of mailing to both of his attorneys did not satisfy due process requirements; and (2) the respondent and his attorney's "special appearance" and participation at the hearing did not constitute a general appearance as such, and the trial court did not acquire personal jurisdiction over the respondent on that basis.

We reject both contentions. The New Mexico court's jurisdiction over respondent, if defective, became complete when he appeared and participated in the hearing on the merits on the order to show cause. *Csanyi v. Csanyi*, 82 N.M. 411, 483 P.2d 292 (1971). Here, despite continuous warnings by the court that such participation may waive jurisdictional objections, the respondent's attorney cross-examined witnesses and called the respondent to testify. New Mexico courts have jurisdiction over custody matters if the parties disputing custody are personally subject to the jurisdiction of the court. *Montoya v. Collier*, 85 N.M. 356, 512 P.2d 684 (1973). See *Wallace v. Wallace*, 63 N.M. 414, 320 P.2d 1020 (1958). In the present case, the trial court had personal jurisdiction over the respondent not only under the case law established in *Csanyi, supra*, but also because the respondent had previously invoked the jurisdiction of and submitted himself to the New Mexico court's jurisdiction in this case. *See Matter of Johnson*, 94 N.M. 491, 612 P.2d 1302 (1980).

At the October 1978 hearing on the *respondent's* motion to set aside the divorce decree, the New Mexico district court specifically ruled that the court had acquired jurisdiction over the child custody, visitation and property settlement provisions contained in the July 1976 final decree by the respondent's acceptance of service and later filing motions in this case. Although the court did not have subject matter jurisdiction over the divorce, it did acquire jurisdiction over both of the parties. The trial court relied on Section 22–7–2, N.M.S.A. 1953 (Supp.1975), now Section 40–4–3 N.M. S.A. 1978, which reads:

> Whenever the husband and wife have permanently separated and no longer live or cohabit together as husband and wife, either may institute proceedings in the district court for a division of property, disposition of children or alimony, without asking for or obtaining in the proceedings, a dissolution of marriage.

This statute gives the court subject matter jurisdiction over such matters when it has acted in a proceeding, whether a dissolution of marriage is requested or not, as long as the parties are personally subject to the jurisdiction of the court. There is no residence or domicile requirement under this statute. In addition, the respondent's motion of October 1978 sought to set aside *only* the divorce decree. The respondent did not challenge the child custody and visitation provisions of the original New Mexico decree. The trial court had jurisdiction under Section 40–4–3 and under *Wallace, supra. See Heckathorn v. Heckathorn, supra.*

2. *Oklahoma Decree.*

The respondent claims that the New Mexico trial court's order should be set aside because full faith and credit should be given to the Oklahoma divorce decree. However, the first Oklahoma court's default decree was set aside by stipulation of the parties. When the parties later ap-

peared for trial on the merits, the Oklahoma district court found that the New Mexico divorce decree was entitled to full faith and credit in Oklahoma and refused to entertain the action. This decision was later reversed by the Oklahoma Court of Appeals which stated that it was unclear whether the New Mexico divorce decree was entitled to full faith and credit because of the possible lack of jurisdiction on the part of the New Mexico court which issued the decree. The Oklahoma Court of Appeals remanded the case for further proceedings to determine whether either party met the domiciliary and residency requirement for divorce in New Mexico.

Thereafter, on October 26, 1978, a hearing was held in New Mexico on respondent's motion to set aside the New Mexico divorce decree. As stated previously, the district court announced that it would set aside the provision of the divorce decree on the grounds that the parties did not meet the residency requirements in June 1976 when the court granted the divorce.

After the October 1978 hearing in New Mexico, the parties met and drew up a stipulated order in accordance with the district court decision. The stipulation was signed by all parties but was not filed until June 22, 1979.

At the time the second Oklahoma decree was entered in December 1978, the original divorce decree in New Mexico had not been formally set aside and no order had been entered on the question of the New Mexico court's jurisdiction as required by the decision of the Oklahoma Court of Appeals. Since the second Oklahoma divorce was granted without such a determination first being made, it would not be entitled to full faith and credit.

Even if the December 19, 1978, Oklahoma decree were valid in Oklahoma, the New Mexico district court would not be deprived of jurisdiction to further consider custody and visitation matters. The New Mexico court had *in personam* jurisdiction over both parties and subject matter jurisdiction over both parties and therefore could determine the custody of their children. *Worland v. Worland, supra.* As long as the court continues to have jurisdiction over either the children or both parents, it has continuing jurisdiction to hear all matters relating to custody.

At the hearing on the order to show cause, the respondent argued that the New Mexico court must give full faith and credit to the second Oklahoma decree. This court has held as a general rule that

> a judgment of a sister state awarding custody is entitled to full faith and credit on the state of facts then existing but if subsequent thereto a substantial change of conditions has occurred calculated to affect the child's welfare, the court may in a later hearing render such decree as the child's welfare requires.

Terry v. Terry, 82 N.M. 113, 114, 476 P.2d 772, 773 (1970) (citing *Evens v. Keller*, 35 N.M. 659, 6 P.2d 200 (1931).

The Oklahoma court which entered the 1978 divorce decree and determined custody did not hear the evidence which the New Mexico court considered at previous hearings and at the time it entered the order of June 26, 1979. Because of the consideration of additional evidence, the district court was not required to give full faith and credit to the Oklahoma decree.

Oklahoma statutes, as well as case law, establish a principle that child custody matters may continue to be reexamined even after an original custody decree is entered. Not only will Oklahoma reexamine its own decrees awarding custody, but will also reexamine foreign decrees. Okla.Stat. tit. 12, § 1277 (Supp.1980); *Lee v. Lee*, 579 P.2d 1284 (Okl.Ct.App.1978). There is no reason why a New Mexico court should be bound by an Oklahoma decree which itself would be subject to reexamination in an Oklahoma court.

3. *Injunction Against the Respondent.*

The respondent claims that the district court had neither the jurisdiction nor the authority to enjoin him from bringing any proceeding involving child custody and visitation matters in any other jurisdiction.

The request for the injunction was based upon the petitioner's belief that the trial court's previous order and the Oklahoma court's order reserving jurisdiction in the New Mexico court had been signed by the parties and approved by the respective courts. In fact, the previous order of the New Mexico court had not been signed by the court or filed. The Oklahoma order that had been agreed to by the parties was entered, but had the provision stricken that related to the New Mexico court having continuing jurisdiction over custody. In light of this, the trial court should not have entered the injunction. We hold the trial court erred in issuing the injunction given the status of the pleadings upon which it was based.

4. *Contempt.*

The respondent claims that the New Mexico trial court erred in finding the respondent and his counsel in contempt of court and in summarily sentencing each to a twenty-five minute jail term. He claims that the trial court failed to meet the requirements for exercising its criminal contempt powers spelled out in a recent decision by this Court. *Matter of Klecan*, 93 N.M. 637, 603 P.2d 1094 (1979). *Klecan* provides that before *criminal* contempt may be imposed and enforced, the following requirements must be met:

> (1) Except in cases of flagrant contemptuous conduct, the trial court should not exercise the power of summary contempt in the absence of a prior warning;
>
> (2) There must be an opportunity to explain; and
>
> (3) There must be a hearing on the matter.

It is not clear from the record in this case whether the trial court was holding the respondent and his attorney in criminal or civil contempt of court. The distinction between the two was made in *Klecan*:

> 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. (Citations omitted.)

93 N.M. at 638, 603 P.2d at 1095.

The trial court said that it was sending the respondent to jail for twenty-five minutes as an expression of the court's displeasure with what the respondent was trying to do in this case. The court also held the respondent in contempt for "his obstruction of justice insofar as the Court Order is concerned and for his actions toward the Petitioner and the minor children." The judge commented that he had "[n]ever seen such flagrant abuse of an ex-wife."

With respect to respondent's attorney, the court stated that it was sending her to jail "because of her willful holding of this Court Order after signed by all the parties and never presenting it to the Court."

[redacted] The trial court erred if it was holding the respondent or his attorney in criminal contempt for failing to file the stipulation. At the October 1978 hearing, the court did not order the respondent or his attorney to file the order. After the court announced its decision, the following colloquy took place:

> MR. DAVIDSON (previous Attorney for Respondent): As I understand it, your Honor, you have announced a tentative decision subject to submission of briefs.
>
> THE COURT: Yes.
>
> MR. DAVIDSON: And if neither party submits a brief, then the Court will enter an order prepared by one of the parties consistent with announcement of the Court.
>
> THE COURT: That's right.

No order was ever made by the court directing or commanding the respondent or his attorney to submit the stipulated order for signature. Nor did the court ever issue a prior warning as required by *Klecan* that the respondent would be held in contempt if he did not file the stipulated order. Therefore, we hold that the respondent or his attorney could not be held in criminal contempt for failing to file the stipulated order.

Punishment for *civil* contempt is remedial and for the benefit of one of the parties. There can be no doubt that the court could hold respondent in civil contempt of court for violating a court order that previously directed him to take certain action or that prohibited certain conduct. Nor is there any doubt that the judge could enforce such orders by fine or by a coercive or remedial jail sentence or both. Since neither the respondent nor the attorney were ordered to file the court order, neither could be held in civil contempt for failure to file the stipulated order.

Another reason which the court articulated for holding the respondent in contempt was the respondent's actions toward the petitioner and the minor children.

However, assuming that the court intended to hold the respondent in civil contempt, he could not be held in contempt for violation of the stipulated order because it was not signed or entered by the New Mexico court. If the court's intention was to hold the respondent in contempt for the abuse of the petitioner, such action must also fail. There was no court order entered that was violated. Further, the petitioner was not given notice of any other alleged violations of previous court orders in the order to show cause.

It appears from the record that the New Mexico court may have based the contempt on the actions of the respondent and his attorney in failing to notify the petitioner of the change in the Oklahoma decree or in failing to provide the petitioner with a copy of the decree. Again, no order of the New Mexico court was alleged to have been violated. Before the court could have found respondent in civil contempt, it would have to find that the respondent failed to perform a previously ordered affirmative act, or performed an act previously prohibited. In looking at the original divorce decree and at the order of June 22, 1979, we do not see where the court prohibited the respondent from doing any act or compelled the respondent to act in some specific way which respondent later failed to do.

5. *Order Suspending Visitation Privileges.*

The respondent claims that the trial court erred in temporarily suspending his visitation privileges and in ordering him to pay the petitioner's attorney fees and costs. Since we have already held that the trial court had jurisdiction over child custody and visitation matters, it clearly had the authority to temporarily suspend the father's visitation privileges. Given the record in this case, the trial court did not abuse its discretion in doing so.

6. *Order to Pay Attorney's Fees and Costs.*

Pursuant to Section 40–4–7, N.M. S.A. 1978 the trial court has the authority to designate which party in such proceedings will bear the expenses of those proceedings. We hold that the court did not abuse its discretion.

The respondent is ordered to pay petitioner $3,000.00 in attorney fees for this appeal as well as costs.

While this case was before us on appeal, we issued a writ in our Cause Number 12,643 prohibiting the trial judge from taking future actions in this case. In view of the result we reach on appeal, we modify the writ of prohibition to the extent it is inconsistent with this opinion.

The actions of the trial court are affirmed with the exception of the findings of contempt against the respondent and his Oklahoma counsel and the injunction that was entered.

IT IS SO ORDERED.

SOSA, Senior Justice, PAYNE, J., and DOUGHTY, District Judge, concur.

EASLEY, C. J., dissenting.

FEDERICI, J., not participating.

631 P.2d 315

Janet SALAZARE, as Personal Representative of the Estate of her Fetus, Plaintiff-Appellant,

v.

ST. VINCENT HOSPITAL, Eric C. Wolf, Kenneth Harrold, M.D. and Northern New Mexico Emergency Medical Services, P.C., Defendants-Appellees.

No. 4433.

Court of Appeals of New Mexico.

July 1, 1980.

Carl J. Butkus, Civerolo, Hansen & Wolf, P. A., Albuquerque, for defendants-appellees St. Vincent Hospital and Eric C. Wolf.

Daniel Shapiro, Ortega & Snead, P. A., Albuquerque, for plaintiff-appellant.

Thomas A. Simons, IV, Sommer, Lawler, Scheuer & Simone, P. A., Santa Fe, for defendants-appellees Kenneth Harrold, M. D., and Northern New Mexico Emergency Medical Services, P. C.

W. Robert Lasater, Jr., Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for amicus curiae.

OPINION

WALTERS, Judge.

This matter is before us on an interlocutory appeal from the trial court's quashing of plaintiff's notice to take the deposition of a panel member of the Medical Review Commission.

Plaintiff filed a malpractice suit on behalf of herself and her stillborn fetus after presenting the matter to the Commission in accordance with the Medical Malpractice Act, §§ 41–5–1 to 41–5–28, N.M.S.A.1978. The reviewing panel found substantial evidence of malpractice.

It appears from the trial court's order that at the time plaintiff deposed defendant Wolf (an emergency room nurse at St. Vincent's Hospital when the alleged malpractice occurred), Wolf was unable to recall much of the evidence he gave at the hearing before the panel. Plaintiff thereupon sought to depose a member of the panel who recalled Wolf's testimony. In ruling on St. Vincent's and Wolf's motion to quash the notice of deposition, the trial court observed that the witness's testimony probably would provide "an admission [made by Wolf at the panel hearing] which may almost prima facie go to meet [plaintiff's] burden of proof in the case." Nevertheless, the motion to quash was granted. The operative portions of the trial court's order read:

> [The court] FINDS AND CONCLUDES as follows:
>
> 1. The legislative intent of the Medical Malpractice Act, Sections 41–5–1 et seq. (NMSA 1978) was to create a privilege for members of the Medical Review Commission that would generally exempt them from discovery procedures during the pendency of a lawsuit.
>
> 2. This legislatively enacted privilege, referred to in paragraph one (1) above, is constitutionally valid.
>
> 3. Plaintiff has properly noticed opposing counsel and properly subpoenaed William Haire, all for the taking of Mr. Haire's deposition. Mr. Haire was a member of the Medical Review Commission that heard Plaintiff's claims against Defendants, and he heard the testimony of ERIC WOLF, one of the defendants.
>
> 4. Plaintiff's counsel represented to the Court that Defendant WOLF can no longer recall some of the events to which he testified at the Medical Review Commission Hearing. Plaintiff's counsel also represented that Mr. Haire can recall Mr. WOLF'S testimony with respect to such areas, that, Mr. WOLF'S testimony would be an admission that would tend to establish liability with respect to negligence, and that Mr. Haire is willing to be deposed subject to Subpoena.
>
> 5. Good cause does not exist for the taking of Mr. Haire's deposition.
>
> The court further FINDS that this Order involves controlling questions of law as to which there are substantial grounds for difference of opinion and that an immediate appeal from such Order may materially advance the ultimate termination of the litigation.

We are asked principally to determine the correctness of the trial court's interpretation of the Act as it applies to the facts of this case.

We first dispose of another issue raised by appellees. The suggestion that the interlocutory appeal should be dismissed (1) because the order was unappealable and, (2) alternatively, because the issue with which this appeal is concerned—that is, whether the Malpractice Act prevents the taking of

testimony from panel members—arises from an assumption that the parties had appeared before the Medical Review Commission; that since the appealed ruling was invoked only upon motions and argument requesting that the notice of deposition be quashed, there is no *evidence* in the record to verify that the discovery issue was concerned with a proceeding before the statutory Medical Review Commission. To quote from appellees' brief: "Accordingly, as this interlocutory appeal purports to be based upon a privilege or lack thereof contained or not contained in the Medical Malpractice Act, there is no evidentiary basis upon which to base an interlocutory appeal involving the Act."

We note first that the pleadings and the record of the trial court's ruling from the bench, conclusively disclose that both sides acknowledged the underlying proceedings before the Commission as the basis for plaintiff's subpoenaing the witness for deposition and for the defendants' resistance to the proposed discovery. A later order of the trial court recites that it accepted as true plaintiff's representations regarding the case history preceding the notice for Haire's deposition. The *fact* of that acceptance is a sufficient record to determine the propriety of the ruling as it was influenced by the Malpractice Act.

Secondly, if the denial of discovery were *not* occasioned by the trial court's conclusion of a privilege conferred by the Act, then the grounds recited in defendants' motion to quash were false, and defendants were without justification to oppose the taking of the witness's deposition. *See* Rule 26, N.M.R.Civ.P.1978. Defendants cannot have it both ways. Either they relied on certain provisions of the Malpractice Act to obtain the court's ruling, or they offered no sufficient grounds to support their motion to quash.

The argument of non-appealability of the order is equally facetious. The order complied with the requirements of § 39–3–4 A, N.M.S.A.1978; this court granted the interlocutory appeal on January 2, 1980. The acceptance of the appeal by this court, when there has been compliance with § 39–3–4 A, is not subject to challenge. Additionally, the discovery question here "is of extraordinary significance [and] there is extreme need for reversal of the district court mandate before the case goes to judgment" if the ruling was erroneous. *American Express Warehousing, Ltd. v. Transamerica Ins. Co.*, 380 F.2d 277, 282 (2d Cir. 1967). The elements of a controlling question of law and a likely advancement of the ultimate termination of litigation exist and are inherent in the question here presented. The trial court so ruled, and so did this court in granting the interlocutory appeal. We adhere to our earlier ruling.

I.

The provisions of the Medical Malpractice Act upon which appellees rely are the following:

> 41–5–20. Panel deliberations and decision.
>
> A. The deliberations of the panel shall be and remain confidential. . . .
>
> * * * * * *
>
> D. The report of the medical review panel shall not be admissible as evidence in any action subsequently brought in a court of law. . . .

Section 41–5–21 authorizes the director of the Commission to adopt and publish rules of procedure. In 1971, the New Mexico Medical Society and the Board of Bar Commissioners jointly approved a revision of Rules of Procedure of the Medico-Legal Malpractice Panel, a screening panel voluntarily formed by the two professions which pre-existed the statutory commission.

In their motion to quash, appellees cited and attached to their motion a copy of the rules of the original plan adopted voluntarily in 1963 by the Medical Society, Board of Bar Commissioners and the State Bar, as well as a copy of the revised rules adopted in 1971. They particularly pointed to Paragraph III (3) of the original plan regarding the requirement that the application for consideration by the panel include:

> An agreement that the deliberations and discussions of the Panel and of any member of the Panel in its deliberation of the case will be confidential within the Panel and privileged as to any other person, and that no Panel member will be asked to testify in any action where he has previously sat as a Panel member related to such action[,]

and Paragraph 3 of the revised rules:

> By appearing before the Panel, the parties consent that no attempt will be made to use as impeaching evidence in Court any statement made by any person during a hearing before the Panel.

The transcript of the trial court's ruling does not suggest that the language of the Commission's procedural rules was a factor in its decisions to quash. Instead, it considered the Act itself as establishing a veil of confidentiality about the screening process which would be defeated if matters other than the panel's report could "be subject . . . to discovery and . . . to evidentiary use." Its findings and conclusions reflect that interpretation. We are not concerned with the finding that good cause did not exist, since good cause is not necessary to discovery under Rule 26 if the Act does not bestow a privilege to panel members.

Plaintiff calls our attention to § 41–5–19 C. It provides:

> The hearing will be informal and no official transcript shall be made. Nothing contained in this paragraph shall preclude the taking of the testimony by the parties at their own expense.

This section and those we have already set forth above express, we think, that the Legislature intended the Commission hearings to be conducted in an atmosphere free of the intimidations that may accompany a court setting, and that the give-and-take of the panel's deliberations, after it has heard the presentation of the parties, be as open and uninhibited as are a jury's deliberations at the end of a court trial.

But we do not find any portion of the Malpractice Act which grants a privilege to any participant or witness from testifying regarding anything other than the panel's deliberations or a report prepared by the panel. Nor can Rule 3 of the revised procedural rules of the Commission be read to apply to this case. Plaintiff was not seeking "impeaching evidence"; her effort to depose panelist Haire was for the purpose of retrieving evidence lost as a result of defendant Wolf's lapse of memory. Such evidence is properly discoverable and may be admitted at trial. *See* Rule 804(a)(3), N.M.R.Evid.1978. It falls also within the proscription of Evidence Rule 501 which denies a privilege to anyone, unless provided by the Constitution, the Rules of Evidence or a Supreme Court rule, to refuse to be a witness or to disclose any matter. Indeed, if any portion of the Medical Malpractice Act or its internal operating rules could be construed to grant such a privilege, it would be an invalid provision. Such a notion of statutorily-created privilege was emphatically dispelled by the pronouncement of our Supreme Court in *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 312, 551 P.2d 1354 (1976), when it said,

> . . . [U]nder our Constitution the Legislature lacks power to prescribe by statute rules of evidence and procedure[;] this constitutional power is vested exclusively in this court, and statutes purporting to regulate practice and procedure in the courts cannot be binding, [thus] we are able to reach no conclusion other than that the privilege purportedly created . . . is constitutionally invalid and cannot be relied upon or enforced in judicial proceedings.

Defendants urge, however, that Evidence Rule 502, which deals with the privilege of any person or entity to refuse to disclose, and to otherwise prevent the disclosure of, a report required by law, is applicable. Section 41–5–20 D requires the medical review panel to send a copy of its report to the health care provider's professional licensing board. Thus, say appellees, this rule brings them within the privilege created by Rule 502. This is not so, of course; plaintiff does not want to reach the report. She seeks testimony of a witness who presumably is able to supply funda-

mental evidence that is not otherwise obtainable because of an "unavailable declarant." Rule 804(b)(3), N.M.R.Evid.1978. The privilege recognized in Rule 502 is not germane. Furthermore, by its terms it refers to written documents; it does not apply to proof of primary testimony which may have contributed to the content of a privileged report or return. See *Blackledge v. Martin K. Eby Constr. Co., Inc.*, 542 F.2d 474 (8th Cir. 1976); *Krizak v. W. C. Brooks & Sons, Inc.*, 320 F.2d 37 (4th Cir. 1963).

To prevent future misunderstandings which may arise from interpretation of the Commission's internal Rules of Procedure, if any are promulgated or the old rules are in use, we hold also that no privilege expressly or impliedly granted by any of its provisions could withstand constitutional attack under the *Ammerman* rationale.

We therefore hold that, on the record before us, it was error for the trial court to quash plaintiff's subpoena to depose witness Haire upon grounds that the Medical Malpractice Act creates a privilege for panel members. We hold, further, that in the absence of good cause shown upon motion for protective order (*see* N.M.R.Civ.P. 30(B), N.M.S.A.1978), plaintiff may depose "any person" regarding "any matter, not privileged, which is relative to the subject matter . . . [of] the pending action." N.M.R. Civ.P. 26(a) and (b). The testimony here sought, not being privileged, may be taken under rule 26.

II

New Mexico Physicians Mutual Liability Company was granted leave by this court to file an Amicus Curiae brief. They argue that the Malpractice Act is not applicable to this appeal because none of the defendants is a "health care provider" as defined in § 41–5–3 A, none of them having qualified under the requirements of § 41–5–5, N.M.S.A.1978. Defendants did not respond to the brief of amicus.

Defendant hospital moved for dismissal of this appeal shortly after plaintiff filed the transcript on the same ground raised now by amicus. The motion was denied because the issue had not been ruled on by the trial court.

We now consider the effect of the affidavit attached to amicus's motion, in which the State Superintendent of Insurance stated, in effect, that none of the defendants had established proof of financial responsibility required by the statute, nor had they paid the surcharge assessed, (*see* § 41–5–25, N.M.S.A.1978), in order to qualify for the benefits of the Act. The principal benefits which amicus must refer to are the payment of judgments against health care providers from the patient's compensation fund under § 41–5–25 and the limitation of recovery established in § 41–5–6. This alleged defect in qualification of defendants is discussed because the case must be remanded and we deem it sensible to offer such assistance to the trial court as we are able.

We agree that if defendants are not health care providers because they have failed to qualify, they fall under the sanctions imposed by § 41–5–5 B and they are not entitled either to the limitation of any recovery against them, or to payment of any such recovery from the compensation fund. All parties having voluntarily submitted to the statutory malpractice screening procedure, however, defendants' lack of status may not deprive plaintiff of the benefit of the expert witness provision (§ 41–5–23), or to the tolling of any statute of limitations during the described period of the screening process (§ 41–5–22). At the time these benefits accrued to plaintiff, the issue of defendants' non-amenability to the provisions of the Act was not raised. That question may not be raised by defendants or amicus now for any purpose other than to estop *defendants* from claiming whatever benefits they might otherwise have received under the Act.

Defendants obtained a ruling from the trial court in reliance upon provisions of the Malpractice Act and certain of the rules under which the medical-legal panel operated. Judicial estoppel will now act to pre-

serve plaintiff's rights granted by the statute or the rules despite defendants' and amicus's untimely denial of the Act's applicability to them. *Cf. Citizens Bank v. C. & H. Constr. & Paving Co., Inc.*, 89 N.M. 360, 552 P.2d 796, *cert. den.* 90 N.M. 7, 558 P.2d 619 (1976) (where party assumes certain position and succeeds in maintaining that position, an opponent acquiescing in position may not be prejudiced by party's assumption of contrary position); *Home Savings Bank v. Woodruff*, 14 N.M. 502, 94 P. 957 (1908) (parties who by their pleadings in express terms have taken a certain position in the cause, cannot be permitted to "mend their hold" after judgment rendered).

The principle is the same here, and if defendants lose the protections which were available to them because of the matters raised by the brief of amicus curiae and in defendant St. Vincent's earlier motion, thus exposing themselves to greater damages than would be allowed under the Act, plaintiff nevertheless may proceed in a common-law malpractice action against defendants outside the Act, but with the assistance of an expert witness to be provided through the Medical Review Commission.

Our resolution of this issue in no way dilutes our holding regarding the taking of Haire's deposition. The order of the trial court quashing plaintiff's subpoena and notice is reversed. The case is remanded for further proceedings consistent with this Opinion.

IT IS SO ORDERED.

LOPEZ, J., concurs.

ANDREWS, J., dissents.

ANDREWS, Judge (dissenting).

I disagree with the majority in this case. This interlocutory appeal presents only one question of law—whether the Medical Malpractice Act [§ 41–5–1 to 41–5–28, N.M.S.A. 1978] establishes a "privilege for members of the Medical Review Commission that would generally exempt them from discovery procedures during the pendency of a lawsuit."

In my opinion, the Act, when read as a whole [§ 41–5–1 to 41–5–28, N.M.S.A.1978] supports this conclusion. The Act specifically delineates the duties of the panel selected by the Medical Review Commission when called upon to review malpractice claims.[1] The panel shall decide only two questions:

1. Whether there is substantial evidence that the acts complained of occurred and that they constitute malpractice; and
2. Whether there is a reasonable medical probability that the patient was injured thereby. Section 41–5–20.

Section 41–5–20(C) further defines the manner in which a panel shall decide each case and specifies the form of the decision. This legislatively established procedure, as well as the fact that even the report of the panel is not admissible as evidence in any subsequent legal action demonstrates legislative intent that the hearings be and remain confidential.

One provision of the Act, alone, creates confusion in what is otherwise a clear and unambiguous law wherein the Medical Review Commission and its members are provided with immunities and privileges.[2] Section 41–5–19(C) states that the hearing "will be informal and no official transcript shall be made." However, the section further allows the parties to take "testimony . . . at their own expense." Obviously, as appellant argues, it can be implied from this clause, that no confidentiality exists for such testimony, nor is a privilege created for such testimony, where the law expressly allows for preservation of the testimony. Whether or not such an argument has merit is not before us in this case. The plaintiff-

1. The majority is correct in holding that whether or not the defendants here are "health care providers" as defined in § 41–5–3 is irrelevant. All parties subjected themselves to the jurisdiction of the Commission and the issue of jurisdiction was not presented to either the panel or the trial court so it is not a matter for this court to consider.

2. *See* § 41–5–20(E).

appellant failed to take testimony during the hearing. Her failure to avail herself of this provision in the law, however, is not material to the real issue in this case. The question is not one of suppression of admissions but one of privilege for a panel member. The fact that plaintiff had the statutory right to record the proceedings gave her an opportunity to preserve admissions, if any, which might have been made. Certainly it is inconsistent to permit the hearing procedures to be transcribed while at the same time granting a privilege to panel members, *see Herrera v. Doctor's Hospital*, 360 So.2d 1092 (Fla.App.1978), but the Medical Malpractice Act is explicit in protecting the confidentiality of the Medical Review Commission.[3] The overwhelming tenor of the New Mexico Act is in favor of such a privilege for members of the statutorily established panel.

Where the "panel has determined that the acts complained of were or reasonably might constitute malpractice and that the patient was or may have been injured by the act, the panel, its members, the director and the professional association concerned will cooperate fully with the patient in retaining a physician . . . who will . . . testify on behalf of the patient." Section 41–5–23. Through this means, the panel assists the patient in a malpractice action brought to trial. There is no need to go further and require a panel member to testify as to matters he heard at the Medical Review Commission hearing.

The policy reasons which support this view are clear. The confidential nature of the proceedings and the protection afforded the panel protects both this process,[4] as well as the fairness of any subsequent action. *Cf. Simon v. St. Elizabeth Medical Center*, 355 N.E.2d 903 (Ohio Com.Pl.1976). (Where the court noted the excessive weight such testimony would have, and the probable interference with a fair trial.)

3. Clearly this would not be true if the statute specifically *did* make mention of the privilege. *See Curtis v. Brookdale Hospital Center*, 62 A.D.2d 749, 406 N.Y.S.2d 494 (1978).

The Medical Malpractice Act was carefully drafted. To disregard the clear legislative intent is to do great injustice to the purpose of the Act. The trial court should be affirmed.

631 P.2d 321

STATE of New Mexico,
Plaintiff-Appellee,

v.

Ralph Henry BARTLETT,
Defendant-Appellant.

No. 4022.

Court of Appeals of New Mexico.

Jan. 29, 1981.

4. The statute contains requirements that there be no official transcript, that the deliberations be confidential, that the report is not admissible in any subsequent action, and that the brief summary of the evidence presented cannot be made public or the subject of subpoena.

Roderick A. Dorr, Terrazas & Dorr, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Michael E. Sanchez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Defendant stabbed his father to death during an altercation in the apartment in which both defendant and his father lived. He pleaded self-defense. Defendant was convicted of second degree murder in violation of § 30–2–1, N.M.S.A. 1978 and appeals. We reverse.

A. *Defendant's conviction is reversed because of prosecutorial misconduct.*

Defendant claims prosecutorial misconduct of the prosecutor who presented the State's case. The misconduct consists of a series of questions asked defendant on cross-examination and the rebuttal testimony of James Duran.

The series of questions asked and answers given were:

Q. Isn't it a fact that on December 20, 1977, you were arrested by the Albuquerque Police Department for trying to kill your father?

A. Say that again, please.

Q. Isn't it a fact that on December 20th last year, 1977, you were arrested by the Albuquerque Police Department for trying to kill your father with a knife?

A. *No.*

Q. You weren't arrested?

A. December 7th.

Q. In December, 1977, you were not arrested?

A. No. Wait. I was arrested, yes.

Q. *And you were arrested because you tried to kill your father, isn't that correct?*

A. *No.*

Q. *You didn't try to kill your father?*

A. *No.*

Q. Weren't you at that time living on, in an apartment house on Crystal NW?

A. Yes.

Q. And wasn't your father living there with you?

A. Yes.

Q. And you were arrested at that apartment house, weren't you?

A. Yes.

Q. *And you were attempting to break down the door to get to your father with a butcher knife, isn't that correct?*

A. *No.*

Q. *And isn't it also a fact that when someone tried to stop you you threw a knife at the person that tried to stop you?*

A. *No.*

Q. Okay. Now about these bumps on your head, Mr. Bartlett, where do you claim they came from?

A. The bumps on the back of my head?

Q. Yeah.

A. From my father, from the night of the incident.

Q. Uh huh. *Isn't it a fact, Mr. Bartlett, that you were in a fight in the jail and that you sent a person to the hospital, and that you got those bumps in that fight?*

A. *No.*

Q. *You weren't in a fight in the jail?*

A. *No.* [Emphasis added.]

This series of questions asked may be divided into two categories:

(1) Constant repetition that on December 20, 1977, the previous year, defendant was trying to kill his father with a knife, a butcher knife, and threw it at a person who tried to stop him.

In rebuttal, the State called James Duran. He testified that on December 20, 1977, he saw defendant trying to kick in a door of the apartment shared by his father, shouting "I'm going to get you"; that defendant's father was not then in the apartment, and defendant was arrested for causing a disturbance. Defendant was not impeached or discredited on any answers given by defendant.

The next day, the trial court attempted to cure the prejudicial effect of the series of questions regarding defendant's alleged attack on his father with a knife. It instructed the jury that there was no evidence that defendant had been arrested for trying to kill his father with a knife; that there was only one question to disregard:

> "Isn't it true that you were arrested for trying to kill your father with a knife?"

(2) Defendant got bumps on his head from a fight in the jail that sent a person to the hospital.

The State presented no rebuttal testimony to impeach or discredit the answers given by defendant.

Prior to Duran's testimony, the State made an offer of proof. This tender showed that Duran did not see defendant with a knife nor see him go after his father or anyone else; that damage was done to a window in another apartment; that the window was broken and Duran, looking through the window, found a "dagger" hunting knife; that defendant was intoxicated. Duran did not think defendant was arrested for attempting to kill his father with a butcher knife; he was arrested for verbal assault. An offense report admitted at the hearing showed defendant arrested for protective custody.

With knowledge of these facts, the prosecutor cross-examined defendant. Nevertheless, the trial court denied defendant a mistrial.

The question for discussion is:

> During trial, while defendant was charged with first degree murder, was the cross-examination of defendant prosecutorial misconduct that denied defendant a fair trial? The answer is "yes."

■ When a person's life or liberty is placed in jeopardy by reason of a charge of first degree murder, courts should be sensitive to any conduct of the prosecutor that might affect the guilt or innocence of a defendant. Especially, courts should note whether, during the examination and cross-examination of witnesses, the prosecutor acted in a standardless fashion.

■ In the instant case, the prosecutor's cross-examination accused defendant of two

false criminal offenses: (1) attempting to kill his father with a knife and butcher knife and (2) assault and battery in a jail. These two items of misconduct could have no purpose other than to arouse the prejudices of the jury against defendant. When a prosecutor asks such questions as those here in question, no course is open to this Court except to set aside the conviction.

A prosecutor who cross-examines in the form of leading questions, which he has a right to do, is the witness who testifies before the jury, not the defendant. The questions asked were equivalent of testimony by the prosecutor that defendant had committed two crimes, both of which could have affected the conduct of defendant in the minds of the jury with reference to the offense charged of first degree murder. These questions were without any foundation to support the zeal of the prosecutor to convict defendant. Because the prosecutor represents the government and people of the State, it is reasonable to say that jurors have confidence that the prosecutor will fairly fulfill the duties necessary to see that justice is done whether by conviction of the guilty or acquittal of the innocent. The cross-examination whether proper or improper carries with it the authority of all he represents. *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). The interest of a state in a criminal prosecution "is not that it shall win a case, but that justice shall be done." [Id. at 88, 55 S.Ct. at 633.] *Berger* was cited in *Valles v. State*, 90 N.M. 347, 354, 563 P.2d 610 (Ct. App.1977), Sutin, J., specially concurring. *State v. Ramirez*, 89 N.M. 635, 649, 566 P.2d 43 (Ct.App.1976), Sutin, J., dissenting; *State v. Aragon*, 82 N.M. 66, 475 P.2d 460 (Ct.App.1970); *State v. Cummings*, 57 N.M. 36, 253 P.2d 321 (1953) [quoted at length]. *Berger* was adopted the country over.

District attorneys are charged with the duties of vigorously prosecuting those who are guilty of crime. Zeal in the prosecution of offenders is always to be commended. But the district attorney who permits his zeal to secure convictions in disregard of his duty as a "sworn minister of justice" not only wrongs the defendant, he impedes the administration of criminal justice and brings the administration of the criminal law into disrepute.

"As an officer of the court a prosecutor carries a heavy responsibility to both the court and the accused to conduct a fair trial. This responsibility requires that he not inject into the trial prejudicial matter which is obviously inadmissible." *United States v. Woods*, 486 F.2d 172, 175 (8th Cir. 1973). While the prosecutor is under a duty to prosecute the case with vigor and earnestness, he should not take unfair advantage of the defendant. *Young v. State*, 363 So.2d 1007 (Ala.Cr.App.1978). The questions alone, although answered in the negative, leave an indelible impression on the jury. *Watkins v. Foster*, 570 F.2d 501 (4th Cir. 1978).

Section 5.7(d) and commentary of the American Bar Association Standards Relating to the Prosecution Function (Tent.Dr. 1971) reads:

> It is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner cannot support by evidence.
>
> * * * * * *
>
> d. Unfounded question.
>
> The attempt to communicate impressions by innuendo through questions which are answered in the negative, for example, "Have you ever been convicted of the crime of robbery?" or "Weren't you a member of the Communist Party?" or "Did you tell Mr. X that * * * ?" when the question has no evidence to support the innuendo, is an improper tactic which has often been condemned by the courts.

Where considered, this standard has been given widespread support. See *Hervey v. People*, 178 Colo. 38, 495 P.2d 204 (1972); *Commonwealth v. White*, 367 Mass. 280, 325 N.E.2d 575 (1975); *State v. Smith*, 228 N.W.2d 111 (Iowa 1975); *State v. White*, 295 Minn. 217, 203 N.W.2d 852 (1973); *State v. Williams*, 297 Minn. 76, 210 N.W.2d 21 (1973); *Gray v. State*, 525 P.2d 524 (Alaska 1974); *Commonwealth v. Smith*, 457 Pa.

638, 326 A.2d 60 (1974); *Hazel v. United States*, 319 A.2d 136 (D.C. Ct.App.1974).

In *State v. Chambers*, 86 N.M. 383, 386–7, 524 P.2d 999 (Ct.App.1974), we quoted the following:

> "While it is the duty of a prosecuting attorney to use his best endeavor to convict persons guilty of crime, his methods in procuring such conviction must accord with the fair and impartial administration of justice, and he should see that the accused receives a fair trial so far as it is in his power to afford him one. Here, if anywhere upon earth, the benign maxim of the law, that it is better that ninety-nine guilty persons should escape than that one innocent man should be punished prevails in all its force."

For the past quarter century, we have continuously reversed convictions for prosecutorial misconduct of this nature. *State v. Day*, 91 N.M. 570, 577 P.2d 878 (Ct.App. 1978); *Albertson v. State*, 89 N.M. 499, 554 P.2d 661 (1976); *State v. Lara*, 88 N.M. 233, 539 P.2d 623 (Ct.App.1975); *State v. Ross*, 88 N.M. 1, 536 P.2d 265 (Ct.App.1975); *State v. Vallejos*, 86 N.M. 39, 519 P.2d 135 (Ct.App.1974); *State v. Garcia*, 83 N.M 51, 487 P.2d 1356 (Ct.App.1971); *State v. Rowell*, 77 N.M. 124, 419 P.2d 966 (1966); *State v. Cummings, supra.*

Where the question is improper in the form given, it is prejudicial error and no attempt to admonish the jury to forget the question could possibly erase the effects. *Rowell, supra; Garcia, supra; Vallejos, supra.* "Indeed, the judge's cautionary instruction may do more harm than good: It may emphasize the jury's awareness of the censured * * * [question] as in the story, by Mark Twain, of the boy told to stand in the corner and not think of a white elephant." *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 656 (2d Cir. 1946), Frank, J., dissenting. Judge Frank's dissent, an essay on this subject matter, should be reviewed as a clarion call in these days of extensive criminal trials. We have consistently condemned such prosecutorial misconduct.

Strong emphasis is placed on this type of misconduct as a deterrent to avoid the expense of mistrials and new trials in a congested trial docket in the district courts. Every district attorney and his staff should place on the wall of each office at least 10 commandments of caution. Subsequently, it might tend to make them live up to the standards of courtroom decency. It has been said, in affirming a conviction, that the district attorney, a constitutional officer, should be subject to censure for his conduct. *State v. DiPaglia*, 64 N.J. 288, 315 A.2d 385 (1974). See also, vigorous dissenting opinion of Justice Clifford.

We have a natural hesitation to reverse a conviction where the evidence of guilt is strong. But to reach the conclusion that the errors were harmless as the State contends, we must hold that the guilt of the defendant was conclusively proved. To do so in a first degree murder charge is to try the defendant in this Court and deprive him of his right to a trial by jury. If we, sitting on a reviewing court, believe from merely reviewing the record that a defendant is guilty, we must not hold that cross-examination of the defendant that seriously prejudiced the jury against the defendant, is to be regarded "harmless." We have not seen or heard the witnesses. If we render our own independent verdict of guilty, then the defendant has been convicted by the judges, not the jury. We do not sit as a jury. The courts generally hold that such prosecutorial misconduct will be deemed to have induced the verdict and to require reversal. After injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless.

The State contends that the prosecutor's cross-examination was proper under Rules 404 and 405(a) of the New Mexico Rules of Evidence. These rules pertain to character evidence and proof thereof. It is sufficient to say that false accusations of violent criminal charges do not bear upon defendant's traits of character.

In view of the conclusion reached, it is unnecessary to consider other points raised by defendant.

For the above reasons, the judgment must be reversed and the cause remanded for a new trial.

Reversed.

IT IS SO ORDERED.

WALTERS, J., specially concurs.

HERNANDEZ, J., dissents.

WALTERS, Judge (specially concurring).

I concur. N.M.R.Evid. 609, N.M.S.A. 1978, does not permit questioning about *conviction* unless the crime can be established, on defendant's denial, by public record, and then only if (1) the conviction concerned a crime punishable by death or imprisonment in excess of one year and the court determines that admission of the evidence is justified because its probative value outweighs its prejudice; or (2) the crime involved dishonesty or false statement. Here, one question asked about an *arrest*; the other referred to an alleged prior bad act.

If a prosecutor may not inquire about a conviction except in narrowly circumscribed instances and then must be prepared to prove it by a public record if denied (*see also State v. Williams*, 76 N.M. 578, 417 P.2d 62 (1966)), it is wholly illogical to assume he may be permitted to inquire about an arrest, much less that he may rely upon hearsay information to establish his good faith in asking such a question. *State v. McCabe*, 41 N.M. 428, 70 P.2d 758 (1937), long ago held that testimony regarding an arrest is not admissible for impeachment or to affect a defendant's credibility.

Rule 404(b), N.M.R.Evid., N.M.S.A. 1978, prohibits admission of prior bad acts to prove a defendant's character and that he acted in conformity therewith, except for certain purposes. The trial court felt the exception of "mistake or accident" would apply since defendant pleaded self-defense. I cannot agree that a claim of self-defense may be equated with a claim of mistake or accident. The plain meanings of "mistake" and "accident" have nothing in common with a defense that may be translated as stating the first law of nature, the right of self-preservation: "I used such force as was necessary in defense of my own life and person." The exception to rule 404(b) relied on by the trial court is not inherent in the law of self-defense, and unless an exception exists, the rule prohibits the question.

There was no evidence at all that the second improper set of questions regarding a fight in the jail had any basis in fact. Consequently those questions could not have been asked in good faith. *State v. Rowell*, 77 N.M. 124, 419 P.2d 966 (1966), imposes the burden on the State of proving that it proceeded in good faith when it is challenged for propounding improper questions which tend to prejudice the defendant in the minds of the jury. With regard to the question of a prior arrest, I agree wholeheartedly with what Justice Moise had to say in the Rowell case, and I quote:

> We are convinced that the damage implicit in the asking of the question was in no way repaired by virtue of the fact that the objection was sustained. Neither was it overcome by the admonitions given the jury. We would be deluding ourselves if we were to believe that human nature being what it is, at least some of the jurors would not assume because of the form of the question, that indeed appellant had been * * * [arrested] as stated by the district attorney. Whether or not * * * [he] had was irrelevant in this case and, accordingly a reversal and new trial are inevitable.

The inadmissibility of evidence of prior bad conduct, the State's failure to establish a factual predicate for such questions concerning an alleged fight at the jail, and defendant's objection to those inquiries, all combine to bring that set of questions as well within the censure of the *Rowell* decision. As Justice Moise pointed out:

> Here, we are not dealing with evidence admitted and withdrawn. Rather, the question is one of prejudice to the defendant arising out of the asking of an improper question for the ostensible purpose of planting ideas or thoughts in the minds of the jury.
>
> * * * * * *

* * * [T]he question was in a grossly improper form to prove anything. It could not possibly establish or accomplish anything but prejudice.

HERNANDEZ, Judge (dissenting).

I respectfully dissent.

Defendant alleges three points of error, to-wit:

POINT I: DEFENDANT'S CONVICTION SHOULD BE REVERSED BECAUSE OF THE CUMULATIVE EFFECT OF PROSECUTORIAL MISCONDUCT.

POINT II: THE TRIAL COURT ERRED BY ABUSING ITS DISCRETION IN ADMITTING INTO EVIDENCE THE TESTIMONY OF THE STATE'S REBUTTAL WITNESS CONCERNING AN ALLEGED PRIOR BAD ACT BY DEFENDANT.

POINT III: THE TRIAL COURT ERRED BY ABUSING ITS DISCRETION IN NOT GRANTING DEFENDANT'S MOTION FOR A MISTRIAL BASED UPON THE MISCONDUCT OF THE PROSECUTOR.

All three of these points rest upon whether the trial court was correct in allowing the following questions to be asked of the defendant:

Q. Isn't it a fact that on December 20, 1977, you were arrested by the Albuquerque Police Department for trying to kill your father?

A. Say that again, please.

Q. Isn't it a fact that on December 20th last year, 1977, you were arrested by the Albuquerque Police Department for trying to kill your father with a knife?

A. No.

* * * * * *

Q. And you were attempting to break down the door to get to your father with a butcher knife, isn't that correct?

A. No.

* * * * * *

Q. Uh huh. Isn't it a fact, Mr. Bartlett, that you were in a fight in the jail and that you sent a person to the hospital, and that you got those bumps in that fight?

A. No.

Q. You weren't in a fight in the jail?

A. No.

The defendant's attorney objected only to the last two questions and his objection consisted of "I object."

A party must make timely and proper objection to alleged error in the admission of testimony, if he wishes to preserve it for appellate review. Absent a contemporaneous objection, such alleged error will be reviewed on appeal only if it is plain error and results in manifest injustice. *U. S. v. Sluder*, 457 F.2d 703, 712 (10th Cir., 1972).

The general rule, subject to some qualifications, is that objections to evidence should state the specific grounds upon which they are based, and that the trial court may properly disregard general objections which fail to point out why the evidence is inadmissible. General objections, if they raise any point at all, go only to the question whether the evidence is admissible under any phase of the case. *State v. Jackson*, 47 N.M. 415, 143 P.2d 875 (1943).

Rule 103(d), N.M.R. of Evid. provides: "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge." The defendant admitted that he killed his father but claimed that he did so in self defense. He testified that his father had beaten him since he was a child and did so on the night of the killing. He further testified that he had never struck back until that night.

It is my opinion that, in this context, it did not constitute plain error to allow these questions to be asked. It is my further opinion that the trial court would not have erred in allowing these questions even if defendant had objected to those he did not object to, and had objected properly to those he did object to. Rule 405(b), N.M.R.

of Evid. provides: "In all cases in which character or a trait of character of a person is an essential element of a charge, claim, or *defense*, proof may also be made of specific instances of his conduct." [Emphasis added.] The defendant made his trait or quality of passivity an essential element of his defense. Defining the word "character" as a person's normal or usual qualities or traits, the State under Rule 405(b) had the right to question the defendant about specific instances that showed the contrary.

I would affirm.

631 P.2d 328

Ramon GONZALES, Plaintiff-Appellee and Cross-Appellant,

v.

BATES LUMBER COMPANY, A Self-Insured Employer, Defendant-Appellant and Cross-Appellee.

No. 4726.

Court of Appeals of New Mexico.

April 28, 1981.

Certiorari Denied July 10, 1981

David W. King, Threet & King, Albuquerque, for defendant-appellant and cross-appellee.

Richard J. Crollett, Roybal & Crollett, Albuquerque, for plaintiff-appellee and cross-appellant.

OPINION

HERNANDEZ, Chief Judge.

In this workmen's compensation case, defendant appeals from a judgment in favor of plaintiff which adjudged plaintiff to be temporarily totally disabled since October 27, 1977. In addition to weekly benefits, medical expenses, rehabilitation expenses and attorney's fees, the plaintiff was awarded $1,639.82 for travelling expenses incurred in connection with medical treatments that he received.

Defendant's first point of error is that plaintiff's failure to lose weight constituted a refusal to receive medical treatment. Section 52–1–51(G), N.M.S.A. 1978, provides in pertinent part:

> If any workman shall persist in any unsanitary or injurious practice which tends to imperil, retard or impair his recovery or increase his disability or shall refuse to submit to such medical or surgical treatment as is *reasonably essential* to promote his recovery the court may in its discretion reduce or suspend his compensation. [Emphasis added.]

The dictionary definition of "essential" explains: "[F]undamental, vital, and cardinal all imply maximum importance, indispensability, and necessary priority in considerations, plans, or discussions. * * * Cardinal may refer to the decisive or conclusive since it may suggest that on which an outcome hinges or pivots[.]" Webster's Third New International Dictionary 777 (1961).

The plaintiff is approximately five feet five inches in height and at the time pertinent to this appeal weighed about 185 pounds. Dr. K. W. Harvie, an orthopedic surgeon who saw the plaintiff on several occasions, testified that on July 11, 1978, "[h]e was continuing to have pain. He had lost twenty-two pounds, his back continued to hurt." Dr. Harvie also testified that the ideal weight for plaintiff would be between 135 pounds and 145 pounds and that it was not a dangerous procedure to lose weight. Dr. G. N. Gold, a neurological surgeon who examined plaintiff on several occasions, was asked "[i]f he lost down to 135 to 140 pounds now, do you think that would affect his physical ability to return to work?" The pertinent part of his answer was as follows: "I don't believe that just losing weight, if he did that without any change in mental attitude—which, of course, is impossible—would necessarily make a difference. I mean, fat people don't have backaches necessarily any more than skinny people." Dr. M. G. Rosenbaum, an orthopedic surgeon, first saw plaintiff on September 17, 1979. He was asked if plaintiff got his weight down to 130 pounds, would this resolve his back problems. His answer was that: "It would make little difference—the lost weight would make little difference in the back condition." Dr. Rosenbaum was also asked if plaintiff could get his weight down to 140 or 130 pounds would he be able to "perform the tasks of his former or past occupations." His answer was: "That it would make no difference." Dr. N. F. Moon, an orthopedic surgeon who saw the plaintiff on several occasions, was asked: "Assume Mr. Gonzales got down to the weight you would like to see him at, would that cure his radiculopath?" He answered: "If he got it down to a truly normal weight

for his height, I do not think that the radiculopathy should improve." He was also asked: "Doctor, you said that if Mr. Gonzales got his weight down to an acceptable level, he could return to work doing his regular duties. Now, would you go so far as to put that in a written guarantee?" His answer was: "No, sir, I would not."

This evidence amply supports the trial court's findings and conclusions that it was not "reasonably essential" for the plaintiff to lose weight in order to promote his recovery, i. e., plaintiff's failure to lose weight was not unreasonable. *See Rhodes v. Cottle Construction Co.*, 68 N.M. 18, 357 P.2d 672 (1960).

Defendant's second point of error is that the trial court erred in awarding travel expenses to and from the places where medical treatment was rendered. The trial court found that plaintiff incurred travel expenses in the sum of $1,639.82. Plaintiff resides at San Ysidro, New Mexico, a distance of approximately 53 miles from Albuquerque, where medical treatment was rendered. The record shows that plaintiff made 91 trips into Albuquerque totaling 9,646 miles. However, no evidence was introduced as to the actual expenses incurred. The sum awarded by the trial court computes out to $.17 per mile.

Section 52–1–49(A), N.M.S.A. 1978, provides:

> After injury, and continuing as long as medical or surgical attention is reasonably necessary, the employer shall furnish all reasonable surgical, physical rehabilitation services, medical, osteopathic, chiropractic, dental, optometry and hospital services and medicine unless the workman refuses to allow them to be so furnished.

As can be seen, this section of the Workmen's Compensation Act does not specifically provide for travel expenses incident to medical treatment. The question then presented is whether such provision can be implied from this language. We believe that it can. The only case in which this question was considered on the appellate level was *Hales v. Van Cleave*, 78 N.M. 181, 429 P.2d 379 (Ct.App.1967). This opinion did not decide the question of the authority of a trial court to award such expenses. It was decided solely on the basis of the failure of proof, as this excerpt will attest:

> He [workman] cites absolutely no authority for his contention that he was entitled to be reimbursed for these claimed expenses.
>
> The trial court refused the requested finding tendered by plaintiff, and concluded that plaintiff is not entitled to reimbursement for travel expenses. Since the trial court refused the requested finding by plaintiff, upon whom rested the burden of establishing the amount of these expenses and his right to recover the same, if they were in fact properly recoverable, this amounted to a finding against plaintiff on this issue. *Id.* at 186, 429 P.2d at 384.

"[T]here comes a point where this Court should not be ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U.S. 49, 52, 69 S.Ct. 1347, 1348, 93 L.Ed. 1801 (1949). We know that the distances many injured workmen have to travel for medical treatment are considerable. This is so because of the size of this state and because certain necessary medical treatment is available at only a few places in the state. We also know that the cost of travel is not inconsequential and is rising yearly. We conclude that reasonable travel expenses necessarily incurred in receiving medical treatment do come within the language of § 52–1–49(A), *supra*. Of course, each case is to be decided on the basis of its peculiar facts and merits. Turning then to the instant situation, we see the following: The trial court found that "[a]s a result of receiving medical treatment and medical evaluations for his job related injuries and aggravated injuries, plaintiff incurred transportation expenses in the amount of $1,639.82." We have previously outlined the facts which led to this conclusion and it is our opinion that they are sufficient to support it.

Defendant's third point of error is that the trial court erred in finding that the plaintiff's disability commenced on or about October 27, 1977. The pertinent findings of the trial court are the following:

> 5. Subsequent to his accidental injury of October 28, 1976, plaintiff continued to perform the regular and usual tasks of his employment with defendant, and in the interim lost approximately twenty-three weeks from work due to his injury, and for which absence plaintiff was voluntarily paid workmen's compensation benefits by defendant in the amount of $114.61 per week.
>
> 6. Except for the aforementioned twenty-three weeks that plaintiff was absent from work, he continued to work for the defendant performing the regular and usual tasks of his employment until approximately October 27, 1977, at which time plaintiff was unable to continue working due to the injuries he sustained as a result of his October 28, 1976, on-the-job accident.

"[W]e are bound to view the evidence, together with all inferences reasonably deducible therefrom, in the light most favorable to support the findings. All evidence unfavorable to the findings must be disregarded and no unfavorable inferences will be drawn." *Oberman v. Oberman*, 82 N.M. 472, 473, 483 P.2d 1312, 1313 (1971).

> [I]f 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.

Casias v. Zia Co., 93 N.M. 78, 79, 596 P.2d 521, 522 (Ct.App.1979). No useful purpose would be served by recounting the evidence. We have reviewed it and conclude that it fully supports the trial court's findings.

Defendant's last point of error is that the trial court abused its discretion in awarding plaintiff attorney's fees in the amount of $5,500.00. The record does not reflect that there was a hearing, or that either party requested a hearing, on the question of attorney's fees. The only thing that appears in the record is the affidavit of plaintiff's attorney setting forth in chronological order the time spent on this matter from initial interview through trial, totaling 131 hours and 15 minutes. The defendant's attorney submitted a document entitled "Controversion of Affidavit of Services Rendered" which recited that the total amount of time he spent in preparing and trying the case came to 72 hours. It went on to allege that much of the time spent was unnecessary "because the complaint was filed within an unreasonable time after the first written demand was made on defendant to resume Workmen's Compensation benefits." Attached to this document were copies of defendant's attorney's billing sheets.

Our Supreme Court in *Fryar v. Johnsen*, 93 N.M. 485, 601 P.2d 718 (1979), ruled that there must be evidentiary support for an award of attorney's fees and that in addition to the requirements of § 52–1–54(D), N.M.S.A. 1978, the following factors must be considered:

> 1. the relative success of the workman in the court proceedings: * * *.
>
> 2. the extent to which the issues were contested: * * *
>
> 3. the complexity of the issues: * * *.
>
> 4. the ability, standing, skill and experience of the attorney: * * *.
>
> 5. the rise in the cost of living: * * *.
>
> 6. the time and effort expended by the attorney in the particular case: * * *.

The trial court's findings state:

> 19. Plaintiff was required to employ counsel to secure benefits under the Workmen's Compensation Act.
>
> 20. Plaintiff's counsel expended considerable time and effort in the handling, preparation and presentation of plaintiff's workmen's compensation claim and was successful in securing workmen's compensation benefits for plaintiff.
>
> 21. Plaintiff should be awarded reasonable attorney's fees in the amount of $5,500.00 for the successful handling, preparation and presentation of his claim.

The attorneys' reports and the trial court's first-hand knowledge of the attorney's work on the issues and proceedings, and the outcome of that work, is sufficient evidentiary support for the award under *Fryar. Lopez v. K. B. Kennedy Engineering Co.*, 20 N.M.St.B.Bull. 315 (March 12, 1981); *Johnsen v. Fryar*, 19 N.M.St.B.Bull. 1024 (November 6, 1980).

Plaintiff, in his cross-appeal, asserts there is not sufficient evidence to support the finding of temporary total disablement. The determination of the degree of disability is a question of fact for the fact finder; if there is substantial evidence to support the finding, this Court is bound thereby. *Adams v. Loffland Bros. Drilling Co.*, 82 N.M. 72, 475 P.2d 466 (Ct.App.1970). The trial court had before it the testimony of plaintiff and medical testimony of several doctors to use in determining the degree of disability. The testimony of at least two doctors was that plaintiff is temporarily totally disabled. There is relevant evidence in the record such as a reasonable mind would accept to support the finding and conclusion. Because we find substantial evidence to support the finding of temporary total disablement, we need not address plaintiff's remaining point regarding lump-sum payment of benefits.

Plaintiff is awarded the sum of $2,250.00 for the services of his attorney in this appeal. The judgment of the trial court is affirmed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

SUTIN, J., concurs in part, dissents in part.

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

I concur in affirmance of plaintiff's judgment and dissent on the matter of plaintiff's cross-appeal.

The trial court found that on October 28, 1976, plaintiff, 40 years old with an 8th grade education, employed by defendant as a field service man, suffered an accidental injury in the scope of his employment. Subsequently, plaintiff continued to perform his regular and usual tasks. Between October 28, 1976, and October 27, 1977, a period of one year, plaintiff lost 23 weeks from work for which defendant voluntarily paid plaintiff compensation benefits of $114.61 per week. As a result of the accidental injury, plaintiff became temporarily totally disabled as of October 27, 1977.

From October 27, 1977, through August 29, 1979, a period of 22 months, defendant paid plaintiff workmen's compensation benefits of $114.61 per week, but failed to pay medical and prescription expenses of $504.16, and transportation expenses of $1,639.82. Plaintiff is a good candidate for rehabilitation, will require future hospital and medical care and is entitled to $4,500.00 in attorney fees.

The court concluded that from October 27, 1977, the date the total disability began, through August 29, 1979, the date plaintiff's disability benefits were terminated, plaintiff was entitled to $142.59 per week instead of $114.61, and defendant was in arrears of $2,686.08, and from August 29, 1979, to April 7, 1980, defendant was in arrears of $4,420.29. Judgment was entered on May 6, 1980, in accordance with the decisions and defendant appealed. Plaintiff cross-appealed.

A. *In workmen's compensation cases this court can act as it desires.*

In *Rumpf v. Rainbow Baking Company*, No. 4795, decided March 12, 1981, Sutin, J., dissenting, this Court held that in workmen's compensation cases, it had jurisdiction to direct the deletion of "with prejudice" from a final judgment of a district court from which no appeal was taken, and, at the same time, held that an attorney, not the client, had the right to sue an employer for attorney fees. Certiorari was denied.

Employers and workmen are now in "a ding-dong battle"—"a fight in good earnest. Ding-dong is an onomatopoeic word reproducing the sound of a bell; and here the idea is that the blows fall regularly and steadily, like the hammer-strokes of a bell."

Brewer's Dictionary of Phrase and Fable (1970), p. 322. I prefer to call it a "wing-ding battle" in which the workman and an attorney can fly to victory without wings. The normal perimeters for protection of workmen and attorneys have been extended.

B. *Defendant's requested findings and conclusions are irrelevant.*

Defendant's first point is that the trial court erred in refusing defendant's requested findings and conclusions. Defendant's requested findings seek judgment for defendant. Before defendant can move in this direction, it must show that the trial court's findings are not sustained by substantial evidence so that plaintiff is not entitled to an award of compensation benefits; therefore, defendant's requested findings and conclusions should have been adopted. If the trial court's findings are sustained by substantial evidence, defendant's requested findings and conclusions are irrelevant. *Castillo v. Tabet Lumber Company*, 75 N.M. 492, 406 P.2d 361 (1965). Absent a counterclaim, a judgment for and against a plaintiff cannot withstand logic and reason.

For related cases that involve a failure to make requested findings, see, *Save-Rite Drug Stores v. Stamm*, 58 N.M. 357, 271 P.2d 396 (1954); *Owensby v. Nesbitt*, 61 N.M. 3, 293 P.2d 652 (1956); *Wiggs v. City of Albuquerque*, 57 N.M. 770, 263 P.2d 963 (1953).

C. *The trial court properly awarded plaintiff transportation expenses.*

The trial court found that:

> As a result of receiving medical treatment and medical evaluations for his job related injuries and aggravated injuries, plaintiff incurred transportation expenses in the amount of $1,639.82.

Defendant does not question plaintiff's right to recover transportation expenses. Defendant claims only that this finding is not supported by any evidence.

The rule is established that transportation costs necessarily incurred in connection with medical treatment are compensable after proof of mileage, cost per mile and method of travel, even if the act, such as § 52–1–49(A), N.M.S.A. 1978, speaks only in terms of medical services and expenses. *Moreau v. Zayre Corp.*, 408 A.2d 1289 (Me. 1979) (without regard to whether employer has authorized trips); *Allor v. Belden Corp.*, 382 So.2d 206 (Ct.App.La.1980); *Eskridge v. Goldman & Co.*, 598 S.W.2d 425 (Ark.App. 1980) (must show method of travel); *Mosley v. Bank of Delaware*, 372 A.2d 178 (Del. 1977); *In re Snider's Case*, 334 Mass. 65, 134 N.E.2d 16 (1956); *Newberry v. Youngs*, 163 Neb. 397, 80 N.W.2d 165 (1956) (even though dates of trips and services performed on each trip are unknown); *Murry v. Southern Pulpwood Insurance Company*, 136 So.2d 165 (Ct.App.La.1962) (at so much per mile); *Dugas v. Houston Contracting Company*, 191 So.2d 178 (Ct.App.La.1966) (itemize and prove them); *Southall v. Kingsville Timber Company*, 168 So.2d 424 (Ct.App.La.1964) (visitation alone is not proof); *Mobley v. Jack & Son Plumbing*, 170 So.2d 41 (Fla.1964); 2 Larson's Compensation Law, § 61.13(b) (1981); 99 C.J.S. Workmen's Compensation § 226, p. 916 (1958).

Payment of transportation expense in *Mobley* was also a matter of first impression. The court said:

> Considering the purposes of the Workmen's Compensation Act and the benefits to be given injured employees by its terms, we conclude that travel expenses necessarily incurred in enjoying the medical benefits provided by the Act are an incident of medical care and treatment. Therefore, the employer-carrier must either furnish such transportation or pay claimant the reasonable actual cost thereof. [Id. 47.]

Defendant claims the court's finding, supra, is not supported by evidence because (1) plaintiff never kept a record of his expenses on 91 round trips from San Ysidro, his home, to Albuquerque, location of doctors and hospital, ten of which were at defendant's request; (2) plaintiff never billed defendant for costs; (3) no evidence

appears of his actual costs, his costs per mile, or his total costs, i. e., whether he stopped over night or ate meals; (4) whether he used his car or borrowed someone elses. Defendant does not contend the doctor and hospital visits were not reasonably necessary.

Plaintiff testified that his wife drove him on these trips in his own car. He obtained evidence of the 91 trips from doctor and hospital bills. In mileage, the round trips are 106 miles. Of the 91 trips, 10 were visitations to defendant's doctors, and other doctors he went to were on his own. Plaintiff never gave defendant a bill for these trips and never kept track of his costs on these trips.

Transportation expense was computed as follows:

91 trips at 106 miles per trip equals . . .	9,646 miles
17 cents per mile equals	$1,639.82

Public employees are allowed 19 cents per mile for each mile traveled in a privately owned automobile. Section 10–8–4(D), N.M.S.A. 1978. Prior to 1980 it was 17 cents per mile. That which is fair and reasonable for public employees is fair and reasonable for injured workmen. It would be unreasonable for injured workmen to save gas and oil tickets for a period of years and try to estimate how much was used for each trip, produce the tickets in court and put on a guessing game at trial or estimate how many miles per gallon the car would use; then produce expert testimony or speculate on the amount of depreciation of the car during each trip.

To avoid a pandemonium of objections and argument in court, a fixed rate of 17 cents per mile for each mile traveled is fair and reasonable for transportation expenses incurred by an injured workman. If an employer is concerned about any probability of excessive expenses, he can provide transportation whenever necessary or require notice and report of each trip made during the time that compensation is paid the injured workman. If compensation payments are not made and suit is filed, an injured workman, of course, has no duty in this respect if request is made. An employer must be cautious in dealing with injured workmen, especially uneducated common laborers who are unprepared or unable to protect their rights under the Workmen's Compensation Act. Every employer risks the payment of past compensation benefits, interest, attorney fees, expenses and costs in the trial and appellate courts. An employer can reduce the loss by investing the potential amount of the risk at a secured high interest rate.

The trial court properly awarded plaintiff transportation expenses.

D. *The trial court's findings and conclusions challenged were not erroneous.*

Defendant claims that findings 5, 6, 7 and 17, and conclusions of law 2 and 3 are erroneous. I am unable to understand defendant's position.

Summarized, these findings are that except for a 23 week period following his injury in October, 1976, until October 27, 1977, when plaintiff stopped working, plaintiff was able to perform his regular tasks and that the date of his disability commenced on or about October 27, 1977; that plaintiff became temporarily totally disabled on October 27, 1977.

The court concluded that plaintiff was totally disabled as of October 27, 1977, and plaintiff was entitled to benefits based upon the compensation rate applicable on the date of his disability which was October 27, 1977, and is entitled to arrearages for the same.

I assume that defendant seeks to have this Court find that the date of disability commenced on October 26, 1976, because the percentage of the average weekly wage for compensation was less in 1976 then in 1977. Sections 52–1–41 and 52–1–42, N.M.S.A. 1978. In 1976, the average weekly wage allowed plaintiff was $114.61 per week as compensation. In 1977, it rose to $142.59 per week.

The trial court found that from October, 1976, the date of the accidental injury, to October, 1977, except for 23 weeks of disability, plaintiff performed all of his usual tasks and was not disabled until October,

1977, when his work stopped because he was temporarily totally disabled. It necessarily follows that plaintiff was entitled to the increased weekly payment of $142.59.

Defendant is aware of the rule that the findings of fact, when supported by substantial evidence, cannot be disturbed on appeal. Defendant's position is that the rule applicable is stated in *Boone v. Boone*, 90 N.M. 466, 565 P.2d 337 (1977). *Boone* held that all reasonable inferences must be "indulged" *in support of the judgment.* Yet the evidence must be of such substance that facts will be established from which reasonable inferences may be drawn.

Defendant submits that the only reasonable inferences to be drawn is that plaintiff was disabled on October 26, 1976, because plaintiff suffered pain thereafter and did not perform his usual tasks; that to so hold is equivalent to taking words out of context in a sentence to get a desired meaning. What defendant seeks to do is draw inferences in its favor to the detriment of plaintiff. But we cannot "indulge" reasonable inferences against the judgment. We do so in support of the judgment. To reverse the rule of reasonable inferences that support the judgment is contra bonos mores (not in accordance with good manners).

The findings challenged were not erroneous.

E. *Plaintiff's cross-appeal should be affirmed in part and reversed in part.*

Plaintiff, in his cross-appeal claims that he was permanently totally disabled so that he could seek a lump sum award and that the attorney fee awarded him was insufficient for services rendered in the trial court.

(1) *Plaintiff is totally disabled permanently but not entitled to a lump sum settlement.*

Plaintiff has been totally disabled since October 27, 1977, and was totally disabled through the time judgment was entered on May 6, 1980, a period of 30 months. *Lane v. Levi Strauss & Co.*, 92 N.M. 504, 590 P.2d 652 (Ct.App.1979). Unquestionably, plaintiff is permanently disabled. On the definition of "temporary disability," I add that which appears in *Pyles v. Triple F. Feeds of Texas, Inc.*, 606 S.W.2d 146 (Ark.App.1980). Omitting authorities cited, it reads:

> Temporary disability is defined as the healing period following an injury. It exists until the employee is as far restored as the permanent character of his injury will permit. Temporary disability is a separate and distinct disability from any permanent disability and may be compensated separately * * * * temporary total disability benefits are payable without interruption from the time of the injury to the time at which the degree of permanent disability is ascertainable. [Id. 148.]

On March 17, 1980, the court found that plaintiff became temporarily totally disabled on October 27, 1977. That finding is correct but the trial court failed to make a finding of plaintiff's disability at the time of trial or at the time the decision was rendered.

This case should be remanded to the district court to make a finding whether plaintiff was temporarily or permanently disabled at the time of trial. The trial court omitted any reference to lump sum award.

Plaintiff requests this Court to give him a lump sum award. This cannot be done until the case is one of total permanent disability. Section 52–1–30(B), N.M.S.A. 1978. Even when this point is reached, to be granted a lump sum award rests within the discretion of the trial court. *Lane, supra; Lamont v. New Mexico Military Institute*, 92 N.M. 804, 595 P.2d 774 (Ct.App.1979). In effect, by its decision, the trial court exercised its discretion and denied plaintiff the right to a lump sum award.

Another reason plaintiff is not entitled to a lump sum award is that plaintiff did not petition the court for a lump sum award after hearing in which the court determined that it is a case of total permanent disability. Section 52–1–30(B).

If this case were remanded to the district court and a finding made of permanent total disability, then plaintiff could petition

the court to award a lump sum in accordance with the statute.

In my opinion, the trial court found temporary total disability in order to avoid granting a lump sum award.

(2) *Plaintiff is entitled to an increase in attorney fees awarded by the trial court.*

Plaintiff is entitled to a reasonable attorney fee for services rendered by his lawyer in the trial court. His lawyer is not. I am sure that plaintiff is satisfied but the lawyer is not. I am sure the plaintiff did not request the lawyer to seek an increase in the amount awarded. I am sure the lawyer seeks an increase on his own. Nevertheless, in *Rumpf*, this Court allowed plaintiff's lawyer to pursue an employer for an attorney fee. Upon what logical or reasonable basis is unknown.

The trial court found that plaintiff was entitled to a reasonable attorney fee but did not state any reason for this entitlement. The court did not consider the evidence presented in support of the amount of the fee. At least, the court did not so state in its decision. Where no reason is given, the court acts beyond the bounds of reason and abuses its discretion.

Based upon the evidence presented in support of a reasonable attorney fee, among other items, 131 hours were spent by the lawyer, success was had in the lawsuit which has a net value to plaintiff of $55,000.00, plaintiff is entitled to an additional attorney fee of $2,500.00.

Because of a cross-appeal, plaintiff was compelled to file two separate briefs in this Court, both of them excellent finished products. Plaintiff's lawyer should receive an attorney fee of $3,000.00 for services rendered in this appeal.

631 P.2d 726

Gary E. CARGILL and Helen Cargill, his wife, Plaintiffs-Appellants,

v.

James Howard SHERROD and Delores Jean Sherrod, his wife, Roy Neal and Realty Executives, Inc., Defendants-Appellees.

No. 13172.

Supreme Court of New Mexico.

July 30, 1981.

Wycliffe V. Butler, Anthony C. Porter, Albuquerque, for plaintiffs-appellants.

Louis S. Marjon, Albuquerque, for the Sherrods.

Threet & King, Martin E. Threet, Albuquerque, for Neal and Realty.

OPINION

EASLEY, Chief Justice.

The Cargills brought an action against the Sherrods seeking damages for fraudulent misrepresentation in the sale of real property and breach of contract. The Sherrods counterclaimed for rescission based upon mutual mistake. The trial court granted summary judgment dismissing the Cargills' claim and granting the Sherrods' counterclaim for rescission. The Cargills appealed. We affirm the dismissal of the complaint, but reverse summary judgment on the counterclaim.

The issues are: (1) whether an advertisement placed in a multiple listing by the Sherrods and allegedly relied on by the Cargills was a false representation; and (2) whether there was a mutual mistake which justified rescission of the contract.

The Cargills contracted with the Sherrods to purchase land which the Sherrods had advertised as follows:

> A–2 zoning can be changed to SU. Choice commercial acreage. . . .

Cargill stated he saw the listing when he visited the office of the Sherrods' realtor. He alleged that he was induced to purchase the Sherrods' property in reliance upon the representation in the ad which he interpreted to mean that the property could be used for commercial purposes. Cargill claimed the representation was false, that the Sherrods knew it could not be used for commercial purposes and that the zoning authorities would not consider or entertain a petition for a change to commercial purposes in the future.

The A–2 zone designated in the ad is shown by the evidence to be agricultural and partially residential and permits range farming and dairy activities. It is used as a holding position and, until a special use (S.U.) permit is granted or a zone change approved, it remains A–2. Anyone can file an application for an S.U. permit. Some commercial uses are conditionally allowed under A–2 zoning, subject to approval at a public hearing, such as commercial stables, polo grounds, a real estate office, an animal clinic and a motorcycle shop. Other commercial uses are available if an S.U. permit is approved.

The record shows that Cargill never had any special use for the property in mind, and never applied for an S.U. permit, nor asked about the procedure for obtaining an S.U. permit. He did not know whether a zone change could be effected. Thus, his claim of misrepresentation is founded on the premise that the multiple listing ad is in fact a representation that the land could be used for commercial purposes without going through the process for changing zones or obtaining a special use permit.

The burden was on the Sherrods, as the moving party, to show an absence of a genuine issue of fact and that they were entitled to judgment as a matter of law. This burden is met by a prima facie showing, i. e., such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question. Once a prima facie showing has been made, the moving party is entitled to summary judgment unless the party resisting the motion demonstrates at least a reasonable doubt as to whether a genuine issue exists. *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972); N.M.R.Civ.P. 56, N.M.S.A.1978 (Repl.Pamp. 1980).

Actionable fraud consists of misrepresentation of a fact, known to be untrue by the maker, and made with an intent to deceive and to induce the other party to act

in reliance thereon to his detriment. *Unser v. Unser*, 86 N.M. 648, 526 P.2d 790 (1974).

In support of the motion for summary judgment, the Sherrods submitted evidence supporting the truth of the statements contained in the ad. The Cargills did not submit any evidence sufficient to raise a genuine issue of fact concerning the truth or falsity of the statements. The evidence indicated that the property is, indeed, zoned A–2. This representation put the Cargills on notice that the property could not be used for most commercial purposes absent a change of zoning or approval of an S.U. permit. There is also no evidence in the record that the statement, "can be changed to S.U." was false. The evidence showed that the zoning authorities would consider a petition for an S.U. permit for commercial usage and that the likelihood of approval was increasing due to the growth of commercial usage in the surrounding area.

Finally, the evidence supports the statement that the property is, by reason of its location, choice commercial acreage. The ad therefore truthfully represented that most commercial usages were not permitted under present zoning, but that the property was ripe for commercial development. In his deposition Cargill complained that the ad might have been phrased better, but acknowledged that it was not a lie.

Under the evidence, the Sherrods have shown that there was no genuine issue of fact and that they were entitled to judgment as a matter of law. We affirm the trial court's granting of summary judgment in favor of Sherrod, dismissing the fraud and breach of contract actions alleged in the complaint, both of which causes of action were based upon the alleged misrepresentations in the ad.

The counterclaim for rescission alleged mutual mistake. For a mistake to be mutual and common to both parties, it must appear that both parties have done what neither intended. *See 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). There was no evidence in this case that both parties were acting under a mutual mistake. Although the facts might indicate a unilateral mistake on the part of the Cargills, that evidence would not justify granting a rescission requested by the non-mistaken party. *See Jones v. Friedman*, 57 N.M. 361, 258 P.2d 1131 (1953). The trial court therefore erred in granting summary judgment of rescission on the counterclaim.

The dismissal of the complaint is affirmed; summary judgment on the counterclaim is reversed and the cause remanded.

IT IS SO ORDERED.

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

631 P.2d 728

John DOE, Plaintiff-Appellee,

v.

The CITY OF ALBUQUERQUE, Defendant-Appellant.

Christopher HOOTON, Plaintiff-Appellee,

v.

The CITY OF ALBUQUERQUE, Defendant-Appellant.

No. 4213.

Court of Appeals of New Mexico.

April 14, 1981.

Rehearing denied May 4, 1981.

Steven H. Schiff, City Atty., Albuquerque, for defendant-appellant.

Ray M. Vargas, Albuquerque, for plaintiff-appellee Doe.

Dan A. McKinnon, III, Marron & McKinnon, Albuquerque, for plaintiff-appellee Hooton.

OPINION

WALTERS, Judge.

The majority of a panel of the Court of Appeals (Walters, J., dissenting) previously held in this case that § 41–4–12 of the Tort Claims Act, N.M.S.A. 1978, prohibited recovery by injured jail inmates against negligent city law enforcement officers. The Supreme Court reversed, declaring that the governmental entity and its law enforcement officers, the city jailers, were not immune from suit for personal or bodily injury caused by the jailers' negligence. The cause was remanded to this Court for determination of other issues raised by the City in its appeal.

The facts of this case are fully recited in the Court of Appeals decision appearing in 19 N.M.S.B.B. 775 (1980) and in the opinion of the Supreme Court published at 20 N.M. S.B.B. 139, 95 N.M. 329, 622 P.2d 234 (1981).

Aside from the question of immunity now disposed of by the Supreme Court's opinion, the city claims it is entitled to a new trial because of errors committed in consolidating the cases for trial, denying a motion for directed verdict, refusing requested instructions, and excluding certain evidence. We discuss the claimed errors in order.

1. *Consolidation.*

Rule 42(a), N.M.R.Civ.P., permits consolidation when actions involve common questions of law or fact. Of course, each plaintiff would have to show discrete facts pertinent only to the event giving rise to his claim; nevertheless, the underlying common facts alleged were the same: plaintiffs had been imprisoned within weeks of each other in the Bernalillo County jail; the jail was under control and responsibility of the City; plaintiffs were seriously injured by other inmates while so jailed; the City was aware for a substantial period of time before the plaintiffs were assaulted and injured of the potential for injury to them. The common issue of law was whether the City was negligent in failing to provide adequate supervision and protection for plaintiffs' safety.

If there were questions common to both cases at the time consolidation was ordered, *Blumenthal v. Berkley Homes, Inc.*, 342 Mich. 36, 69 N.W.2d 183 (1955), the order is reviewable only if the court abused its discretion in entering the order. *Hanratty v. Middle Rio Grande Conservancy Dist.*, 82 N.M. 275, 480 P.2d 165 (1970). Defendant's argument that the jury could not assess the separate claims of the plaintiffs free from a prejudicial influence of evidence heard on the claim of the other plaintiff, is purely speculative. It presumes the jury was unable or refused to follow the detailed instructions. The only proof suggested to support the argument is the $23,000 difference in verdicts returned, which defendant describes as verdicts "reasonably close together." It argues that the "great disparity between the extent of injuries" suffered by the plaintiffs, and the difference in the periods of time over which the injuries were inflicted, call for a wider spread in the damages awarded.

There is no touchstone beyond the instructions given for measuring the damage amounts which juries, in the exercise of their judgments, award. *Baca v. Baca*, 81 N.M. 734, 472 P.2d 997 (Ct.App.1970). Reviewing courts do not disturb awards supported by evidence which is taken in its most favorable light, and which awards are not shown to be the result of passion, prejudice, sympathy, undue influence, or a mistaken measure of damages. *Samedan Oil Corp. v. Neeld*, 91 N.M. 599, 577 P.2d 1245 (1978). We see no defect in the evidence to support the verdicts; and we are led to no conviction that the awards are tainted by passion or other improper consideration that would support a belief that consolidation prejudiced the defendant. It was not error to do so.

2. *Directed verdict.*

The City states in its Brief-in-Chief that there was insufficient evidence to submit all of plaintiffs' theories of negligence to the jury. No reference to the transcript appears in this argument; no recitation of any evidence or testimony either to support the theories or to show the inadequacy of support, is made. The City concedes, however, that it "recognizes that this Honorable Court may disagree and find that there was substantial evidence of negligence as to one or more of the claims."

The factual and legal deficiencies in this argument are somewhat relieved by appellees' Answer Briefs, in which they attempt to guess at the basis of the City's complaint. The argument is then thoroughly presented by the City, as required by Rule 9, R.Civ.App.P., in its Reply Brief. The Reply Brief, of course, is not the place to outline, for the first time, the basis for arguing insufficient evidence; or to set forth the substance of the evidence on the issues attempted to be raised. Such a procedure forecloses a response from appellees, and leaves them with an argument directed only toward what they were able to surmise from the cryptic point stated in the Brief-in-Chief. The court will not search the record to determine whether appellant's Reply Brief arguments could be refuted, or whether the trial court committed error. *See Petty v. Williams*, 71 N.M. 338, 378 P.2d 376 (1963). Points of error not properly briefed or argued will not be considered, *State v. Riggsbee*, 85 N.M. 668, 515 P.2d 964 (1973); rather, we will indulge all presumptions in favor of the correctness of the

procedures in the trial court, including submission of plaintiffs' various negligence claims to the jury.

3. *Refusal of requested instructions.*

(a) Independent Intervening Cause.

The City contends it was entitled to its submitted U.J.I. 13.15 [U.J.I. 3.9 in 1981 revision] on this issue, but in its Brief-in-Chief we are not cited to a single item of evidence or transcript reference in support of its argument. This violates the appellate rules; we will not search the record to find evidence that would have justified submission of the instruction to the jury. *See City of Farmington v. Sandoval,* 90 N.M. 246, 561 P.2d 945 (Ct.App.1977).

(b) Contributory Negligence of Hooton.

According to the undisputed evidence, Hooton's jaw was broken about an hour after he was jailed following his arrest. During that hour Hooton was threatened, intimidated, assaulted and beaten. One of the dozen inmates in that cell held a blade at his throat, and threatened to "slit" Hooton if he tried to call for a guard. Another inmate told Hooton it didn't matter if he killed Hooton because "they weren't going to let him [the inmate] get out for at least twenty years anyway." Still another occupant of the cell told him he might be beaten all night long, and Hooton feared if he called for a guard, he "wouldn't make it . . . wouldn't see morning."

The City claims Hooton should have called for help before his jaw was broken, and his failure to do so was sufficient basis to justify a contributory negligence instruction against him.

Contributory negligence is usually an issue of fact to be determined by the jury, but when the evidence would not support such a finding it is error to submit the issue to the jury. *City of Belen v. Harrell,* 93 N.M. 601, 603 P.2d 711 (1979). U.J.I. Civ. 12.1 [U.J.I.Civ. 16.1 in 1981 revision] defines "negligence," in part, as a failure to do something "which a reasonably prudent person in the exercise of ordinary care would do in order to prevent injury to himself." U.J.I.Civ. 12.2 (then in effect), instructed that "[o]rdinary care is not an absolute term, but a relative one. In deciding whether ordinary care has been exercised, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence."

Under the facts and circumstances of the immediate "gang" attack on Hooton, the relatively short time he was in the cell with his attackers, his well-founded fears for his life if he attempted to get help, we do not believe reasonable minds could differ on the correctness of the course Hooton chose in exercising ordinary care to prevent an even greater, more serious, and probably fatal injury to himself. Thus, as a matter of law, it was not error to refuse defendant's requested instructions. *Harrell, supra; see Sandoval v. Cortez,* 88 N.M. 170, 538 P.2d 1192 (Ct.App.1975).

(c) The City's Standard of Care.

Defendant urges that the jury should have been informed in the language of § 41–4–2, N.M.S.A. 1978, that a governmental entity's standard of care is circumscribed by the "financial limitations within which it must exercise authorized power, and discretion in determining the extent and nature of its activities." Such an instruction was tendered and refused. The City points to evidence that surveillance of the cells was insufficient because the jail director was without sufficient manpower. That, however, is the only evidence in the record to which we are referred regarding lack of precautions for prisoner safety, and it provides no evidence whatever on the cause for insufficient manpower. Without evidence on the issue of "financial limitations," defendant was not entitled to the requested instruction. *Archibeque v. Homrich,* 88 N.M. 527, 543 P.2d 820 (1975); *Garcia v. Barber's Super Markets, Inc.,* 81 N.M. 92, 463 P.2d 516 (Ct.App.1969).

4. *Exclusion of evidence.*

(a) Evidence of Custom and Usage.

The trial court refused to permit the City to inquire about customs and usages in oth-

er correctional institutions concerning attacks among the prisoner population.

The questions asked by the City, to which objections were sustained, leave no doubt that the effect of the answers sought would be to suggest that sexual and violent attacks between and among prisoners is a common, foreseeable occurrence in most jails and prisons. The City argues that evidence of "similar problems" in the other facilities, and how they were handled, was relevant to showing "what an ordinary prudent man would do under similar circumstances."

It is not clear whether the City intended to show the conduct of plaintiffs or the jail director as the acts of a "prudent man" under similar circumstances, but we assume it argues that the director should have done no more than is done in other institutions where such unrest and violence may be expected. We are unaware of any rule of law that excuses a wrongdoer's negligence simply because that type of negligence is prevalent among others in the same position. We feel, instead, that doing nothing in the face of anticipated problems and with awareness of similar difficulties in other institutions under the same circumstances—which was the direction taken by the City's questioning and admitted in the City's brief to be the purpose of the questioning—hardly shows the conduct of a "prudent" person or entity.

If there is a failure of prison officials to provide for the safety of prisoners, generally, as the City attempted to show, the practice amounts to wholesale disregard of duty by those charged with protection of prisoners from assaults by other confined inmates. Even though other jurisdictions have held otherwise, it is the law in New Mexico that when a governmental entity through its agents, by virtue of its law enforcement powers, has arrested and imprisoned a human being, it is bound to exercise ordinary and reasonable care, under the circumstances, for the preservation of his life and health. *Harrell, supra.* The duty of care is one owing to a person in custody by virtue of such powers, and for a breach of that duty, the custodial entity is responsible in damages. *Farmer v. State,* 224 Miss. 96, 79 So.2d 528 (1955). *See also Matthews v. District of Columbia,* 387 A.2d 731 (D.C.App.1978); Restatement (Second), Torts, § 320; Annots. 41 A.L.R.3rd 1021, et seq. (1972), and 14 A.L.R.2d 353, et seq. (1950).

The stated purpose of the inquiries did not relate to a valid defense; the questions were not relevant on any other basis to any issue being litigated. The objections, therefore, were properly sustained. N.M.R.Evid. 401, 402, N.M.S.A. 1978.

(b) "Rap sheet" of other inmates.

After Hooton was removed from the tank in which he was assaulted, he was confined in another cell with several other prisoners. The City attempted to introduce the rap sheets of the other prisoners in Hooton's second cell. On appeal, it says that the rap sheets would have shown the similarity in the criminal backgrounds of the prisoners of both cells, thus permitting the inference that foreseeability of violence in the first cell could not be based on the prisoners' types of criminal character alone.

Hooton in his Answer Brief has not challenged defendant's failure to apprise the trial court of a relevant purpose for which the rap sheets were offered. The record discloses that the only reason mentioned for offering the rap sheets was that the City intended to show that the second cell to which Hooton was assigned was not, on dates before and after his assignment, "confined to housing individuals accused of misdemeanor offenses." The relevancy of that fact was never explained; and the trial court found that the criminal character of the occupants of the second cell on dates earlier and later than the day on which Hooton was transferred there was likewise irrelevant. The reason for admission urged by the City on appeal was not articulated at trial.

Error of the trial court in excluding evidence, if it is error, must be sufficiently called to the trial court's attention to give

the court an opportunity to correct its ruling. That was not done in this case; an offer of proof was not made; the City did not seek clarification of the court's ruling if it felt the evidence should not have been excluded. The alleged error was not preserved. *Williams v. Yellow Checker Cab Co.*, 77 N.M. 747, 427 P.2d 261 (1967).

Even had the rap sheets been introduced, what would they have proved or disproved with regard to the City's foreseeability of danger in placing Hooton in the first cell where he was assaulted? If similarity in criminal backgrounds was the only ground for alerting jail officials to the probability of injury to Hooton or other prisoners, and the rap sheets would have shown that similarity, the logical deduction would be that, as *the City* indicates in its brief, "there was no safe place anywhere in the jail." Certainly exclusion of that kind of evidence could not prejudice the City when it is on trial for negligently failing to provide for the safety of prisoners in its custody.

We find no reversible error in the trial below. The verdicts returned in favor of plaintiffs Doe and Hooton are affirmed.

IT IS SO ORDERED.

HERNANDEZ, C. J., and ANDREWS, J., concur.

631 P.2d 1308

Danelle J. SMITH, Assistant District Attorney, and Children's Court Attorney, Fourth Judicial District, Petitioner,

v.

The Honorable Donaldo A. MARTINEZ, Respondent.

STATE ex rel Benny E. FLORES, District Attorney, Petitioner,

v.

The Honorable Donaldo A. MARTINEZ, District Judge, Respondent.

Nos. 13616, 13659.

Supreme Court of New Mexico.

July 1, 1981.

Rehearing Denied Aug. 5, 1981.

Benny E. Flores, Dist. Atty., Danelle J. Smith, Asst. Dist. Atty., and Children's Court Atty., Las Vegas, for petitioner.

Donaldo A. Martinez, pro se.

OPINION

RIORDAN, Justice.

We previously granted alternative writs of prohibition in our Causes Nos. 13616 and

13659 against the respondent district judge prohibiting him from taking any action in children's court cases in which an affidavit of disqualification has been filed by the State immediately after a petition was filed in children's court. After receiving briefs from the State and the respondent, we make each writ of prohibition permanent.

The issues are:

1. Whether the assistant district attorney is entitled to sign an affidavit of disqualification in a children's court case; and,
2. Whether the appointment of counsel by the court is an exercise of discretion that precludes the later disqualification of the judge who appointed the attorney.

The petitioner in Cause No. 13616 is an assistant district attorney acting as children's court attorney in the Fourth Judicial District. Petitioner in Cause No. 13659 is the district attorney in the Fourth Judicial District. The respondent in each case is the resident district judge in Division II of the Fourth Judicial District. All children's court cases are assigned to his division, and he is the judge before whom the cases are to be tried on the merits. He determines whether a child is indigent and entitled to appointed counsel in a children's court proceeding. He also signs search warrants and issues various court orders under the Children's Code, Sections 32–1–1 to 32–1–45, N.M.S.A.1978 (Orig.Pamp. and Cum.Supp. 1980) before the formal petition is actually filed by the children's court attorney.

In each of the cases before this Court, the respondent appointed counsel to represent the child before a petition was filed in the children's court division of the district court by the children's court attorney. Immediately after filing the petitions, the children's court attorney filed a disqualification of the respondent in the statutory form required by Section 38–3–9, N.M.S.A.1978.

I. *ENTITLEMENT TO DISQUALIFICATION.*

The disqualification statute applies to children's court proceedings and a party to a children's court proceeding is entitled to disqualify the children's court judge. *Frazier v. Stanley*, 83 N.M. 719, 497 P.2d 230 (1972). However, respondent claims that the district attorney is not a "party" and therefore cannot sign an effective affidavit of disqualification. Respondent's position is that if anyone is entitled to file a disqualification, it would be a juvenile probation officer. The district attorney claims, however, that the probation officer is an employee of the judiciary and cannot act on behalf of the State and is not a party to a children's court proceeding.

Respondent bases his allegation that the children's court attorney is not a party to the proceeding on Sections 32–1–17, 32–1–18, and 32–1–5, N.M.S.A.1978. The original statutory scheme of the Children's Code allowed persons other than the children's court attorney to sign a children's court petition. It required the children's court attorney to be notified of the filing of the petition and in certain circumstances required the children's court attorney to furnish legal services in connection with the presentation of the facts behind the petition.

However, the rules of procedure for the children's court limit the signing of the petition to the children's court attorney, N.M.Child.R.P. 22(a), N.M.S.A. 1978 (Repl. Pamp.1980), and give the children's court attorney the right to decide whether or not to file a petition after a petition request is made to that office. N.M.Child.R.P. 21, N.M.S.A.1978 (Repl.Pamp.1980). To the extent that the rules of procedure conflict with the statutory provisions, the rules control. *State v. Jane Doe*, 95 N.M. 302, 621 P.2d 519 (Ct.App.1980).

As the petitioner correctly points out, the State is a party to a children's court proceeding. N.M.Child.R.P. 9, N.M.S.A.1978 (Repl.Pamp.1980). Petitioner, relying on *State v. Hay*, 40 N.M. 370, 60 P.2d 353 (1936), also claims that an assistant district attorney is authorized to sign the affidavit

of disqualification. In *Hay*, this Court recognized the authority of the Attorney General, on behalf of the State of New Mexico to execute an affidavit of disqualification directed at a trial judge.

The respondent argues that the Court of Appeals in *Coca v. New Mexico H. and S. Services Dept.*, 89 N.M. 558, 555 P.2d 381 (Ct.App.1976), *cert. denied* 90 N.M. 8, 558 P.2d 620 (1976), interpreted the predecessor of this statute and the *Hay* case and held that an assistant attorney general could not file an effective disqualification. However, the affidavit in the *Coca* case was one in which the assistant attorney general stated that *she* believed that the judge could not act fairly and impartially. The Court of Appeals interpreted the affidavit as being personal to her rather than on behalf of the State or an agency of the State.

In this case, the assistant district attorney stated in the affidavit:

> That the State of New Mexico is a party to this proceeding; that the State of New Mexico, through Danelle J. Smith, Assistant District Attorney and Children's Court Attorney for the Fourth Judicial District of the State of New Mexico, is of the belief that the Honorable Donaldo A. Martinez, District Judge, cannot preside over this case with impartiality and hereby disqualifies him from presiding further in this cause.

The State is a party in proceedings on petitions alleging delinquency, need of supervision, or neglect. N.M.Child.R.P. 9, N.M.S.A.1978 (Repl.Pamp.1980). The children's court attorney may represent the State in any children's court proceeding. § 32–1–5, N.M.S.A.1978. Any petition filed in children's court must be signed by the children's court attorney. N.M.Child.R.P. 22(a), N.M.S.A.1978 (Repl.Pamp.1980). Therefore, we hold that the power and duty to represent the State necessarily includes the authority to execute an affidavit of disqualification when done on *behalf of the State*. Otherwise, the State would effectively be denied the right to disqualify a judge.

II. *EXERCISE OF DISCRETION.*

New Mexico law is well settled that a judge may not be statutorily disqualified under Section 38–3–9 after a party has invoked the discretion of the court. *See State v. Hester*, 70 N.M. 301, 373 P.2d 541 (1962); *Hill v. Patton*, 43 N.M. 21, 85 P.2d 75 (1938); *State v. Taylor*, 42 N.M. 405, 79 P.2d 937 (1938). The respondent's position is that since he has appointed an attorney at the request of probation services, the child, or the child's family, he has exercised his discretion and may not now be disqualified. However, the request was not made by the State or its representative, the children's court attorney, and therefore, the respondent did not exercise any discretionary act at their request. Further, the respondent is required by law to appoint counsel for the child, if counsel is not waived, and has no discretion in that regard. § 32–1–27(E), N.M.S.A.1978. These provisions are mandatory. *State*, supra. Counsel must be appointed no later than five days after the petition is filed. N.M. Child.R.P. 22(d), N.M.S.A.1978 (Repl.Pamp. 1980). The fact that the respondent may have authority to determine who the appointed counsel will be is not the exercising of a discretionary act at the request of the State.

Since no discretionary act is involved by appointing counsel, and the State has not invoked the discretion of the court in any other manner in the cases before the court, the disqualification is proper and the respondent is prohibited from taking further action in any of these cases.

EASLEY, C. J., and PAYNE, J., concur.

631 P.2d 1311

Richard D. CAUBLE and Ruth M. Cauble, Plaintiffs-Appellants,

v.

Edwin R. BEALS and Abigail M. Beals, and State of New Mexico Commissioner of Public Lands, Defendants-Appellees.

No. 13118.

Supreme Court of New Mexico.

Aug. 10, 1981.

Charlotte Greenfield, Las Cruces, for plaintiffs-appellants.

E. H. Williams, Las Cruces, for defendants-appellees.

OPINION

EASLEY, Chief Justice.

The Caubles (Cauble) sued the Beals for ejectment from a strip of land claimed by Cauble. Beals counterclaimed for quiet title on the grounds of adverse possession and acquiescence in a common boundary. The district court quieted title in Beals on the grounds of acquiescence and estoppel. Cauble appeals. We reverse.

We discuss whether the trial court's findings of acquiescence and estoppel are supported by substantial evidence.

Cauble's land adjoins Beals' on the north boundary of Beals' property. Cauble's tract was previously owned by the State of New Mexico for many years and leased for grazing purposes to S. A. Walters until the lease expired in 1959. While in possession of the land, Mr. Walters constructed a wire fence along the south boundary of the property. Rather than placing the fence on the boundary line, he placed it several feet north of the line for the purpose of preventing adjoining landowners from tying onto the fence. The property now held by Cauble was sold in 1963 by state land contract to Hugh McMillan, of El Paso, Texas. After Mr. McMillan's death in 1969, the property was owned jointly by his widow, Merle McMillan, and the State National Bank of El Paso, as trustee, until they assigned the contract to Cauble in 1976.

Beals acquired the adjoining land in 1959 and made improvements within the disputed land beginning in 1967 and continuing to 1978. These improvements included a wood, and later rock, fence along the line of the old wire fence, and hence several feet within Cauble's land.

The elements of the doctrine of acquiescence were summarized by this Court recently in *Tresemer v. Albuquerque Public School Dist.*, 95 N.M. 143, 144, 619 P.2d 819, 820 (1980), as follows:

> (1) [A]djoining landowners (2) who occupy their respective tracts up to a clear and certain line (such as a fence), (3) which they mutually recognize and accept as the dividing line between their properties (4) for a long period of time, cannot thereafter claim that the boundary thus recognized is not the true boundary.

The burden of proving the elements of acquiescence is upon the party relying upon the doctrine to establish ownership. *Tresemer, supra; Kilcrease v. Campbell*, 94 N.M. 764, 617 P.2d 153 (1980). This burden is not met unless there is a showing of long-established mutual recognition and acceptance by the adjoining landowners that the fence is the dividing line between their properties. *Tresemer, supra.*

The evidence in this case shows that the state's lessee, Mr. Walters, built the fence in 1939 and purposely placed it several feet within the state's land. There is no evidence that either Walters or the state ever accepted the fence line as the boundary. There is no evidence that the purchaser from the state, Hugh McMillan, or his wife, ever set foot on the property, observed the fence line, or discussed it with anyone.

Between 1969 and 1976 the State National Bank of El Paso was trustee of an undivided one-half interest in the property. Although the Bank has a policy of inspecting trust properties annually, the record contains evidence of only two such inspections, one in late 1975, and one in mid-1976. The Bank officer who conducted both inspections testified by deposition introduced at trial that the first inspection was cursory, consisting of a drive along a road which is approximately three-quarters of a mile from the boundary and fence in dispute. The second inspection was more thorough and the Bank officer did observe the improvements constructed on the old fence line by the Beals. Cauble purchased the property in August, 1976, and was aware of the fence and improvements at that time. In May, 1978, they learned that these improvements encroached upon their property and they so informed Beals immediately.

Reading the facts in the light most favorable to Beals, we see that the only evidence upon which recognition and acceptance of the fence location as a borderline could be predicated is far from sufficient. It consists of the agent of the Bank, which was only a trustee of a one-half interest in the land, having seen the Beals' improvements one time in 1976. The record is devoid of any evidence that any of the owners of Cauble's land prior to that time had accepted the fence line as the boundary or were even aware of the existence of the fence.

Even if we could stretch this evidence to support mutual acceptance, it is absurd to contend that this period, less than three years, is sufficient to constitute a long-established recognition of a fence line as the boundary.

Although no New Mexico case has established the minimum period of recognition required to acquire title by acquiescence, the cases in which the application of the doctrine has been upheld all involve a period of recognition considerably longer than the ten years required to acquire title by adverse possession under Section 37–1–22, N.M.S.A. 1978. For example the line had been accepted for twenty-eight years in *McBride v. Allison*, 78 N.M. 84, 428 P.2d 623 (1967), for forty-five years in *Woodburn v. Grimes*, 58 N.M. 717, 275 P.2d 850 (1954), and for sixty years in *Retherford v. Daniell*, 88 N.M. 214, 539 P.2d 234 (Ct.App.1975). We conclude that three years is insufficient to constitute a long-established mutual recognition and acceptance of a boundary line. We hold that the trial court's finding that Beals acquired title by acquiescence was unsupported by substantial evidence.

The trial court also found that Cauble was estopped from claiming ownership to the true boundary line. The elements of estoppel are well-established:

> The essential elements of 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 that such conduct shall be acted upon by the other party * * *; and (3) knowledge, actual or constructive, of the real facts * * *. As related to [the party] which claims estoppel, the essentials are: (1) lack of knowledge and of 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 its position prejudicially.

Capo v. Century Life Ins. Co., 94 N.M. 373, 377, 610 P.2d 1202, 1206 (1980) (Citation omitted). Under the facts of this case as set out above, the application of estoppel was inappropriate. During the period in which Beals constructed improvements along the fence line, the record owners of Cauble's property were unaware of either the true boundary or the fence line, or both. There is not a shred of evidence in the record that Cauble, or any of his predeces-

sors, were guilty of the kind of wrongful conduct which would give rise to an estoppel. We therefore hold that the trial court's finding that Cauble was estopped from claiming ownership was unsupported by substantial evidence.

Beals' claim of laches has no merit whatsoever.

In view of our disposition of these issues, we find it unnecessary to discuss other points of error raised by the parties.

The judgment of the trial court is reversed and the cause remanded with instructions to enter judgment for Cauble.

IT IS SO ORDERED.

SOSA, Senior Justice, and PAYNE, FEDERICI, and RIORDAN, JJ., concur.

631 P.2d 1314

Geraldine MARTINEZ, Plaintiff-Appellee,

v.

Thomas TEAGUE, Defendant-Appellant.

No. 4750.

Court of Appeals of New Mexico.

April 2, 1981.

John B. Pound, Montgomery & Andrews, P. A., Joseph A. Sommer, Sommer, Lawler & Scheuer, P. A., Santa Fe, for defendant-appellant.

Robert R. Rothstein, Jan Unna, Rothstein, Bailey & Unna, Santa Fe, for plaintiff-appellee.

OPINION

LOPEZ, Judge.

On May 16, 1978, when driving her automobile on State Highway 84 shortly after midnight near Medenales, Mrs. Martinez collided with a horse owned by Mr. Teague and suffered injuries. The defendant, Mr. Teague, has horses on his land along this highway. A jury found the defendant's negligence caused Mrs. Martinez' injuries and awarded her $250,000.00 in damages. Mr. Teague appeals on five grounds: 1. that the court should have declared a mistrial when the plaintiff informed the jury that the defendant had insurance; 2. that the jury should not have been instructed on *res ipsa loquitur*; 3. that the jury should not have been instructed that violation of certain statutes was negligence *per se*; 4. that the jury award was excessive; and 5. that the cumulative errors committed deprived the defendant of a fair trial. Finding no error, we affirm the judgment of the trial court.

Mention of insurance. A blanket rule against the inclusion of evidence that a

party is insured does not exist in New Mexico. Evidence that a person is insured is not admissible to show that he acted negligently or wrongfully. N.M.R. Evid. 411, N.M.S.A. 1978. In certain other circumstances, however, it is admissible, as when used to show proof of agency, ownership, or control. *Id.* In extreme circumstances, the exclusion of evidence of insurance is reversible error. *See, Mac Tyres, Inc. v. Vigil*, 92 N.M. 446, 589 P.2d 1037 (1979). The propriety of admitting the evidence depends on the reason it was proffered. In *Grammer v. Kohlhaas Tank & Equipment Co.*, 93 N.M. 685, 692, 604 P.2d 823, 830 (Ct.App. 1979), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980), this court set out the following rules for determining the admissibility of evidence of insurance coverage:

> (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 evidence that Mr. Teague was protected by insurance was mentioned by plaintiff's counsel when he read a portion of Dr. Wood's report to Dr. Egelman. The portion read contained Dr. Wood's observation that Mrs. Martinez did not trust her attorney because she thought he was siding with the insurance company. The portion was read aloud, not to show that the insured, Mr. Teague, acted wrongfully, but to show why Mrs. Martinez was increasing her demands for compensation. The explanation of why Mrs. Martinez was increasing her demands was relevant to discredit Dr. Egelman's earlier opinion that Mrs. Martinez was trying to solve her financial problems through lawsuits. This evidence is not barred by Rule 411, the first rule in *Grammer*, and is admissible under the second rule enumerated in that case. Evidence of insurance, not used to show the wrongful acts of the insured, is admissible to rebut the discrediting effect and correct any wrong impression of earlier testimony by the witness. *See, Wood v. Dwyer*, 85 N.M. 687, 515 P.2d 1291 (Ct.App.1973). This was the legitimate purpose for which the testimony was elicited and admitted in the case before us. The evidence was also admissible under the third rule in *Grammer*. It was introduced in the context of workmen's compensation, and, although Dr. Egelman subsequently clarified the testimony slightly by explaining that Mrs. Martinez was involved in two cases simultaneously—one for workmen's compensation benefits and the present negligence suit—the court could have found the prejudicial effect very minimal. The jury could have missed the reference altogether, or it could have thought the insurance was workmen's compensation insurance. There is no abuse of discretion under the third rule in *Grammer*, and no reversible error under the fourth rule.

Res ipsa loquitur. Mere proof of an accident is insufficient to invoke the doctrine of *res ipsa loquitur. Tapia v. McKenzie*, 85 N.M. 567, 514 P.2d 618 (Ct. App.1973). In order for the doctrine to be applicable, the following must be true:

> (1) [T]he accident [must] be of the kind which ordinarily does not occur in the absence of someone's negligence.
>
> (2) [The accident] must be caused by an agency or instrumentality within the exclusive control and management of the defendant.

Renfro v. J. D. Coggins Co., 71 N.M. 310, 316, 378 P.2d 130, 134 (1963).

The defendant does not dispute that the second test was met. The horse, which was the cause of the accident, was within the defendant's exclusive control and management. He does challenge the applicability of the first test, claiming that *Akin v. Berkshire*, 85 N.M. 425, 512 P.2d 1261 (Ct. App.1973) controls in the circumstances of this case. In *Akin*, a cow on the road caused an automobile accident. In suing the owner of the cow, the plaintiff relied on *res ipsa loquitur*. This court said that *res ipsa* did not apply because the plaintiff failed to prove that the accident was of the kind which ordinarily does not occur in the absence of someone's negligence; *see also, Tapia*, a similar case. *Akin* and *Tapia* do not stand for the proposition that in cases involving a collision with livestock on the road, *res ipsa* is never applicable. In *Mitchell v. Ridgway*, 77 N.M. 249, 421 P.2d 778 (1966), the Supreme Court, finding that a count of the complaint invoking *res ipsa* stated a cause of action in a negligence suit arising out of a collision with a horse on the road, reversed the trial court's dismissal. *Akin, Tapia* and *Mitchell* read together indicate that each case must be decided by considering its own unique facts.

For *res ipsa* to apply, there must be facts which lead to a reasonable and logical inference that the defendant was negligent. *Strong v. Shaw*, 96 N.M. 281, 629 P.2d 784 (1980). The State Policeman who investigated the accident testified that the road where the accident occurred is lined by fences put up by the highway department. The gate to the defendant's property was open, and there was no cattle guard at the gate. Defendant said he always left the gate open for easy access. Other witnesses testified that defendant's corral, from which the horses somehow escaped, was about three and a half feet high. The defendant stated that he knew a horse could jump a three and a half foot fence. When the corral was examined after the accident, it was found to be closed and locked. There was no evidence that anyone had let the horses out; no one had been heard near the house, nor were there any tracks to indicate the presence of strangers.

This case is distinguishable from both *Akin* and *Tapia*. In those cases, there was no evidence of negligence in the construction or maintenance of the gates and fences. In *Akin*, there was also no evidence of how the cow escaped onto the road. In *Tapia*, there was some evidence that the cow walked across a cattle guard. Thus it was unfair to infer the defendant's negligence from the lack of evidence in *Akin*; and in *Tapia*, a reasonable inference was that the defendant was *not* negligent. The logical inference in the instant case, on the contrary, is that the horse escaped through the owner's negligence. Since the facts indicate that Mr. Teague was negligent in the construction of his corral and in his use of the gate, and that this negligence was the cause of the accident, the trial court did not err in instructing the jury on the doctrine of *res ipsa loquitur*.

Negligence per se. We do not reach this issue, because Mr. Teague failed to preserve it for appeal. The specific vice in a challenged instruction must be pointed out to the trial court in order to preserve the error for review. *Gonzales v. Allison & Haney, Inc.*, 71 N.M. 478, 379 P.2d 772 (1963); *McBee v. Atchison, T. & S. F. Ry.*, 80 N.M. 468, 457 P.2d 987 (Ct.App.1969). Unless the objection raised at trial to an instruction is the same as that raised in the brief on appeal, this court will not consider the objection. *Harrell v. City of Belen*, 93 N.M. 612, 603 P.2d 722 (Ct.App.), *rev'd on other grounds*, 93 N.M. 601, 603 P.2d 711 (1979). The defendant argued to the trial judge that the instruction on negligence *per se* was repetitious, and that there was no evidence to support part of the instruction. That part was then deleted. No argument was made at that time that the statutes cited do not give a standard for determining negligence and so cannot be used in an instruction on negligence *per se*. We will not now consider this argument.

Defendant contends that, as the error was fundamental error, we should review it even if he failed to make the proper objection below. In support of this, he cites *Vaughn v. Philadelphia Transportation Co.*, 417 Pa. 464, 209 A.2d 279 (1965). While *Vaughn* indicates that fundamental error may be found in the instructions given in a civil negligence case, this rule has not been adopted in New Mexico, and we decline to adopt it in this case.

Excessive award. The defendant gives a three pronged argument as to why the award of damages was excessive. First he argues that the full range of consequences was extraordinary and should not be attributable to the defendant. Secondly he argues that Mrs. Martinez' psychological disorder pre-dated the accident and that she failed to prove the extent of the aggravation for which he is liable. His third argument is that the evidence does not support an award of $250,000.00.

Defendant's first argument is based on § 435(2) of the Restatement (Second) of Torts (1965) which reads:

> The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.

This argument fails for two reasons. Section 435 does not limit liability, once it is determined to exist, but is used to determine whether there is any liability at all. Introductory note and Comments to § 435. Even if this section did apply, there is nothing "highly extraordinary" in incurring psychological problems as the result of an accident. Negligent conduct is that which a reasonably prudent person should recognize as involving an unreasonable risk of harm to another, regardless of whether the exact nature and extent of that harm is foreseeable. *See, Lujan v. Reed*, 78 N.M. 556, 434 P.2d 378 (1967); *see generally, Reif v. Morrison*, 44 N.M. 201, 100 P.2d 229 (1940).

> There is almost universal agreement upon liability . . . for quite unforseeable consequences, when they follow an impact upon the person of the plaintiff. . . . The defendant is held liable when his negligence operates upon a concealed physical condition, such as pregnancy, or a latent disease, or susceptibility to disease, to produce consequences which he could not reasonably anticipate. He is held liable for unusual results of personal injuries which are regarded as unforeseeable, such as tuberculosis, paralysis, pneumonia, heart or kidney disease, blood poisoning, cancer, or the loss of hair from fright.

Prosser, Law of Torts 260–261 (4th ed. 1971). We note that in order for an act to be the proximate cause of an injury, it need not be the sole cause, but merely a concurring cause. *Galvan v. City of Albuquerque*, 85 N.M. 42, 508 P.2d 1339 (Ct.App.1973). There is substantial evidence that Mr. Teague's negligence was the proximate cause of Mrs. Martinez' psychological problems.

Hebenstreit v. Atchison, T. & S. F. Ry., 65 N.M. 301, 366 P.2d 1057 (1959), which holds that when a person's negligence aggravates a pre-existing condition, his liability is limited by the extent of the aggravation, supports defendant's second argument. For the rule to become effective, however, it is necessary that there be a pre-existing condition which was aggravated by the injury. In reviewing the evidence, this court will indulge in all reasonable inferences in support of the verdict, and will disregard all inferences or evidence to the contrary. *Anaconda Co. v. Property Tax Dept.*, 94 N.M. 202, 608 P.2d 514 (Ct. App.1979), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980).

Dr. Trost testified that Mrs. Martinez' present psychological problems are attributable directly to her accident with Mr. Teague's horse. Dr. Hochman's testimony, viewed in the light most favorable to upholding the verdict, indicated that Mrs.

Martinez had a pre-disposition for psychological disorders. He did not say that her present psychological condition with its attendant physical complaints existed before the collision with the horse. This testimony indicated a susceptibility to psychological disorders, but did not indicate that she was suffering from such disorders at the time of the accident. There is substantial evidence that the accident with Mr. Teague's horse was the proximate cause of Mrs. Martinez' current condition, rather than the cause which aggravated a pre-existing mental state.

The standard for determining whether an award is excessive was set out in *Sweitzer v. Sanchez*, 80 N.M. 408, 409, 456 P.2d 882, 883 (Ct.App.1969), which gives the rules as:

> (1) whether the evidence, viewed in the light most favorable to plaintiff, substantially supports the award and (2) whether there is an indication of passion, prejudice, partiality, sympathy, undue influence or a mistaken measure of damages on the part of the fact finder.

Damage awards are found to be excessive only in extreme cases. *Lujan.* Defendant invites us to compare *Gonzales v. General Motors Corp.*, 89 N.M. 474, 553 P.2d 1281 (Ct.App.1976), where we ordered remittitur, with the present case. We are warned by *Sweitzer*, however, that the comparison of awards is improper because the question of prejudice must be determined from the evidence in each case. In *Gonzales*, we found evidence of prejudice and sympathy by the jury; here there is no such evidence. Nor is there evidence that the jury used the wrong measure of damages. Mrs. Martinez proved $80,000.00 in medical expenses, lost wages, and property damages. Beyond this, the jury was instructed to award damages for psychiatric injuries and for pain and suffering. If a plaintiff in a personal injury case is entitled to recover at all, he is entitled to damages for his injuries, for pain and suffering, and for mental injury arising from the accident. *Jones v. Pollock*, 72 N.M. 315, 383 P.2d 271 (1963). There was substantial evidence to support the jury award of $250,000.00.

Cumulative error. Not having discovered any errors at the trial, we find no cumulative error.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

SUTIN, J., specially concurring.

HERNANDEZ, C. J. concurs.

SUTIN, Judge (Specially concurring).

I specially concur.

A. *Mention of "the insurance company" in a doctor's report does not warrant a mistrial.*

In the course of the cross-examination of defendant's psychiatrist, plaintiff read a portion of a report of a non-witness doctor which included the following:

> "She felt that she was pressed into getting an attorney, but even this relationship was marred by a great deal of lack of trust on her part where she felt her attorney was siding with *the insurance company* and employing a variety of delaying tactics." [Emphasis added.]

Defendant objected to the question and moved for a mistrial at the close of the day's proceedings. The court was not prepared to rule upon defendant's motion. The following morning after argument, the court stated that it would consider the motion as taken under advisement. Thereafter, the trial proceeded and ended. The trial court never ruled on defendant's objection to the question or his motion for a mistrial. Defendant abandoned his motion. Upon what basis defendant's motion can be raised in this appeal has not been shown.

Even though we assume the trial court denied the motion for a mistrial, defendant failed to show that the trial court abused its

discretion. *Transwestern Pipe Line Company v. Yandell*, 69 N.M. 448, 460, 367 P.2d 938 (1961) says:

> . . . A motion to declare a mistrial is addressed to the sound discretion of the trial judge and is reviewable only for an abuse thereof. [citation omitted.] The trial judge is in a much better position to know whether a miscarriage of justice has taken place and his opinion is entitled to great weight in the absence of a clearly erroneous decision. We find no abuse of discretion by the court in overruling the motion for mistrial.

Defendant did not state this rule or discuss it. There was no abuse of discretion.

Plaintiff's and defendant's lawyer each possessed copies of the doctor's report for several months and were thoroughly familiar with its contents. If defendant wanted to test the use by plaintiff of that portion of the report which included "the insurance company," a motion *in limine* should have been filed. *Proper v. Mowry*, 90 N.M. 710, 568 P.2d 236 (Ct.App.1977). The issue would have been decided and an order entered. If adverse to defendant, error in the appeal would have been proper. Defendant used the doctor's report. It would be reasonable for defendant to believe that plaintiff would also use it. Anticipation of its use by plaintiff should have warned defendant to seek a resolution before trial, not during trial. To catch a district judge off guard requires a shot from the hip to resolve the issue. This method of procedure fosters reversible error. It does not lessen it.

If defendant was seriously concerned about "the insurance company" being harmful because of its effect upon the jury, he could have requested UJI Civ. 2.8 which reads:

> Whether a party is insured has no bearing whatsoever on any issue that you must decide. You must refrain from any inference, speculation or discussion about insurance.

Defendant did not want to focus upon this issue. But the failure to request the instruction is at least an indication that defendant was not worried. To me, it means that defendant only sought, but failed to discover another point to raise in the appeal. I am convinced that the juror of today, who has the above instruction before him during deliberations, will not violate his oath of office and disregard the admonition of the court.

It appears in the instant case that plaintiff and defendant are represented by the same insurance company. For my views of what constitutes reversible error in the mention of an insurance company; see, *Chavez v. Chenoweth*, 89 N.M. 423, 533 P.2d 703 (Ct.App.1976), Sutin, J., dissenting in part.

Defendant was not entitled to a mistrial.

B. *"Res ipsa loquitur" instruction is erroneous but not prejudicially.*

Over objection of defendant, the court submitted UJI Civ. 16.23 on "res ipsa loquitur." It reads:

> The plaintiff relies *in part* upon the doctrine of "res ipsa loquitur" which is a Latin phrase and means "the thing speaks for itself". In order for the jury to find the defendant negligent under this doctrine, the plaintiff has the burden of proving each of the following propositions:
>
> 1. that the injury and damages to plaintiff were proximately caused by a horse, which was under the exclusive control and management of the defendant; [defendant concedes this proposition.]
>
> 2. *that the event causing the injury and damages to the plaintiff was a kind which ordinarily does not occur in the absence of negligence on the part of the person in control of the instrumentality.* [at issue.]
>
> If you find that each of these propositions has been proved, *then the law permits you to infer that the defendant was negligent* and that the injury and damages proximately resulted from such negligence.

> If, on the other hand, you find that any one of the propositions have not been proved, or if you find, *notwithstanding the proof of these propositions*, that *the defendant used ordinary care for the safety of others* in his control and management of the horse, *then plaintiff cannot recover* under the doctrine of res ipsa loquitur. [Emphasis added.]

When stated simply, this instruction reads:

> Plaintiff relies *in part* upon the doctrine of "res ipsa loquitur." Plaintiff must prove two essential propositions to establish defendant's negligence.
>
> * * * * * *
>
> If you find that each of these propositions has been proved, then you may conclude that defendant was negligent and that the injury and damage proximately resulted from such negligence.
>
> If on the other hand, you find that one of the propositions has not been proven, plaintiff cannot recover. *Also, plaintiff cannot recover, although he has proven the two propositions, if you find that the defendant used ordinary care for the safety of others.*

It is important to explain the meaning and effect of this instruction:

(1) The jury is told that "The plaintiff relies *in part* upon the doctrine of 'res ipsa loquitur.'" Plaintiff does not rely on *res ipsa* alone. Under UJI Civ. 3.2, on statement of the issues, the jury was also told that plaintiff relied upon three "claimed acts of negligence." During its deliberations, the jury could consider both *res ipsa* and "claimed acts of negligence."

(2) The jury is told that if plaintiff proves the two essential propositions, irrespective of the three "claimed acts of negligence," it can also find the defendant otherwise negligent, and conclude that the injury and damage proximately resulted from such negligence. *The jury is not told that plaintiff can recover.*

(3) However, even though plaintiff proves the two essential propositions which establish defendant's negligence and proximate cause, the jury is told that "plaintiff cannot recover" if the jury finds that defendant exercised "ordinary care for the safety of others." I cannot reconcile a jury finding defendant to be both negligent and careful at the same time on the same subject matter. This portion of the instruction is erroneous, but it strongly favors defendant. Regardless of what plaintiff proves, plaintiff cannot recover under *res ipsa* if the mental attitude of the jury favors an animal owner.

(4) The submission of this instruction was not reversible error. When the verdict of the jury was returned in plaintiff's favor did the jury rely upon *res ipsa*, the three "claimed acts of negligence" or both? Only the jury knows. In a jury trial in which a general verdict is returned, the manner in which the jury discharged its functions is for us an unknowable. No one but the jurors know the effect of the *res ipsa* instruction on their verdict. To learn the knowledge of the jury is to request, in addition to the general verdict, interrogatories which direct the jury to find the basis upon which it arrived at its verdict. *Maxwell v. Santa Fe Public Schools*, 87 N.M. 383, 534 P.2d 307 (Ct.App.1975), Sutin, J., specially concurring.

Inasmuch as we do not know whether the jury relied on *res ipsa loquitur*, one of three "claimed acts of negligence," or both, we cannot arbitrarily say that the jury relied upon *res ipsa loquitur*. To seek a reversal, the burden is on defendant to show that the submission of the instruction was prejudicial error, i. e., that it substantially affected his right so as to result in a miscarriage of justice. *Kight v. Butscher*, 90 N.M. 386, 564 P.2d 189 (Ct.App.1977), Sutin, J., dissenting. It must have some effect upon the final result of the trial. *State Highway Commission v. Beets*, 88 S.D. 536, 224 N.W.2d 567 (1974).

To establish prejudicial error, defendant must show that his rights were affected because the jury actually relied upon *res*

ipsa. This cannot be done. Defendant failed to lift the burden. Prejudicial error cannot be established.

C. *Res ipsa loquitur was properly submitted.*

Defendant argues that based upon the record, it is not possible to say that the event that caused plaintiff's injuries was a kind which ordinarily does not occur in the absence of negligence on the part of defendant.

Terry v. Dunlap, 84 N.M. 86, 499 P.2d 1008 (Ct.App.1972) held that there was no basis for an instruction on the theory of *res ipsa loquitur* where there was no evidence that any animal, including a yearling, had ever escaped onto a highway via a cattleguard which was owned and controlled by the State Highway Department, not defendant. If defendant owned and controlled the cattleguard, must plaintiff prove that prior to the accident one or more animals had escaped onto the highway via a cattleguard to establish that the event is "of a kind which ordinarily does not occur in the absence of negligence"? If so, I disagree.

Akin v. Berkshire, 85 N.M. 425, 512 P.2d 1261 (Ct.App.1973) relies on *Terry.* The court said:

> The evidence submitted on this point can be summarized in one sentence: Defendants' cow was on highway 41 where it was struck by plaintiffs' automobile. Our decision can likewise be stated in one sentence: Plaintiff has not sustained his burden of proof on the first element of the res ipsa loquitur doctrine. The only evidence in this case is that cows might get out of a fenced pasture if chased by men or animals; that cows have been known to jump fences; and that they will do just about anything you would expect them not to do. Thus, the only evidence is that this accident is of the kind which occurs in the absence of negligence. [Id. 426, 512 P.2d 1261.]

If so, I disagree.

Carrillo v. Hoyl, 85 N.M. 751, 517 P.2d 73 (Ct.App.1973) follows *Akin.* I disagree.

It is far more important to balance injury, damage and death by persons using the highway against injury or death of an animal.

Mitchell v. Ridgway, 77 N.M. 249, 251, 421 P.2d 778 (1966) said:

> Modern highways and vehicular traffic in New Mexico with livestock permitted to roam at large presents an intolerable situation.... We hold that it is for the trier of facts to determine whether the owner of the animal has used reasonable care to restrain his livestock.

If it was intolerable in 1966, it can be considered tragic in 1981. The resolution of this problem rests in the judicial approach of the courts. If the court favors the protection of the animal owner, *Terry, Akin* and *Carrillo* should remain the law of New Mexico. If the court favors the protection of the public, *Terry, Akin* and *Carrillo* should be overruled. In my opinion, the general public should be protected because *Mitchell* is controlling, not *Terry, Akin* or *Carrillo.*

I favor the rule which holds that an unattended animal on the highway is sufficient evidence to allow the jury to infer negligence on the part of those whose duty it is to restrain the animal because unattended animals do not escape their enclosure unless someone is negligent, a conclusion which is supported by an abundance of authority. *Nuclear Corporation of America v. Lang,* 480 F.2d 990 (8th Cir. 1973); *O'Connor v. Black,* 80 Idaho 96, 326 P.2d 376 (1958); *Mercer v. Byrons,* 200 F.2d 284 (1st Cir. 1952); *Bender v. Welsh,* 344 Pa. 392, 25 A.2d 182 (1942); *Vaclavicek v. Olejarz,* 61 N.J. 581, 297 A.2d 3 (1972).

The basic reason for the rule was stated in *Bender, supra,* as follows:

> [H]orses which are properly confined ordinarily do not escape. Hence the presence of an unattended horse on the highway is sufficient evidence to allow the jury to infer negligence on the part of those whose duty it was to restrain him,

and this has been held in a number of cases .... [Citations omitted.] [Id. 25 A.2d 184.]

The court quoted the following from one of the cases cited:

"Under any but exceptional circumstances, the exercise of ordinary care will serve to keep unattended animals in their proper inclosures. In these days of rapid automobile transportation, the extreme hazard to drivers and passengers of animals straying unattended on the roads at night cannot be overestimated. The driver is placed in a well-nigh helpless position because of the tendency of an animal to spring out of darkness in front of a car when blinded or hypnotized by its headlights. Against this contingency, drivers should be protected, by having our roads clear of such obstructions, and every owner of live stock should make an earnest endeavor to so control their movements with due care that the lives of others may not be thereby endangered." [Id. 25 A.2d 184.]

Bender enlarges on the intolerable concept stated in *Mitchell.*

The characteristics of the horse were known only to defendant. The method of escape of defendant's horse based upon defendant's testimony and that of his daughter, is unknown. None of the other horses had ever escaped. Any evidence of the method of escape of the horse, if any, is ordinarily known only to defendant, not plaintiff. Plaintiff had no reasonable method of determining the method of escape. All that plaintiff could discover was the corral and its fencing. If the fencing of a corral is relied upon to contain a horse, the fencing must be shown to have been one that a reasonable man would believe to be adequate to that end. *Vaclavicek, supra.* Substantial evidence established that the fencing was not adequate to contain the horse. This was the negligence of defendant. If the corral has been adequate to contain the horse, "the event causing the injury and damages to the plaintiff was of a kind which ordinarily does not occur."

Res ipsa loquitur was properly submitted to the jury.

On the other issues raised by defendant, I concur with Judge Lopez.

631 P.2d 1324

STATE of New Mexico, Plaintiff-Appellee,

v.

David LOPEZ and Lorenzo Flores, Defendants-Appellants.

No. 4858.

Court of Appeals of New Mexico.

June 4, 1981.

Certiorari Denied July 24, 1981.

Larry R. Hill, Alamogordo, for defendants-appellants.

Jeff Bingaman, Atty. Gen., Santa Fe, Marcia E. White, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

Flores was convicted of aggravated assault with a firearm, aggravated battery with a firearm and conspiracy. Lopez was convicted of aggravated assault, aggravated battery and conspiracy. Sections 30–3–2 and 30–3–5, N.M.S.A. 1978, §§ 30–28–2 and 31–18–16, N.M.S.A. 1978 (1980 Cum. Supp.). They appeal. We discuss (1) the jury selection process, and (2) answer other issues summarily.

Jury Selection Process

Defendants are members of the political party, La Raza Unida. Defendants challenged the selection of names for possible service as a juror (the jury wheel), because no members of that party were among the names selected; the result was that no member of that party was included in the panel from which the trial jury was selected.

There is no claim that the statutory procedure was not followed. The clerk of the district court testified that she randomly selected thirty-five percent of the names appearing in the pollbooks for each voting division in the last general election. Section 38–5–3, N.M.S.A. 1978. Those names were placed in the jury wheel. Section 38–5–4, N.M.S.A. 1978. The names on the jury panel were taken from the jury wheel.

The pollbooks contain the names of those persons who voted. Sections 1–12–10 and 1–12–11, N.M.S.A. 1978. If no member of La Raza Unida voted in the last general election, then under the procedure for selecting names for the jury wheel, no member's name could be included in the jury wheel.

Defendants claim that the method of selecting names for the jury wheel deprived them of a fair cross-section of the community in violation of the Sixth Amendment to the Constitution of the United States. This claim has two parts; the absence from the jury wheel of (1) names of La Raza Unida members, and (2) names of persons registered to vote but who did not vote in the general election.

Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), dealt with a Louisiana jury selection system which did not "disqualify women from jury service, but in operation its conceded systematic impact is that only a very few women, grossly disproportionate to the number of eligible women in the community, are called for jury service." Fifty-three percent of the persons eligible for jury service in the two parishes involved were women; not more than ten percent of the names in the jury wheel of one of the parishes were women. This disparity resulted because of a provision in the Louisiana Constitution which provided that no woman should be called for jury service unless she had filed a written declaration of her desire to be subject to jury service. *Taylor* held

> that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.
>
> * * * * * *
>
> [E]xcluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial * * *.
>
> [T]he fair-cross-section requirement is violated by the systematic exclusion of women, who in the judicial district involved here amounted to 53% of the citi-

zens eligible for jury service. This conclusion necessarily entails the judgment that women are sufficiently numerous and distinct from men * * *.

Missouri provided an automatic exemption from jury service for any woman requesting not to serve. In a county where fifty-four percent of the adult inhabitants were women, *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), held that the automatic exemption for women amounted to a systematic exclusion of women because jury venires averaged less than fifteen percent female, in violation of the fair-cross-section requirement. *Duren*, supra, states:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

The above requirement is not unrelated to the requirement of showing an equal protection violation. *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), stated that to show an equal protection violation,

> the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied.

■ Defendant made a showing that La Raza Unida members were excluded, but this exclusion was not the exclusion of La Raza Unida members as a group. The exclusion was of persons registered to vote who did not vote. There being no showing of the exclusion of La Raza Unida members because they were members of that party, the claim based on the absence of La Raza Unida members fails.

■ Our concern is with the exclusion from the jury wheel of the names of persons who were registered to vote, but who did not vote. Are such persons a distinct group in the community?

Both *Taylor v. Louisiana*, supra, and *Duren v. Missouri*, supra, dealt with women eligible to serve as jurors as a distinctive group; neither case attempted to define "distinctive group". Some courts have used the phrase "cognizable group". *United States v. Warinner*, 607 F.2d 210 (8th Cir. 1979), considered a claim that the jury panel did not represent a fair cross-section because it consisted only of registered voters. Defendants argued that nonregistered voters constituted a "distinctive group". *Warinner* held that nonregistered voters did not constitute a "cognizable group". See *State v. Gretzler*, 126 Ariz. 60, 612 P.2d 1023 (1980). Thus, we make no distinction between "distinctive group" and "cognizable group"; nor did the court in *United States v. Test*, 550 F.2d 577 (10th Cir. 1976).

Discussing the alleged underrepresentation of a "distinctive" or "cognizable" group, *United States v. Test* stated:

> To establish cognizability, it is necessary to prove the following:
>
> "(1) the presence of some quality or attribute which 'defines and limits' the group; (2) a cohesiveness of 'attitudes or ideas or experience' which distinguishes the group from the general social milieu; and (3) a 'community of interest' which may not be represented by other segments of society."

We do not suggest that this definition is exclusive; there may be fact situations which may require its modification. It is, however, a sufficient definition under the facts of this case.

United States v. Blair, 493 F.Supp. 398 (D.Md. 1980), held that age alone and that

non-federal employees did not constitute distinct groups, and that it was doubtful that either black males (as opposed to blacks generally) or the "less advantaged" (by employment and education) constituted distinct groups. *United States v. Coats*, 611 F.2d 37 (4th Cir. 1979), states:

> The only showing here is that persons who failed to vote in the 1976 general election were excluded from consideration for jury duty. Absent a demonstration that some cognizable group has thereby been systematically excluded or substantially underrepresented, this type of exclusion does not violate constitutional principles.

Defendants offered no proof that registered voters who did not vote were a "distinctive" or "cognizable" group. The jury selection claim is without merit.

Issues Answered Summarily

We answer the following issues summarily because defendants' contentions as to these issues do not accurately reflect what happened in the trial court. Defendants either ask this Court to find the facts, which we do not do as a court of review, or ignore matters adverse to their appellate position. See N.M.Crim.App. 501(a)(3).

■ (a) Defendants claim the evidence was insufficient to sustain the convictions. We disagree. The victim, a police officer going off duty, testified that a car driven by Lopez, and in which Flores was a passenger, drove slowly by as the victim exited the police station. Going to his car in the parking lot, the victim noticed that the car driven by Lopez stopped nearby and that someone got out of the car. As the victim started up his car he noticed two persons walking toward him, one of which was Flores. These two persons ducked into some bushes and as the victim was driving out of the parking lot, Flores raised up with something in his hands. The victim threw himself to the floor of his car as the first charge was fired from a shotgun through the driver's window of the victim's car. Either shotgun pellets or glass broken by the pellets struck the victim in the left hand. Thereafter, two more shots were fired into the victim's car.

Lopez' car was nearby when the shooting occurred; when booked, Lopez had two unfired shotgun shells in his possession. These two live shells were of the same color, gauge and size and were made by the same manufacturer as the three spent shotgun shells recovered at the scene. The two live shells bore extraction marks indicating they had been removed from the same gun as the three spent shells. Prior to the shooting, Flores had remarked that " 'we have to shoot some cops.' "

Defendants do not claim that the evidence failed to establish the three crimes of which they were convicted. Their claim is that, with the exception of the victim, the evidence is circumstantial and that the victim's testimony should not have been believed. That a portion of the evidence was circumstantial does not alter the rule that a verdict in a criminal case will not be set aside if supported by substantial evidence. *State v. Adams*, 89 N.M. 737, 557 P.2d 586 (Ct.App. 1976). The credibility of the victim was for the jury as fact finder; not this Court. *State v. Barber*, 93 N.M. 782, 606 P.2d 192 (Ct.App. 1979). We view the evidence in the light most favorable to the verdict of conviction, *State v. Lankford*, 92 N.M. 1, 582 P.2d 378 (1978), and 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. *State v. Carter*, 93 N.M. 500, 601 P.2d 733 (Ct.App. 1979). The evidence was sufficient to sustain each of the convictions.

■ (b) The eleventh witness called by the State in its case-in-chief was Detective Valdez. He testified that he remained with Lopez' car until it was taken to a storage yard and sealed as to the chain of possession of the shotgun shells, as to the lighting conditions during the search at the scene of

the shooting, and the distance from the victim's car to where the spent shells were found.

On cross-examination, Valdez admitted that prior to his testimony he was with a group of other officers who *had* testified, that there was conversation about the case. After the State had presented four additional witnesses and rested its case-in-chief, defendants moved for a mistrial on the basis that Valdez had violated the trial court's admonition to witnesses not to discuss the case. See Evidence Rule 615.

Apart from the untimeliness of defendants' motion, the trial court did not err in denying the mistrial motion. Defendants made no effort to show what the officers were discussing or whether it related in any way to the substance of Valdez' testimony. In light of the contents of Valdez' testimony, there is no basis for holding the trial court abused its discretion in denying the motion. *State v. Ortiz*, 88 N.M. 370, 540 P.2d 850 (Ct.App. 1975); *State v. Kijowski*, 85 N.M. 549, 514 P.2d 306 (Ct.App. 1973).

(c) A witness who testified to the "'we have to shoot some cops'" remark, stated that Flores made the remark in a telephone conversation. Defendants objected that there was insufficient foundation that Flores was the person speaking on the telephone. We disagree. The witness testified that he recognized that it was Flores' voice; in addition, the content of the conversation, which went to a request the witness had made to Flores, was sufficient to show that it was Flores. *State v. Wesson*, 83 N.M. 480, 493 P.2d 965 (Ct.App. 1972); see *State v. Fore*, 37 N.M. 143, 19 P.2d 749 (1933).

(d) Prior to the shooting in this case there had been an incident, at El Palacio, between Lopez and the victim. Trial testimony developed conflicting theories—that defendants were out to "get" the victim, and vice versa. This resulted in an issue as to whether Lopez or the victim started the El Palacio incident. The State called Gurule as a rebuttal witness. On direct examination, Gurule was asked to tell *what happened* at El Palacio. Gurule's answer was nonresponsive; the answer was that Lopez was drunk and Gurule smelled marijuana on Lopez. This answer was stricken and the jury admonished to disregard it. Defendants also asked for a mistrial, which was denied. Refusing to declare a mistrial because of the nonresponsive answer was not error; the admonition was sufficient. See *State v. Brewster*, 94 N.M. 783, 617 P.2d 172 (Ct.App. 1980); *State v. McFerran*, 80 N.M. 622, 459 P.2d 148 (Ct.App. 1969); compare *State v. Ruffino*, 94 N.M. 500, 612 P.2d 1311 (1980).

(e) Various claims are made as to prosecutor misconduct. None have merit.

(1) Defendants claim that the district attorney prosecuted this case for improper purposes—either because defendants were members of, or associated with, La Raza Unida, or because the parents of Lopez did not vote for the district attorney. This disregards the substantial evidence of defendants' guilt and the duty of the district attorney to prosecute. The record shows a prosecution for a proper purpose—substantial evidence of defendants' guilt.

(2) Lopez was cross-examined about an automobile collision investigated by the victim and about the El Palacio incident. On direct examination, Lopez had been asked about *all* his prior experiences with the victim. The cross-examination was proper.

(3) Flores was cross-examined as to his activities with La Raza Unida. It was not, as defendants contend, "inflammatory editorializing against" the party, nor was it editorializing in any form. The questioning was proper cross-examination, being within the scope of Flores' direct examination.

(4) In cross-examining Flores, the prosecutor did not misquote the testimony of witness Leach.

(5) Asked whether he had said, "'Let's man the battlefield'", Flores denied

making such a statement. The prosecutor then asked, " 'These days it's not "battlefield," it's "gorilla [sic] warfare"?' " Objection to the question was sustained and the jury was instructed to disregard the question. This question, unanswered, does not require reversal for a new trial; under the circumstances of this case the admonition was sufficient. *State v. Brewster*, supra; *State v. McFerran*, supra.

(6) No record of the attorney's closing arguments was made. Defendants sought a mistrial on the basis that one of the prosecutors had improperly characterized the evidence. The prosecutor argued there had been no improper characterization. Absent a record, or some agreement as to what was said, we cannot determine whether the evidence was improperly characterized. See *State v. Carrillo*, 88 N.M. 236, 539 P.2d 626 (Ct.App. 1975). Further, the trial court admonished the jury as to the evidence in a manner favorable to defendants. The failure to grant a mistrial was not error.

The judgment and sentences are affirmed.

IT IS SO ORDERED.

ANDREWS, J., concurs.

HENDLEY, J., concurs specially.

HENDLEY, Judge (specially concurring).

I concur in the result reached by the majority as to the first issue and concur in the issues answered summarily.

Defendants objected to the absence of La Raza Unida members on the jury venire. It was defendants' contention that La Raza Unida members were systematically excluded from the jury wheel because they did not vote in the previous general election because there were no La Raza Unida candidates in that election. The clerk of the court testified that names for the jury wheel were drawn from the poll books. The poll books contain the names of persons who voted in the last general election. They do not contain a party designation. The clerk of the court did not know whether or not any members of La Raza Unida had voted in the last general election or if any were on the jury wheel. Thus, there is no showing on the record that La Raza Unida members were systematically excluded by the jury selection procedure. Defendants had the burden of making such a showing. *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979).

Defendants did not object to the absence of non-voters on the jury wheel. Defendants suggested that La Raza Unida members would have been included on the jury wheel if potential jurors were drawn from lists of registered voters. That, however, did not amount to an objection to the exclusion of non-voters on the jury wheel. Whether or not non-voters are a "distinctive" group in the community is an issue not properly before this court. *Santa Fe Nat. Bank v. Galt*, 94 N.M. 111, 607 P.2d 649 (Ct.App. 1979); *Maldonado v. Haney*, 94 N.M. 335, 610 P.2d 222 (Ct.App. 1980). On that question I express no opinion. The theory upon which defendants relied at trial may not be changed on appeal, *Adoption of Doe*, 89 N.M. 606, 555 P.2d 906 (Ct.App. 1976), and even if allowed, there is nothing in the record to support such a theory.

I would affirm the trial court's ruling.

631 P.2d 1330

In the Matter of the ESTATE OF Phillip RUTHER, deceased.

Rubal RUTHER, Petitioner-Appellant,

v.

Richard RUTHER, Personal Representative-Respondent-Appellee.

No. 4899.

Court of Appeals of New Mexico.

July 2, 1981.

OPINION

SUTIN, Judge.

On November 20, 1979, Rubal Ruther filed an application for Informal Appointment of Personal Representative In the Matter of the Estate of Phillip Ruther, deceased. The application alleged that decedent, at the time of his death was domiciled in Albuquerque, Bernalillo County, New Mexico. The application stated that so far as known or ascertainable, the name and address of heir of decedent was Lena Arnett, P. O. Box 146, Haman, Oklahoma, 73650.

On December 11, 1979, the district court entered an Order for Informal Appointment of Personal Representative, naming Rubal as personal representative of the estate. The court found that venue was proper and that Rubal was unaware of any unrevoked testamentary instrument relating to property having a situs in New Mexico. Rubal accepted the appointment, letters were issued, and notice to creditors was filed and published. Rubal failed to name ten of the eleven heirs, including Richard Ruther, and no notice of the proceedings was given to any heirs.

On May 6, 1980, an Order of Consolidation was entered that certified copies of papers "In the Matter of the Estate of Phillip Ruther, Deceased . . . Curry County . . . be consolidated with" Rubal's informal proceedings.

On May 19, 1980, Richard Ruther filed a Petition for the Court to Determine the Domicile of Decedent Phillip Ruther. Richard alleged that he was a legal heir and sole devisee of a purported Last Will and Testament of Phillip Ruther, dated January 28, 1975; that Richard was without knowledge of the informal proceedings undertaken by Rubal in Bernalillo County; that Richard filed a Petition to Probate the Will in the Probate Court of Curry County; that the only action in Curry County taken was to dismiss his Petition and transfer the Will to the District Court of Curry County, on February 27, 1980.

Robert R. Fuentes, Corrales, for petitioner-appellant.

Harold O. Gore, P. C., Dan B. Buzzard, Clovis, for personal representative-respondent-appellee.

On the same day, Richard filed a Petition in the District Court of Curry County for Formal Probate and for Appointment of Personal Representative, with notice mailed and publication made. Rubal intervened and gave notice of the pending informal probate proceedings in Bernalillo County. Rubal filed a notice of improper venue on March 19, 1980, and on hearing the court held that the issue should be decided in Bernalillo County and signed an Order of Abatement and Transfer on April 20, 1980. Richard's Petition of May 19, 1980, also alleged that although decedent died in Bernalillo County on November 8, 1979, his domicile on the date was Curry County.

On June 16, 1980, Richard filed an Amended Petition for Formal Probate and Appointment of Personal Representative in Bernalillo County with notice given. On the same day, an Order Setting Date of Hearing was filed. The court ordered that the hearing be set on the "31st day of July, 1980, at 9:00 A.M. at the District Courtroom of the Curry County Courthouse, Clovis, New Mexico, before this Court."

Notice of the hearing was made by publication and made personally by mail to individual heirs and attorneys.

On June 23, 1980, an Order was filed based upon a hearing on a motion of Richard that was held on June 11, 1980. The court found that decedent was domiciled in Bernalillo County, that all probate proceedings were consolidated and that venue and jurisdiction were properly found in the District Court of Bernalillo County.

On June 24, 1980, Richard filed Demand for Jury of 12 persons.

Trial was had in Curry County. The jury brought in a verdict "that Phillip Ruther's Will was properly executed and that it was not the product of undue influence." Judgment on the Verdict was entered "that the last will and testament of Phillip Ruther, deceased, be, and it is hereby, admitted to formal probate in the above-entitled cause." Rubal appeals. We affirm.

A. *Jury trial was properly held in Curry County.*

Rubal's position appears to be that the informal probate proceedings took precedence over the formal probate of the Last Will and Testament of Phillip Ruther and, in an informal probate proceeding, no jury trial is allowed.

The informal proceeding and the formal testacy proceeding were consolidated. Before the informal proceeding could continue with administration, the validity of the Last Will and Testament of Phillip Ruther had to be determined. Rubal had to refrain from exercising any power of administration. Section 45–3–414(A), N.M.S.A.1978. To determine the validity of the Will required a hearing before a trier of the fact. This hearing was "a formal testacy proceeding," and in such a proceeding, see § 45–3–401, "[i]f demanded, in the manner provided by the Rules of Civil Procedure, a party is entitled to a trial by jury . . . ." Section 45–1–306, N.M.S.A.1978. Richard made such demand and was entitled to trial by jury, there being no issue on appeal as to the timeliness of the jury demand.

Rubal's main argument appears to be that since the trial court had entered an Order that jurisdiction and venue were in Bernalillo County, trial could not be held in Curry County. "Jurisdiction is the power to hear and determine a cause." *Rutherford v. Buhler*, 89 N.M. 594, 596, 555 P.2d 715 (Ct.App.1976).

The trial court retained jurisdiction of this case in Curry County and presided at the trial.

On the issue of venue, § 45–3–201 reads in pertinent part:

> A. Venue for the first informal or formal testacy or appointment proceedings after a decedent's death is:
>
> (1) in the county where the decedent had his domicile at the time of his death . . . .

* * * * * *

B. Venue for all subsequent proceedings is in the place where the initial proceeding occurred, unless the initial proceeding has been transferred as provided in Section 1–303 [45–1–303 NMSA 1978] . . . .

Section 45–1–303(C) reads:

If a court finds that in the interest of justice a proceeding . . . should be located in another court of New Mexico, the court making the finding may transfer the proceeding . . . to the other court.

The transfer of a proceeding to another court rests within the discretion of the trial court.

When requested to fix a time and place of hearing for adjudication of testacy, absent a finding that the proceeding should be heard in Curry County in the interest of justice, the court transferred the proceeding to Curry County. No objection was made to this Order. Rubal never objected to the absence of a finding that transfer to Curry County was in the interest of justice; such a finding was implicit in the Order of June 16, 1980, setting the matter for trial in Curry County. See *State v. Tartaglia*, 80 N.M. 788, 461 P.2d 921 (Ct.App.1969). Immediately prior to trial, Rubal asserted that the court was without jurisdiction to try the matter in Curry County. The answer is that § 45–1–303(C) authorized the trial in Curry County. This statutory authority for venue makes inapplicable cases such as *Davey v. Davey*, 77 N.M. 303, 422 P.2d 38 (1967) and *Peisker v. Chavez*, 46 N.M. 159, 123 P.2d 726 (1942).

The venue of this testacy proceeding was properly transferred to Curry County. No basis can be found upon which to hold that Richard was not entitled to trial by jury in Curry County.

B. *Substantial evidence supports the validity of the Will.*

It is Rubal's position that the purported Will of Phillip Ruther was prepared under undue influence of Richard. He also seems to contend there was a lack of proof as to due execution of the Will.

In contested cases, Richard, a proponent of the Will, had the burden of establishing prima facie proof of due execution, death and venue. Rubal, a contestant, "will have the burden of establishing . . . undue influence." Section 45–3–407. Richard easily carried his burden. Rubal did not.

For Rubal to establish undue influence means that Rubal must prove that Richard exercised "influence, improperly exerted, which acts to the injury of . . . [Phillip Ruther] swayed by it or the injury of those persons whom . . . [Phillip Ruther] would have benefited. It is immaterial whether such influence is exercised directly or indirectly." *Brown v. Cobb*, 53 N.M. 169, 172, 204 P.2d 264, 266 (1949).

The testimony was substantial that there was due execution of the Will. The testimony was such that no presumption of undue influence arose. See *Galvan v. Miller*, 79 N.M. 540, 445 P.2d 961 (1968). Even if a presumption did arise, the evidence was such that the presumption was rebutted under both Evidence Rule 301, N.M.S.A. 1978 (Supp.1980) and *Galvan v. Miller*. The issue of undue influence and a presumption of undue influence were submitted to the jury under instructions which are not attacked. There being no complaint concerning the instructions and there being evidence substantially supporting the jury's verdict, there was no error in the verdict that the Will "was not the product of undue influence."

AFFIRMED. Costs are to be paid by Rubal Ruther.

IT IS SO ORDERED.

WOOD and LOPEZ, JJ., concur.

632 P.2d 343

In the Matter of Harold E. MOTT, Attorney at Law.

No. 13477.

Supreme Court of New Mexico.

Feb. 11, 1981.

DISCIPLINARY PROCEEDING

This matter coming on for consideration by the Court at the time and place heretofore set;

AND IT APPEARING TO THE COURT that the Respondent has been notified of the time and place for this hearing and has filed no entry of appearance or other pleading showing cause why he should not be disciplined in the identical manner heretofore imposed by the Supreme Court of Arizona;

And good cause appearing;

NOW IT IS ORDERED that HAROLD EDWARD MOTT be and he hereby is suspended from the practice of law in the State of New Mexico for a period of three months, effective the 1st day of January, 1981 and thereafter until: (a) He has, pursuant to Rule 19(b) of the rules of this Court, petitioned for automatic reinstatement and filed an affidavit of compliance with all of the requirements of the Supreme Court of the State of Arizona for reinstatement in that jurisdiction, together with proof of such reinstatement; and (b) has paid all dues, disciplinary assessments and other obligations and is in good standing with respect thereto, in the Office of the State Bar of New Mexico.

632 P.2d 343

Nick A. SANCHEZ, Jr., Plaintiff-Appellee,

v.

KEMPER INSURANCE COMPANIES, Defendant-Appellant.

No. 13,076.

Supreme Court of New Mexico.

Feb. 25, 1981.

Rehearing Denied March 11, 1981.

Shaffer, Butt, Thornton & Baehr, Louise Gigson, James Johansen, William Madison, Albuquerque, for defendant-appellant.

Glass & Fitzpatrick, Charles N. Glass, Albuquerque, for plaintiff-appellee.

OPINION

FEDERICI, Justice.

This case arises out of a claim plaintiff-appellee made to his insurance company (defendant-appellant) for damages to appellee's property. Appellant moved for summary judgment which was granted. Appellee moved the court to reconsider its ruling. Upon reconsideration, the court reversed the summary judgment and certified the matter for interlocutory appeal to this Court. We reverse.

The alleged loss to appellee's property occurred on February 13, 1978, and weeks following. On August 17, 1978, appellant rejected appellee's claim. The claim was again rejected on December 26. Appellee brought suit upon the claim on March 9, 1979. Appellant's amended answer alleged the affirmative defense of failure to file suit within one year of the date of loss as required by the insurance contract. The trial judge granted summary judgment upon this defense. Appellee filed a motion to reconsider based upon *Foundation Reserve Ins. Co. v. Esquibel*, 94 N.M. 132, 607 P.2d 1150 (1980), alleging that under that case an insurance company must show both a substantial breach and prejudice to the insurer before a cooperation clause will be enforced. Appellee contended that the reasoning of *Foundation Reserve* should be extended to a time-to-sue clause as well. Since appellant insurance company had not shown any prejudice, it was not entitled to summary judgment. The trial court agreed and reversed its prior summary judgment.

Upon appeal, appellee agrees that the sole issue before this Court is whether appellant is entitled to summary judgment where appellee did not bring suit upon his claim within the period of time required by the contract and appellant did not show prejudice caused thereby.

It is the law in most jurisdictions that have considered the question that an insurance contract provision limiting the time within which a suit may be brought after damage occurs is valid and enforceable if the time period is reasonable. *Brandywine One Hundred Corp. v. Hartford F. Ins. Co.*, 405 F.Supp. 147 (D.Del.1975).

The reasonableness of such a contractual provision is usually determined by "looking at the prescribed time interval to see if it affords the insured an adequate opportunity to investigate his claim so that he can prepare for any controversy which might arise between him and his insurer. (Citation omitted.)" *Donahue v. Hartford Fire Insurance Company*, 110 R.I. 603, 605, 295 A.2d 693, 694 (1972).

Reasons for allowing such provisions to stand include public interest in prompt assertion of legal claims. *Webb v. Kentucky Farm Bur. Ins. Co.*, 577 S.W.2d 17 (Ky.App. 1978), and the possibility of fraudulent claims arising if a long period is allowed between the occurrence and the initiation of a legal claim. *Centennial Insurance Company v. Dowd's, Inc.*, 306 A.2d 648 (D.C. 1973).

In *Brandywine, supra*, the court noted two public policy reasons why time-to-sue provisions should be enforced. First, such a limitation allows an insurer to avoid uncertainty as to the amount of its liability. Certainly, it could be very burdensome for an insurer to be uncertain of its liability for an indefinite period into the future. Second, such a contractual provision allows stale claims to be cut off.

The New Mexico Court of Appeals considered such a clause in *Wiseman v. Arrow Freightways, Inc.*, 89 N.M. 392, 552 P.2d 1240 (Ct.App.1976), *cert. denied*, 90 N.M. 9, 558 P.2d 621 (1976). There, the court upheld a one-year limitation clause, stating that appellant had advanced no public policy reason why the time-to-sue provision should not be enforced.

In *Foundation Reserve, supra*, this Court considered a *cooperation* provision in an insurance contract. There, the insurance pol-

icy provided that the policy would be voided if the insured failed to notify the insurer of an accident, failed to cooperate in defending or settling a claim, or willfully concealed material facts concerning a claim. This Court held that such a cooperation provision could only be enforced upon (1) a showing of lack of coopération in some substantial and material respect, and (2) a showing of substantial prejudice to the insurer as a result of the breach. The reasoning behind the decision was that it spread the risk of liability to provide affected members of the public—frequently innocent third parties—with maximum protection without being unfair to the insurer. A number of courts have adopted this approach in recent years, as cited in *Foundation Reserve, supra.*

The purpose of a cooperation clause in an insurance contract is "to prevent collusion between the insured and the injured, as well as to make possible the insurer's investigation. (Citations omitted.)" *M.F.A. Mut. Ins. Co. v. Cheek*, 66 Ill.2d 492, 496, 363 N.E.2d 809, 811 (1977). Since the reason for such a clause is fear of prejudice to the insurer, it is reasonable to require a showing of prejudice. This is especially true when one considers that actions of this nature taken subsequent to the loss rarely increase the risk to an insurance company. *See Standard Acc. Ins. Co. v. Ponsell's Drug Stores, Inc.*, 57 Del. 485, 490, 202 A.2d 271 (1964), *questioned on other grounds, Cross v. Hair*, 258 A.2d 277 (Del.Super.1969). It has also been pointed out that requiring an insurer to show prejudice is appropriate because today's insurance contract is furnished to an insured on a take-it-or-leave-it basis. *Pickering v. American Employers Insurance Co.*, 109 R.I. 143, 282 A.2d 584 (1971).

However, the policy considerations are different for a time-to-sue provision. As set out above, time-to-sue provisions advance public policy considerations not present in cooperation provisions. Furthermore, the purpose of a time-to-sue provision is not necessarily fear of prejudice to the insured. These distinctions were persuasive to the court in *Brandywine, supra*, where the court determined that prejudice to the insurer need not be shown for a time-to-sue provision. They are also persuasive to this Court.

Where the insurer raises the affirmative defense of violation of a time-to-sue provision, it need not show that it was prejudiced by violation of the provision. It need only show the breach. The insured may still raise affirmative defenses to this claim, but none have been asserted in the present proceeding before this Court.

The trial court is reversed. This matter is remanded to the trial court for a determination of whether any affirmative defenses have been properly raised which would avoid or toll the time-to-sue provision. If such defenses have been properly raised, the cause is remanded for trial on these issues. If no such affirmative defenses have been raised, the trial court is directed to enter summary judgment for appellant insofar as the complaint on the insurance contract is concerned.

IT IS SO ORDERED.

EASLEY, C. J., and PAYNE, J., concur.

632 P.2d 345

Monte R. SINGLETERRY et al., Plaintiffs-Appellees,

v.

CITY OF ALBUQUERQUE, Defendant-Appellant.

No. 13171.

Supreme Court of New Mexico.

April 3, 1981.

William L. Kraemer and Gary Daves, Deputy City Attys., Albuquerque, for defendant-appellant.

Michael L. Danoff, Albuquerque, for plaintiffs-appellees.

OPINION

FEDERICI, Justice.

Appellees (Singleterrys) own property on which their home is located in the City of Albuquerque. Their deed to the property contains a restrictive covenant requiring them to construct a block wall at least five feet high on their property boundaries with adjoining lots. Singleterrys constructed a wall eight feet high. A City zoning ordinance applicable to this area apparently limits fence or wall heights to eight feet.

Singleterrys built a tennis court in their back yard and then applied for a variance to allow them to build a chainlink fence thirteen feet high along a side boundary of their property for the width of one end of the tennis court. The application was eventually granted, with the City Council allowing a chainlink fence twelve feet high. However, it imposed the conditions that: (1) the fence had to be a clear chainlink fence, and (2) the block wall had to be lowered to a height of forty-two inches. The Commissioners felt this would create a workable compromise for the adjoining landowner, who protested the variance. Singleterrys did not appeal this decision.

About eleven months after the variance was granted, Singleterrys constructed the twelve-foot high chainlink fence, but did not lower the height of the block wall. They subsequently applied for another variance, requesting a twelve-foot high chainlink fence without the condition to lower the height of the wall. The application was denied at all administrative levels. Singleterrys then petitioned for a writ of certiorari to the district court pursuant to Section 3–21–9, N.M.S.A. 1978. The trial court reversed the prior administrative decisions and ordered the City to allow the variance without imposition of the condition to lower the wall. The City appeals. We reverse.

The issues we discuss on appeal follow:

I. Whether the trial court could give any weight to the restrictive covenants in making its decision.

II. Whether the City could properly attach conditions to the variance granted.

III. Whether the trial court correctly found that the City Council had abused its discretion.

I.

THE TRIAL COURT COULD NOT CONSIDER THE RESTRICTIVE COVENANTS IN MAKING ITS DECISION.

The trial court made the following finding of fact:

> 22. That Section VI of the purchase agreement with Affiliated Mortgage & Development Company for which the property subject to [sic] in this action states:
>
> > It is agreed that the purchaser shall construct block walls on the property lines of each lot that shall have been purchased hereunder and upon which a dwelling has been constructed. Said wall shall be a minimum of five feet.

Based in part upon this finding, the trial court concluded:

> 3. That the Environmental Planning Commission will not be allowed to interfere with Plaintiffs/Appellants' right to freely contract and have a wall eight feet high as well as a chainlink fence and that further Plaintiffs/Appellants need not reduce the wall to a height of 42 inches but may maintain the wall at its present height of eight feet measured from Plaintiffs/Appellants' side of the property.

■ It is well established that zoning ordinances cannot relieve private property from valid restrictive covenants if the ordinances are less stringent. *Ridge Park Home Owners v. Pena*, 88 N.M. 563, 544 P.2d 278 (1975). However, it is equally well-settled that restrictive covenants do not control a decision on the question of whether a *variance* should be granted by a zoning authority in a *variance proceeding*.

■ Only private parties possess the right to enforce restrictive covenants. *Suess v. Vogelgesang*, 151 Ind.App. 631, 281

N.E.2d 536 (1972); *Whiting v. Seavey*, 159 Me. 61, 188 A.2d 276 (1963); *In Re Michener's Appeal*, 382 Pa. 401, 115 A.2d 367 (1955). *See also* R. M. Anderson, *3 American Law of Zoning 2d* § 18.75 (1977). *But cf. Francis v. Rios*, 350 F.Supp. 1130 (D.V.I. 1972), where the court stated that the Planning Board should confine its discretion in granting exceptions to situations where restrictive covenants do not create a bar.

In *In Re Michener's Appeal, supra*, the court stated:

> Zoning laws are enacted under the police power in the interest of public health, safety and welfare; they have no concern whatever with building or use restrictions contained in instruments of title and which are created merely by private contracts. If these applicants were to succeed in obtaining a variance relieving them from the restrictions of the zoning ordinance they would still be subject to the restrictions contained in their deeds, but the enforcement of those restrictions could be sought only in proceedings in equity in which the grantors, their representatives, heirs and assigns, would be the moving parties.

Id., 382 Pa. 401, 115 A.2d at 369.

In *Whiting v. Seavey, supra*, the court was faced with a situation similar to ours here. The court found:

> When the condition or terms of a zoning law are repugnant to those contained in the restrictive covenants in a deed of title the remedy for a breach is not through the prescribed procedure of the zoning law but rather by an action based on a breach of covenant.
>
> In the case at bar the appellants do not contend that the Board of Appeals abused its discretion or was in error factually but only that its decision was invalid because of the existence of the restrictive covenants.
>
> The Board of Appeals had the legal right to grant the exception.

Id., 159 Me. 61, 188 A.2d at 280–81.

The logic behind this reasoning is explained in *In Re Michener's Appeal, supra*:

> The fact that there were building restrictions in the deeds was wholly irrelevant in the appeal before the court on the question whether a variance should have been granted by the Board under the zoning ordinance. The private parties who alone possessed the right to enforce those restrictions were not before the court. It might be that they would never seek such enforcement, or that for some reason they had waived or lost their right so to do, or that, because of neighborhood changes or because the restriction had ceased to be of advantage to the covenantees, the restriction would no longer have been enforceable. Accordingly it has been uniformly held that any consideration of building restrictions placed upon the property by private contract has no place in proceedings under the zoning laws for a building permit or a variance. (Footnote and citations omitted.)

Id., 382 Pa. 401, 115 A.2d at 370.

Thus, Singleterrys were faced with two choices when the variance was granted: (1) they could elect not to proceed under the variance; or (2) they could proceed under the variance and risk defending a lawsuit for violation of restrictive covenants.

While we think a zoning authority should consider restrictive covenants in a variance proceeding, as was suggested in *Francis v. Rios, supra*, the zoning authority is not bound by restrictive covenants in granting a variance. Here, there is evidence in the record showing that the zoning authority knew of the restrictive covenants, yet determined to impose conditions on the variance which would violate the restrictive covenants. Nonetheless, it was within the Commission's discretion to do so.

It was error for the trial court to give conclusive weight to the restrictive covenants in making its decision.

II.

A ZONING AUTHORITY MAY ATTACH CONDITIONS TO A VARIANCE.

Singleterrys concede that cities have the power to impose reasonable conditions on variances. Such conditions are allowed by statute. Section 3–21–8, N.M.S.A. 1978

(Cum.Supp. 1980), provides that a zoning authority may:

> (1) authorize in appropriate cases and subject to appropriate conditions and safeguards, special exceptions to the terms of the zoning ordinance or resolution:
>
> (a) which are not contrary to the public interest;
>
> (b) where, owing to special conditions, a literal enforcement of the zoning ordinance will result in unnecessary hardship; and
>
> (c) so that the spirit of the zoning ordinance is observed and substantial justice done.

In this case, the trial court found that Singleterrys applied for a variance requesting a standard twelve-foot chainlink fence. The variance granted was for an open chainlink fence and there could be no vines or other foliage so as to impair one's aesthetic view. Although the City had at some previous time approved the existent eight-foot high block wall, the condition imposed required this wall to be reduced to a height of forty-two inches.

Based upon these facts found by the trial court, the conditions imposed meet the criteria set forth in Section 3–21–8. Singleterrys do not attack this. Rather, they argue that conditions imposed cannot require illegal conduct. *Gerla v. City of Tacoma*, 12 Wash.App. 883, 533 P.2d 416 (1975). We agree. However, we have not been directed to any law making it illegal to reduce a wall height to forty-two inches. Even if such conduct were illegal, Singleterrys were not required to comply with the variance. They could have done nothing at all.

The conditions imposed by the Environmental Planning Commission here were within the standards set forth in Section 3–21–8, and could be properly imposed.

III.

THE ZONING AUTHORITY DID NOT ABUSE ITS DISCRETION.

The standard of the district court's review of the zoning authority's decision is explained in *Llano, Inc. v. Southern Union Gas Co.*, 75 N.M. 7, 11, 399 P.2d 646, 649 (1964), quoted with approval in *Coe v. City of Albuquerque*, 76 N.M. 771, 774, 418 P.2d 545–48 (1966):

> [T]he questions to be answered by the court are questions of law and are restricted to whether the administrative body acted fraudulently, arbitrarily or capriciously, whether the order was supported by substantial evidence and, generally, whether the action of the administrative body was within the scope of its authority. The district court may not substitute its judgment for that of the administrative body.

It does not matter what the judgment of the trial court would have been when presented with a request for a variance. So long as the zoning authority's decision was not fraudulent, arbitrary or capricious, it must stand. *Coe v. City of Albuquerque, supra.*

While the trial court could consider the restrictive covenants involved here, there is no other evidence found by the trial court to constitute arbitrary or capricious conduct by the zoning authority. Violation of restrictive covenants alone is not a sufficient basis for finding an abuse of discretion in a variance proceeding. Apparently the trial judge was of the view that in variance proceedings the zoning authority could not impose conditions which conflict with the restrictive covenants.

We have considered other issues raised on appeal and deem it unnecessary to address them in light of our disposition of the issues above.

The trial court is reversed. Judgment should be entered sustaining the decision of the zoning authority in this matter.

IT IS SO ORDERED.

EASLEY, C.J., and RIORDAN, J., concur.

632 P.2d 350

EL PASO ELECTRIC COMPANY et al., Plaintiffs-Appellants,

v.

Stewart M. PINKERTON, Jr., et al., Defendants-Appellees.

No. 13167.

Supreme Court of New Mexico.

April 21, 1981.

Martin, Martin, Lutz & Cresswell, Stephen A. Hubert, James T. Martin, Las Cruces, for plaintiffs-appellants.

Bivins, Weinbrenner, Regal, Richards & Paulowsky, William W. Bivins, Neil Weinbrenner, Campbell, Reeves, Burn, Dolan & Burn, T. K. Campbell, Las Cruces, for defendants-appellees.

OPINION

PAYNE, Justice.

Three public utilities sought to condemn certain lands of seven defendants for the purpose of constructing transmission lines. The jury returned a consolidated condemnation award for the defendants in the amount of $203,000.00. El Paso Electric appealed. It raises four points on appeal: (1) that the court erred in giving a jury instruction which allowed the jury to consider loss of crops as an element of special damages; (2) that the court erred in refusing to permit El Paso Electric's witness to give rebuttal testimony as to the value of the land after the construction of the transmission lines; (3) that the court erred in giving a non-uniform instruction, and (4) that the court abused its discretion by allowing the defendants to recover separate costs for the use of the same expert witness. We affirm the trial court on all points.

We hold that the trial court did not commit error in giving an instruction that allowed the jury to consider loss of crops as an element of special damages. The challenged instruction, adapted from N.M.U.J.I.Civ. 7.10, N.M.S.A.1978 (Repl. Pamp.1980), stated:

> In addition to determining the value of the land taken, you may consider the following items of special damages claimed by the landowner:
>
> (a) Loss of damage to or decrease in yield of crops of Defendants Gray, Hernandez, Brooks and Perea.

Where there is only a partial taking of land in an eminent domain action the measure of damages is the difference in the value of the property immediately before and the value immediately after the taking. *Board of Trustees v. B. J. Service, Inc.*, 75 N.M. 459, 406 P.2d 171 (1965); *Board of County Com'rs v. Slaughter*, 49 N.M. 141, 158 P.2d 859 (1945). This "before and after" rule is designed to compensate the landowner for the diminution in the fair market value of the land caused by the taking. The value of the land is determined by examining what an unobligated, willing purchaser would pay. *Board of Trustees v. B. J. Service, Inc., supra.* The challenged instruction allowing the jury to consider crop damage as an element of special damages is not inconsistent with this "before and after" rule.

In this case certain of the defendants claimed damage in addition to the mere taking of land. These additional damages resulted from the loss of several cuttings of their alfalfa crop caused by the construction of the transmission lines. This loss was properly considered special or consequential damages. An existing crop is a condition which a willing, unobligated buyer would consider in arriving at a price for the property. Therefore, crop damages of this type may be included in a condemnation award. The court did not err in giving the requested instruction and allowing the jury to consider crop damage.

The trial court did not commit error or abuse its discretion in refusing to allow Ronald Crouse to testify. Mr. Crouse's testimony was excluded for two reasons. The trial court has broad discretion in the exclusion or admission of testimony concerning purchases of property made subsequent to a condemnation proceeding. *See State ex rel. State Highway Commission v. Bassett*, 81 N.M. 345, 467 P.2d 11 (1970). Mr. Crouse had previously been a defendant in this condemnation suit but had settled prior to trial. He purchased a number of tracts of land involved in the

condemnation proceeding from other landowners who had also settled with El Paso Electric. He could have testified only as to purchases of property made after the condemnation action. Mr. Crouse was not listed in the pre-trial order as a prospective witness. We have held that it was an abuse of discretion for the trial court to allow a witness to testify in a condemnation proceeding who had not been listed in the pre-trial order. *State ex rel. S. Hwy. Dept. v. Branchau*, 90 N.M. 496, 565 P.2d 1013 (1977). El Paso Electric argues that Mr. Crouse should have been allowed to testify even though he had not been listed in the pre-trial order because his testimony was "rebuttal" testimony and not part of its case-in-chief. El Paso Electric cannot escape a requirement imposed by the pre-trial order by simply labeling Mr. Crouse's testimony as "rebuttal." It knew that the defendants would offer evidence relating to the fair market value of their property after the taking. There was a sufficient basis for the trial court to exercise its discretion in holding Crouse's testimony inadmissible.

The defendants' third point of error is that the trial court abused its discretion by using a non-uniform jury instruction. This challenged instruction reads:

> In determining the fair market value of the property after the taking, you should consider the value of the land actually taken and the damage, if any, to the remaining land not taken but injuriously affected.

While this particular instruction is ambiguous and obscures the "before and after" formula for measuring damages, we do not feel it was prejudicial to the plaintiffs. The challenged instruction was given as an aid in the determination of the fair market value of the land. Other instructions properly defined the "before and after" measure of damages. An unnecessary and non-prejudicial instruction is not grounds for reversal if it does not mislead the jury. *See generally Mining Co. v. Hendry*, 9 N.M. 149, 50 P. 330 (1897). Here we do not find that the jury was misled.

We also affirm, without discussion, the trial court's award for expert witness fees. Section 38–6–4(B), N.M.S.A.1978 allows district judges to award additional compensation for expert witnesses' investigation and preparation prior to testifying. The fee for these services "may be allowed by the court to the prevailing party [but] shall not exceed seven hundred fifty dollars ($750)."

For the foregoing reasons we affirm the trial court on all points and remand for entry of judgment consistent with this opinion.

IT IS SO ORDERED.

SOSA, Senior J., and FEDERICI, J., concur.

632 P.2d 352

Betty MONTERO, Petitioner-Appellee,

v.

Larry MONTERO, Respondent-Appellant.

No. 13296.

Supreme Court of New Mexico.

April 23, 1981.

Payne, Mitchell & Quigley, Gary C. Mitchell, Ruidoso, for respondent-appellant.

Bowen & Shoesmith, Peggy A. Bowen, Alamogordo, for petitioner-appellee.

OPINION

RIORDAN, Justice.

Petitioner and respondent were divorced on December 8, 1979. There was a stipulation signed the same day that addressed the custody and visitation of the two minor children of the parties and set out specific, well defined visitation rights of the respondent. The final divorce decree stated, *inter alia*, that the wife was to have legal custody of the children and that the husband was to have specified rights of visitation with his children which included two months visitation in the summer. In addition, the parties stipulated that they were both fit and proper parents. Seven months after the divorce, the respondent filed a motion to enforce his visitation rights or in the alternative to find petitioner in contempt of court for failure to follow the provisions of the final decree relating to visitation. The morning of the hearing, petitioner's attorney requested a modification of the visitation schedule, setting forth the reason that petitioner had removed herself from Roswell, New Mexico to Irving, Texas. Respondent is a resident of Ruidoso, where both parties resided at the time of the divorce.

The district court granted the petitioner's motion to amend summer visitation rights. The court, based upon petitioner's testimony found that although the parties had agreed to the visitation of two months in the summer, it was contemplated by the parties that they would continue residing in the same general vicinity after the divorce. The court also found that there was a material change in circumstances whereby the district court could, as a matter of law, alter its previous order concerning visitation.

The sole issue for consideration is whether, for the purpose of visitation rights, it is considered a "sufficient change of circumstances" when a custodial parent voluntarily leaves the locality in which she and her former husband were living at the time of the divorce and establishes a new residence elsewhere with their children. The district court found that this was a sufficient change of circumstances. We reverse.

Both sides rely on *Kerley v. Kerley*, 69 N.M. 291, 366 P.2d 141 (1961), in support of the proposition that any change in the visitation rights provisions of a divorce decree must be predicated upon the best interests of the children and must result from a substantial or material change of circumstances. The question is whether the same standard that is applied in changes in custody situations is applied to cases involving visitation modification. The *best interest* standard is always applied to custody matters, and it is to be applied in all matters dealing with the well-being of minor children. This standard is, in reality, the controlling standard which is applied in *all* matters involving minor children of divorced parents. As for the change in circumstances requirement, *Kerley, supra*, held that it is a necessary element in determining whether or not visitation should be modified or terminated. In *Kerley*, the trial court denied a change in visitation requested by a father who had moved to another community. The court also denied the mother's request to terminate the father's visitation. This court upheld the trial court's rulings denying both motions.

No other New Mexico case concerning visitation privileges and the standard to be applied in such cases was cited to this Court. However, a number of other jurisdictions have addressed this issue.

> Visitation is not solely for the benefit of the adult visitor but is aimed at fulfilling what many conceive to be a vital, or at least a wholesome contribution to the child's emotional well-being by permitting partial continuation of an earlier established close relationship.

Looper v. McManus, 581 P.2d 487, 488 (Okl. Ct.App.1978). We wholeheartedly agree with this view and believe that the original decree would accomplish this end. We fail to see in this case how reducing a father's visitation rights can benefit either the respondent or his children.

There is nothing in the final decree to suggest that the visitation rights granted to the husband were only intended to be binding on the wife as long as both parties remain in the same general vicinity. In any event, it was not the husband who moved to another locality, it was the wife who voluntarily did so. It was she who took the children away and thus increased the physical distance between the children and their father. In addition, the present arrangement imposes a heavier financial burden only on the husband in his effort to see his children than would have been experienced had no move taken place. He had agreed at the time the decree was entered to pay for transportation expenses for the children. Under the circumstances, we do not perceive how the petitioner can now be heard to complain that what was written in the decree, and agreed to by both parties should now be changed just because or her move, absent some other compelling interest.

If we were to accept the petitioner's premise that a voluntary move of one party from the vicinity where the other resides is in and of itself a sufficient change to justify reducing visitation, it would provide a method for any party to undermine child visitation provisions of a divorce decree at their whim. Such an inequitable result cannot be tolerated. While it is true that, in the sound exercise of its discretion, the trial court has the authority to modify its previous orders relative to custody and visitation upon a showing of circumstances warranting a change in the best interests of the children, *Bernick v. Bernick*, 31 Colo.App. 485, 505 P.2d 14 (1972), here the record shows no substantial change bearing upon the necessity or the justice of modifying the provisions regarding visitation. We hold that the trial court abused its discretion in modifying its previous order.

The trial court is reversed, and this case is remanded with instructions to proceed in a manner consistent with this opinion.

IT IS SO ORDERED:

PAYNE and FEDERICI, JJ., concur.

632 P.2d 354

STATE of New Mexico, Petitioner,

v.

Frank SANTILLANES, Respondent.

No. 13470.

Supreme Court of New Mexico.

June 29, 1981.

Jeff Bingaman, Atty. Gen., Arthur Encinias, Asst. Atty. Gen., Santa Fe, for petitioner.

Martha A. Daly, Appellate Defender, Lynne Corr, Asst. Appellate Defender, Santa Fe, for respondent.

OPINION

EASLEY, Chief Justice.

Santillanes pled guilty to three counts of trafficking in heroin, after the trial judge sustained a defense motion to strike "the enhancement penalty (if any)" with prejudice. The State appealed; the Court of Appeals reversed. We granted certiorari and certified the case back to the Court of Appeals, which affirmed the trial court's decision. Application for certiorari was again made and granted, and we now reverse.

The issue is whether it is mandatory that prior trafficking convictions be charged and enhancement of sentence be demanded before the defendant starts serving time on the most recent convictions, or may the State file enhancement charges after conviction and sentence on the new charges.

The indictment did not call for an enhanced penalty. However, Santillanes filed a motion "to strike the enhancement penalty (if any) contained in the indictment. . . ." He asserted that the indictment did not charge that he was subject to an enhanced sentence and that his prior federal conviction could not be counted as a prior offense. The State had not filed any other enhancement charge. The trial judge ordered the enhancement proceedings "dismissed with prejudice", although Santillanes had not asked for the "with prejudice" portion.

Thereafter, with the State objecting to the proceedings, the trial court accepted guilty pleas on the three counts and gave Santillanes a suspended sentence.

Section 30–31–20(B), N.M.S.A.1978, provides for an enhanced sentence for second and subsequent convictions of trafficking controlled substances. Prior to its amendment in 1980, the statute did not provide any procedures for imposition of an enhanced sentence. In *State v. Rhodes*, 76 N.M. 177, 413 P.2d 214 (1966), this Court held that due process requires that defendant be given notice that enhancement of sentence is sought by a pleading filed by the State and an opportunity to be heard before an increased penalty can be imposed. However, *Rhodes* does not address the issue as to when the charges must be filed.

Santillanes contends that any enhancement proceeding brought after he has begun serving his sentence on the most recent convictions would violate his constitutional guarantees of due process and against double jeopardy. This contention is foreclosed by our recent opinion in *State v. Stout*, N.M., 627 P.2d 871 (1981). In *Stout* we held that the enhancement of a sentence under these circumstances violates neither the right of due process nor the right against double jeopardy, even in the absence of statutory authorization of such a procedure.

We hold that the trial court erred in dismissing any enhancement proceedings with prejudice as there is no constitutional or statutory bar to the procedure. Part II of the Court of Appeals opinion in *State v. Santillanes*, 20 N.M.St.B.Bull. 163, (1980), is reversed; Part I of that opinion, which held that the State had the right to appeal, is unaffected by this opinion.

IT IS SO ORDERED.

PAYNE, FEDERICI and RIORDAN, JJ., concur.

SOSA, Senior Justice, not participating.

632 P.2d 356

The CITY OF CLOVIS, New Mexico, a municipal corporation, Plaintiff-Appellant,

v.

G. C. WARE and Kitty Lee Ware, husband and wife, and All Unknown Claimants of Interest in the Premises Adverse to the Plaintiff, Defendants-Appellees.

No. 13457.

Supreme Court of New Mexico.

Aug. 13, 1981.

Harry L. Patton, Clovis, for plaintiff-appellant.

Walker & Tatum, Lyle Walker, Clovis, Hinkle, Cox, Eaton, Coffield & Hensley, Harold L. Hensley, Richard E. Olson, Roswell, for defendants-appellees.

OPINION

FEDERICI, Justice.

City of Clovis (appellant), initiated an action in eminent domain to take a portion of Ware's (appellees') property for the purpose of constructing a sewage disposal plant for appellant. The condemnation action involved 120 acres of a 360–acre tract owned by appellees. The jury returned a verdict for appellees and the trial court entered judgment for appellees. We affirm.

Evidence was introduced and presented to the jury on diminution in value of appellees' remaining land caused by the fact that the condemned land was to be used as a sewage treatment facility. Expert testimony as to damages to appellees ranged from $148,000 to $347,750. The jury found appellees' damages to be $250,000. Subsequent to trial, a member of the jury panel who did not actually serve on the jury signed an affidavit to the effect that during voir dire one of the members who eventually did serve on the jury had told the affiant that she was a friend of appellees. This information was not divulged to the court.

Appellant raises three issues on appeal:

I. Whether there was sufficient evidence to support the jury's verdict;

II. Whether the verdict is invalid due to bias and prejudice of a juror; and

III. Whether the jury could properly consider diminution in value to appellees' remaining land brought about by the fact that a sewage disposal plant was to be placed on that portion of the land which had been condemned.

I.

The parties agree that the proper measure of damages in eminent domain proceedings where there is a partial taking is the difference between the value of the tract immediately before the taking and immediately after the taking. Section 42–1–10, N.M.S.A.1978. *See Board of Trustees v. B. J. Service, Inc.*, 75 N.M. 459, 406 P.2d 171 (1965). The value of the property is determined by considering not merely the uses to which it was applied at the time of condemnation, but the highest and best uses to which it could be put. *City of Albuquerque v. Chapman*, 76 N.M. 162, 413 P.2d 204 (1966).

Appellant argues that there is no substantial evidence to show that appellees' property was suitable for rural homesites, nor was there substantial evidence of the sale of homesites in the area where the condemnees' property was located. We disagree. There is considerable evidence in the record concerning sale of rural homesites in the rural areas in the vicinity of Clovis. Appellant's own expert witness testified concerning sale of two homesite lots just east of appellees' property. Appellant's expert also testified that part of appellees' property was suitable for homesites. The only conflict in this regard among the experts was the extent of acreage suitable for homesite development. Substantial evidence means sufficient relevant evidence for a reasonable mind to accept as adequate to support a conclusion. *Toltec Intern., Inc. v. Village of Ruidoso*, 95 N.M. 82, 619 P.2d 186 (1980). There is substantial evidence in the record to support the jury's verdict.

II.

On voir dire, part of the jury panel was placed in the jury box and the remainder was placed in the front row of the room. According to an affidavit submitted by a member of the panel, one of the jurors who was chosen to serve on the jury stated that she was "very good friends" with the appellees. The fact was never made known to the judge or attorneys due to some confusion over the placement of jurors in two locations in the courtroom.

The record shows that a general question was directed to the entire jury concerning ability to sit and render a fair and impartial

verdict. The juror in question did not indicate any problems in this regard.

We agree that parties to a lawsuit are entitled to an impartial jury. *See State v. Cutnose*, 87 N.M. 300, 532 P.2d 889 (Ct. App.1975). The burden of establishing partiality is upon the party making the claim. *See Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1960); *State v. Cutnose, supra*; and *State v. Ford*, 81 N.M. 556, 469 P.2d 535 (Ct.App.1970). Where the evidence of alleged partiality is accepted as true but is insufficient to establish the claim made, the failure of proof requires that the relief be denied. *State v. Chavez*, 78 N.M. 446, 432 P.2d 411 (1967).

Here, even if we consider the affidavit as true, it does not establish the partiality of the juror. It shows that the juror was a friend of the appellees. Friendship alone is not sufficient to show that the juror was biased. *See State v. Ford, supra.*

In any event, we note the long established rule in New Mexico that affidavits of jurors presented after the jury has been discharged cannot be considered for purposes of impeaching a verdict. *Skeet v. Wilson*, 76 N.M. 697, 417 P.2d 889 (1966). While the affidavit in this case was submitted by a member of the jury *panel* and not a member of the jury which actually heard the case, the public policy reasons for not allowing consideration of the affidavit are similar. *See Goldenberg v. Law*, 17 N.M. 546, 131 P. 499 (1913). At the time the juror made the remarks, all of the members of the panel had been sworn and the panel was undergoing voir dire. This situation is not sufficiently distinguishable from one where the jury has already begun to hear a case to warrant a different conclusion.

III.

Appellant contends that the jury should not have been allowed to hear or consider evidence concerning the use to which the condemned property was to be put in determining damages to the remainder of appellees' tract, relying upon *Aguayo v. Village of Chama*, 79 N.M. 729, 449 P.2d 331 (1969). In *Aguayo*, the Village of Chama constructed a sewage disposal plant near Aguayo's home. No direct condemnation was involved. Chief Justice Noble stated that the "mere location of the treatment plant in the neighborhood or plaintiffs' land gives rise to no cause of action unless it is a nuisance per se." *Id.* at 730, 449 P.2d at 332. The sewage plant was not a nuisance per se because it was possible to eliminate all offensiveness. Therefore, consequential damages were not available.

The present case involves condemnation proceedings. It does not involve nuisances to adjoining landowners. *Aguayo* is not applicable. Section 42–1–10 states that "all elements which would enhance or dimish [diminish] the fair market value before and after the taking shall be considered even though some of the damages sustained by the remaining property, in themselves, might otherwise be deemed noncompensable."

It is clear that the statute requires the trial court to consider any diminution in the fair market value of the remaining property which occurs as a result of the placement of a sewage treatment facility on the condemned portion of the tract. Expert testimony was introduced into evidence showing that placement of a sewage facility, regardless of whether noxious odors came from the facility, would diminish the value of appellees' remaining land. There is substantial evidence to support the verdict of the jury and the judgment of the trial court.

The trial court is affirmed.

IT IS SO ORDERED.

SOSA, Senior Justice, and RIORDAN, J., concur.

632 P.2d 359

STATE of New Mexico,
Plaintiff-Appellant,

v.

Frank SANTILLANES,
Defendant-Appellee.

No. 4528.

Court of Appeals of New Mexico.

March 25, 1980.

Opinion on Certification Dec. 16, 1980.

Jeff Bingaman, Atty. Gen., Sammy Lawrence Pacheco, Asst. Atty. Gen., Santa Fe, Art Encinias, Asst. Atty. Gen. (Opinion on Certification) Santa Fe, for plaintiff-appellant.

John L. Walker, William D. Teel, Teel & Walker, P. A., Albuquerque, John B. Bigelow, Chief Public Defender, Lynn Corr, Asst. Appellate Defender, (Opinion on Certification) Santa Fe, for defendant-appellee.

MEMORANDUM

HENDLEY, Judge.

The State appeals from an order of the district court striking the enhancement clause from the indictment and "the enhancement proceeding is dismissed with prejudice." We proposed summary affirmance of the Court's order on the basis that the notice required under the Controlled Substances Act for enhancement had not been provided to the defendant. § 30–31–20(B), N.M.S.A. 1978; *State v. Rhodes*, 76 N.M. 177, 413 P.2d 214 (1966); *State v. Garduno*, 93 N.M. 335, 600 P.2d 281 (1979). Except for the assertion of State's counsel that oral notice was given the defendant, there is no indication in the record that notice was given by "some pleading filed by the State, whether by motion or otherwise" that enhancement would be sought. On its face, the indictment provides no such notice. Compare *State v. Garduno*, supra.

It is our conclusion, therefore, that the trial court, in effect, was striking the State's oral assertion that it would seek enhancement *in that proceeding*. Due to the lack of notice discussed above, the trial court was correct in so ruling.

State v. Rhodes, supra recognized that a comparison and application of the procedure mandated by the Habitual Criminal Act to the Narcotic Drug Act is unjustified due to the specific legislative directives provided in the former act and which direction is lacking in the latter act. See § 31–18–7, N.M.S.A. 1978 (repealed July 1, 1979); § 31–18–20, N.M.S.A. 1978 (Supp.1979); *State v. Soliz*, 79 N.M. 263, 442 P.2d 575 (1968); *Lott v. Lox*, 76 N.M. 76, 412 P.2d 249 (1965). Nonetheless, *Rhodes* held that notice and opportunity to be heard before an increased penalty could be imposed were required as a matter of fundamental fairness—due process. *Rhodes* thus states the minimum requirement. By legislative enactment, additional requirements are mandated by the Habitual Criminal Act. *Rhodes* does not

preclude the State from following such additional procedures when prosecuting a "second" drug offense. See *State v. Chavez*, 79 N.M. 741, 449 P.2d 343 (Ct.App. 1968).

Therefore, we hold that the State may file a supplemental information charging a second violation of the Controlled Substances Act against a defendant, subsequent to the defendant's conviction on the second. Therefore, only that aspect of the trial court's order striking the enhancement provision "with prejudice" is reversed.

IT IS SO ORDERED.

LOPEZ and WALTERS, JJ., concur.

OPINION ON CERTIFICATION

WALTERS, Judge.

Two questions in this matter are certified to us by the Supreme Court which granted certiorari to defendant when we denied his motion for rehearing. Those questions are:

1. Whether the state had the right to appeal the decision of a trial court's striking any enhancement of sentence with prejudice after the trial court had sentenced the petitioner for the current charges in the indictment;

2. Whether the Court of Appeals erred in holding that the double jeopardy clause of the New Mexico Constitution and the United States Constitution did not preclude the state from filing a supplemental information charging a second violation of the Controlled Substances Act after petitioner had already been sentenced by the trial court for the original charges contained in the indictment.

This certification arose from our memorandum opinion of March 25, 1980, affirming the trial court's striking of the enhancement clause from the indictment. We reversed that portion of the court's order which struck the clause "with prejudice" and held that the State could file a supplemental information charging a second violation of the Controlled Substances Act, under which enhancement could be sought.

We respond to the two questions certified, in order.

I.

Article VI, § 2 of the New Mexico Constitution, before amendment in 1965 read:

> The appellate jurisdiction of the Supreme Court shall be co-extensive with the state, and shall extend to all final judgments and decisions of the district courts, and said court shall have such appellate jurisdiction of interlocutory orders and decisions of the district courts as may be conferred by law.

The section was wholly amended in 1965, and since then has read:

> Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as may be provided by law; provided that an aggrieved party shall have an absolute right to one appeal.

Defendant argues that the State is limited to the type of criminal appeals specifically set out in § 39–3–3 B, N.M.S.A.1978, which provides:

> B. By the state. In any criminal proceeding in district court an appeal may be taken by the state to the supreme court or court of appeals, as appellate jurisdiction may be vested by law in these courts.
>
> (1) within thirty days from a decision, judgment or order dismissing a complaint, indictment or information as to any one or more counts;
>
> (2) within ten days from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property, if the district attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

It is true that forerunners of the present statute provided that the state should "only" be allowed an appeal for alleged errors similar to those in the current stat-

ute. *See* §§ 4517, 4519, 1915 Code (1907 N.M.Laws, ch. 57, § 48); § 42–1503, N.M.S.A.1941; § 41–15–3, N.M.S.A.1953, repealed by 1966 N.M.Laws, ch. 28, § 65. In 1966 the legislature enacted § 21–10–2.1 B, N.M.S.A. 1953 (1966 N.M.Laws, ch. 28, § 36), which restated the several instances in which the State could appeal a criminal matter, but omitted the word "only" in the new act. In 1972, the section was again repealed, and a new § 21–10–2.1 B, N.M.S.A.1953, which is now § 39–3–3 in the 1978 compilation, was enacted under 1972 N.M.Laws ch. 71, § 2. Again the word "only" was left out. Thus, cases decided before 1965 when the constitution was amended, or 1966 when the statute omitted "only," are not pertinent to the question of the State's right to appeal criminal matters in 1980.

In 1969 the Supreme Court held that the State had no right to seek review, by certiorari, of the Court of Appeals' reversal of a criminal conviction. It reasoned that an appeal by the State to the Supreme Court, after a criminal trial, was not included in the provisions of § 21–10–2.1, *supra*, and that the State "should not be permitted to accomplish by certiorari what it cannot do by appeal." *State v. Paul*, 80 N.M. 746, 747, 461 P.2d 228 (1969). That result accorded with earlier New Mexico precedent, decided under the earlier statutes and constitutional provision we have referred to. *See State v. Ashcraft*, 32 N.M. 209, 252 P. 1001 (1927); *State v. Dallas*, 22 N.M. 392, 163 P. 252 (1917); *Ex parte Carrillo*, 22 N.M. 149, 158 P. 800 (1916); *State v. Chacon*, 19 N.M. 456, 145 P. 125 (1914).

However, in 1973 *State v. Paul, supra*, was overruled to the extent that it prohibited the State from seeking, and the court from granting, a writ of certiorari to review the Court of Appeals' decision in a criminal case, if other certiorari requirements of § 34–5–14, N.M.S.A.1978 (then § 16–7–14, N.M.S.A.1953), were met. *State v. Gunzelman*, 85 N.M. 295, 512 P.2d 55 (1973). *Gunzelman* further held that the Supreme Court's "original jurisdiction to issue writs of certiorari, as provided for in art. VI, § 3 . . . leaves no doubt as to the power of the Court to issue such writs." (85 N.M. at 299, 512 P.2d 55)

Certain language of *Gunzelman, supra*, seems to imply that the State's right to appeal a criminal matter in the first instance is restricted to those circumstances provided in § 39–3–3, *supra:*

> ". . . [T]here is no reason to assume that the legislature, *in limiting the State's right to appeal in a criminal case*, intended a like limitation in the granting of a writ of certiorari." (Emphasis added.) (85 N.M. at 298, 512 P.2d 55)

We note, however, that the question in *Gunzelman* was not concerned with whether the State's right to bring an appeal in a criminal matter was restricted, but whether the State could request and obtain certiorari from a decision of the Court of Appeals in a criminal appeal. Thus, the emphasized language may have been inadvertent. We note further that the constitutional provision of art. VI, § 2, was referred to only in the context of the Supreme Court's appellate jurisdiction "as may be provided by law"; the last sentence of the section granting to an aggrieved party an "absolute" right to one appeal was not discussed. Nor was there any reason to discuss it within the compass of the matter decided in *Gunzelman*. But we are now squarely faced with this issue by the first question certified to us by the Supreme Court.

We have just recently decided, in *State v. Doe and Doe*, 95 N.M. 90, 619 P.2d 194 (1980), that "[t]he state is aggrieved by a disposition contrary to law and may properly challenge such a disposition on appeal." A disposition contrary to law is exactly what the State has alleged in this appeal from the trial court's order striking the enhancement clause in the indictment, and dismissing, with prejudice, the enhancement proceeding against defendant.

In *Doe and Doe, supra*, we relied on the portion of § 32–1–39(A) of the Children's Code, N.M.S.A.1978, which provides that "[a]ny party may appeal from a judgment of the court to the court of appeals in the manner provided by law," settling in that case only the question whether the State or

the Corrections Department was the proper party on appeal of a children's court delinquency proceeding.

We think the instant matter is governed wholly by the constitutional amendment of 1965 granting an "absolute right to one appeal" to any aggrieved party. Article VI, § 2, N.M.Const. The State is without question a party to every criminal proceeding in the district courts; a claim of disposition contrary to law is a valid and legal grievance which indisputably makes the State "an aggrieved party." In our view, § 39–3–3 merely recognizes the State's constitutional right to appeal, and identifies circumstances permitting ordinary and interlocutory appeals, and affirms the constitutional prohibition against appeals that would violate double jeopardy principles. The legislature, by statute, may not diminish a right expressly provided by the constitution; "no branch of government may add to, nor detract from" the constitution's clear mandate. *State v. Mechem*, 63 N.M. 250, 316 P.2d 1069 (1957).

We hold, therefore, that the State had the constitutional right to appeal the order of the trial court which struck the enhancement portion of the indictment and dismissed the enhancement proceeding, with prejudice.

II.

The second question certified to us requires a reversal of our earlier disposition of this case.

Defendant was indicted on three counts of trafficking in heroin. The indictment itself contained nothing to indicate that defendant was or would be subject to enhancement of sentence as a multiple offender under § 30–31–20(B), N.M.S.A.1978.

The State and the defendant take opposing positions on the procedure by which the State may charge a prior drug conviction in order to permit imposition of an enhanced sentence. The State contends it may be done as suggested in our memorandum opinion of March 25, 1980, by filing "a supplemental information charging a second violation . . . subsequent to defendant's conviction," because this is the manner in which the habitual offender enhancement is handled. *See* §§ 31–18–18, –19, –20, N.M.S.A.1978.

On the other hand, defendant urges that *State v. Allen*, 82 N.M. 373, 482 P.2d 237 (1971), prohibits increasing a sentence after defendant begins to serve it, contending that to do so would violate the constitutional double jeopardy provision.

Section 30–31–20 B(2) of the Controlled Substances Act in effect at the date of the crimes charged against defendant specified that one who violates the trafficking statute more than once shall be sentenced to life imprisonment. The amendment to that section (1980 Supp. to N.M.S.A.1978) provides that the sentence to be imposed upon a second or subsequent narcotics offender shall be the same as the sentence set out in the basic sentence section, § 31–18–15 of the Criminal Sentencing Act, §§ 31–18–12 through 31–18–21, N.M.S.A.1978 (1980 Supp.). The Criminal Sentencing Act also includes provisions for altering a basic sentence and the procedures for prosecuting an habitual offender. *See* §§ 31–18–17 and 31–18–20, N.M.S.A.1978 (1980 Supp.) But like its predecessor, the Narcotic Drug Act (§§ 54–7–1 through –51, N.M.S.A.1953), the Controlled Substances Act itself, even after amendment, still does not provide the procedure for enforcing under that Act the increased sentence to be applied when defendant is a second or subsequent violator of the trafficking section of the Act. One of the effects of the amendment to § 30–31–20 B(2) is to bring the penalty provisions of the Controlled Substances Act into conformity with penalties for commission of other crimes and subsequent offenses.

The precise issue before us, then, is whether this defendant may be charged in a supplemental information to establish a prior drug conviction, as in habitual offender proceedings, after he has been convicted and sentenced on the "second" offense.

The case law in this area applicable to this case is not consistent or reconcilable. The initial consideration of the procedure

for establishing a prior drug conviction, for purposes of enhanced sentencing, came in *State v. Rhodes*, 76 N.M. 117, 413 P.2d 214 (1966). Defendant there, after conviction under the Narcotic Drug Act and prior to being sentenced, was asked whether he had ever before been convicted of a drug felony. Following his admission of a prior conviction, the court sentenced him to the time provided for second offenders under the Narcotic Drug Act. The Supreme Court reversed holding that there must be "some pleading filed by the state . . . by which a defendant is given notice and an opportunity to be heard before an increased penalty can be imposed." But *Rhodes* made two distinct comments in reaching its decision, which we think are most significant. It rejected any analogy to the habitual offender sentencing statute, saying:

> We have recently had occasions to discuss the difference between the Habitual Criminal Act and the Narcotic Drug Act, insofar as these two statutes relate to subsequent convictions. [Citations omitted.] The Habitual Criminal Act is fairly definite as to how charges should be made. . . . However, the above quoted statute [the Narcotic Drug Act] is completely lacking in any legislative direction *as to procedures* in the event of second and subsequent convictions. Thus the comparison made by the attorney general between the Narcotic Drug Act and the Habitual Criminal Act is of no assistance. [Our emphasis.]

The other observation of *Rhodes* is even more suggestive:

> In this case, there was never any charge *filed* against this appellant which would give him notice that, *if convicted*, he would be sentenced as a second offender. [our emphasis.]

[redacted] *Rhodes* cannot be read to stand for anything less than this:

1. The subsequent conviction sentencing *procedures* of the habitual offender statutes do not apply to sentencing procedures under the Narcotic Drug [Controlled Substances] Act.
2. Before an increased penalty under the Narcotic Drug Act may be imposed, defendant must be given notice by a pleading, and provided an opportunity to be heard.
3. Such notice must be filed *before* conviction and sentencing on the second or subsequent offense.

Notwithstanding what we consider to be the clear essence of *Rhodes*, it was held in *State v. Chavez*, 79 N.M. 741, 449 P.2d 343 (Ct.App.1968), that a supplemental information charging a prior conviction filed after the second conviction, and a hearing thereon, satisfied the *Rhodes* requirements of "essential fairness." *Chavez*, however, did not include in its appraisal of the *Rhodes* requirements what we have shown as Items 1 and 3 above in our distillation of the *Rhodes* decision. *Chavez* was further obfuscated by defendant's reliance there on §§ 54–7–15.2 and –15.3, N.M.S.A.1953, relating to procedures for charging and convicting as a second offender, which were held not to be in effect at the time of his sentencing and which were later repealed and not reenacted into the present Controlled Substances Act.

[redacted] We think *State v. Chavez, supra*, was incorrectly decided, in view of the Supreme Court's decision in *Rhodes*. We are bolstered in that conviction by the Supreme Court's affirmance in *State v. Garduno*, 93 N.M. 335, 600 P.2d 281 (1979), where the indictment itself gave defendant notice that enhancement because of prior drug convictions would be sought on both counts of the indictment. The court held that defendant "had ample notice that a life sentence would be imposed *if he was convicted*." (Our emphasis.)

[redacted] In the instant case defendant, presumably on the date trial was scheduled, pled guilty to the charges in the indictment after obtaining the trial court's ruling on the enhancement issue. He was immediately sentenced. Because the State failed to properly and timely plead the enhancement penalty it would also seek, as *Rhodes* requires, we are bound under the rule of *State v. Allen, supra*, prohibiting increasing

a sentence after defendant begins to serve it. The State's oversight cannot be allowed to prejudice the defendant.

We do not believe the constitutional infirmity in the enhancement procedure now proposed by the State, and as suggested in our memorandum opinion, is properly termed a double jeopardy issue at this point, because the sentencing requirements of the Controlled Substances Act do not contemplate a separate charge as a multiple offender, nor do the statutes establish any crime, as such. The Act in effect at the time of defendant's offenses directs the sentences which must be imposed if defendant were found to be a second or subsequent offender. Thus, defendant is not "prosecuted" for an offense growing out of the same charges upon which he already had been tried and convicted so as to meet the classical description of double jeopardy. *See Ex parte Williams*, 58 N.M. 37, 265 P.2d 359 (1954); *State v. Goodson*, 54 N.M. 184, 217 P.2d 262 (1950). Rather, in the absence of any statutory procedural authorization for imposition of an enhanced trafficking sentence which exceeds the sentence to be imposed on habitual offenders, it is suggested that this defendant be brought before the court under the habitual offender procedure, after having been convicted and sentenced upon more than one trafficking charge, and then advised that his guilty pleas subject him to a more severe sentencing. This procedure, in a narcotics case, according to *Rhodes*, violates due process.

Defendant relies on *State v. Allen, supra*, to argue double jeopardy because in that case our Supreme Court said:

> Increasing a sentence, after a defendant has commenced to serve it, is a violation of the constitutional guarantee of double jeopardy.

The *Allen* court expressly rested that declaration upon the language of *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873), regarding the scope of the double jeopardy guarantee:

> * * * [T]here has never been any doubt of its entire and complete protection of the party when a second punishment is proposed by the same court, on the same facts, for the same statutory offense.

We agree that the *effect* of proceeding in this case as our memorandum opinion proposed would be to increase a sentence "by the same court, on the same facts," although not "for the same statutory offense," which *Ex parte Lange, supra*, prohibits as a violation of the double jeopardy clause. But in *Oyler v. Boles*, 368 U.S. 448, 452, 82 S.Ct. 501, 503, 7 L.Ed.2d 446, 450, (1962), the United States Supreme Court ruled that a state legislature may constitutionally provide for two separate proceedings—trial of the felony charge, and invocation of the habitual offender penalty after conviction—without offending due process because of lack of notice "that the trial on the substantive offense will be followed by an habitual criminal proceeding." However, a method for enforcing the enhanced penalty provided in our Controlled Substances Act at the time of defendant's offenses, as well as at the present time, was not set up as a separate proceeding, nor was the method of enforcement covered in the Act at all, then or now. *Rhodes* says that enforcement, under the habitual act, of the increased penalty then imposed by the Narcotic Drug Act, is not permissible. *Oyler* serves as precedent only to permit two such proceedings if habitual offender charges are under consideration, and there exists statutory authority allowing two procedures.

We are thus forced to acknowledge that *Rhodes, supra* establishes the only means by which enforcement of the enhanced sentencing of this defendant's second and subsequent trafficking offenses under the Controlled Substances Act could have been sought. We hold, as did *Rhodes*, that because there was no specific statutory authorization in the Controlled Substances Act for a second sentencing procedure to implement enhanced sentencing for this defendant's multiple trafficking convictions under the Controlled Substances Act; and because the enhanced sentence would have exceeded the sentence which could have been imposed on an habitual offender, it would be a denial of due process in the

absence of some pleading filed prior to conviction which notified defendant that he would be sentenced as a second or subsequent offender if convicted, to proceed to enhance the sentence under a separate proceeding after the initial sentence was imposed. Thus, no such enhanced sentence for this defendant could be sought under the procedures applying to habitual offender enhancements.

This opinion should not be construed to mean, however, that defendants convicted of second or subsequent trafficking offenses after July 1, 1979, may not be processed as habitual offenders under the Criminal Sentencing Act. The disparity between penalties for multiple trafficking offenses and penalties for other multiple criminal offenses has been removed by the 1980 amendment to § 30–31–20, *supra*; one convicted of multiple trafficking offenses committed after July 1, 1979 fits the definition of an habitual criminal found in § 31–18–17, *supra*; and the Criminal Sentencing Act provides the separate, statutory procedure for sentence enhancement of habitual offenders which *Oyler, supra*, requires.

We reverse our prior memorandum decision in this matter and affirm the trial court's order barring any enhancement proceedings in this case.

LOPEZ, J., concurs.

WOOD, C. J., concurs in part and dissents in part.

WOOD, Chief Judge (concurring in part and dissenting in part).

The second question posed by defendant in his petition for certiorari, and certified to us for decision by the Supreme Court, highlights the importance of the first issue, the State's right to appeal. Defendant acquired a ruling from the trial court to which he was not entitled and, in the second issue, seeks to wrap that improper benefit in a constitutional guarantee. In the first issue he seeks to prevent appellate review of that improper ruling. The public, as well as defendant, is entitled to fair play. See *State v. Day*, 94 N.M. 753, 617 P.2d 142 (1980). Thus I agree with, and join in, Judge Walters' discussion of the State's right to appeal.

I disagree with Judge Walters' discussion of the second issue, and disagree with the result reached because the second issue disregards a basic fact. The question of seeking an enhanced sentence for second and subsequent convictions for trafficking in heroin did not arise for the first time *after* sentencing or even *after* conviction. The enhancement issue was before the trial court prior to conviction. Thus, I do not comment on Judge Walters' legal discussion in Point II other than to state my disagreement with her reading of *State v. Rhodes*, 76 N.M. 177, 413 P.2d 214 (1966). *Rhodes* holds that there must be notice and an opportunity to be heard; in my opinion, it does not decide the time and procedure for giving notice.

Rhodes held that notice that enhancement would be sought must be given by "some pleading filed by the state . . . ." No such pleading was filed by the State; the defect in seeking enhancement was the absence of such a pleading.

Defendant was indicted May 31, 1979 on three counts of trafficking in heroin, three different dates being alleged. On June 20, 1979 he filed a discovery demand asking to be informed of any prior criminal record of defendant. On June 30, 1979 he moved for disclosure of his prior criminal record; this motion was granted August 6, 1979. Due to change in counsel, a trial setting was vacated and the Supreme Court extended the time for trial under R.Crim.Proc. 37. Trial was rescheduled during the week of February 5, 1980. On February 5, 1980 defendant moved for severance of the three counts.

On February 7, 1980 defendant moved "to strike the enhancement penalty (if any) contained in the indictment. . . ." This motion asserted two grounds: (1) that the indictment did not charge that defendant was subject to an enhanced sentence; and (2) the defendant's prior federal conviction

could not be counted as a prior offense. On that day, after a hearing, the trial court granted the motion.

If the trial court's order had done no more than grant the motion to strike, it would have been proper because enhancement had not been pleaded. However, the order also stated, "the enhancement proceeding is dismissed with prejudice." Defendant's motion did not seek this ruling.

There was no basis for the "with prejudice" ruling at the time it was made by the trial court. Defendant's various discovery demands show that he was aware that enhancement might be involved; his motion to strike also shows this awareness. It has not been disputed that defendant had oral notice that the State would seek an enhanced sentence; a hearing was held on defendant's motion to strike. There was no due process issue concerning notice and an opportunity to be heard. At the time the trial court made its "with prejudice" ruling no trial had occurred, jeopardy had not attached, and there was no double jeopardy issue.

Immediately after the "with prejudice" ruling, defendant pled guilty to each of the three counts; the trial court accepted the plea and gave defendant a suspended sentence. At this point, we do not have a transcript of proceedings, the matter having been handled on the summary calendar. The docketing statement recites that the motion to strike, filed on February 7, 1980, was heard on that date in disregard of the State's objection that it had just received the motion and needed time to prepare. The docketing statement also recites that the trial court accepted the guilty pleas over the State's objection and in disregard of the State's position that it would appeal the "with prejudice" dismissal. In this appeal I accept the docketing statement allegations as true. *State v. Calanche*, 91 N.M. 390, 574 P.2d 1018 (Ct.App.1978).

Because he has begun to serve the sentence imposed after his guilty plea, defendant contends the Constitution protects him from efforts by the State to seek enhancement of the sentence. My answer is that the sentence was not valid because of error in the proceedings prior to imposition of sentence. My opinion is that Judge Hendley's Memorandum Opinion correctly permitted further proceedings under the facts of this case.

The decision concerning the second question is of limited application because the trafficking offenses to which defendant pled guilty were committed prior to the effective date of the Criminal Sentencing Act. Laws 1977, ch. 216, § 18. As to the applicability of that Act for second and subsequent trafficking offenses, see §§ 31–18–12, 31–18–17, 31–18–20, N.M.S.A.1978 (1980 Cum.Supp.) and § 30–31–20(B), N.M.S.A.1978 (1980 Repl. Pamphlet).

The decision concerning the first question, the State's right to appeal, is of vital importance to the administration of criminal justice. The Supreme Court, in extraordinary writ proceedings, has required trial courts to enforce sentencing provisions enacted by the Legislature. See citation to such a proceeding in *State v. Gabaldon*, 92 N.M. 230, 585 P.2d 1352 (Ct.App.1978). In this case, however, extraordinary writ proceedings would not have been effective to correct the trial court's errors because of the hurry-up guilty pleas and sentencing immediately after the errors were committed. The right to appeal is necessary to correct such maladministration of criminal justice.

632 P.2d 726

FRONTIER LEASING, INC., a New Mexico corporation, and Wayne Lovelady's Frontier Ford Corporation, a New Mexico corporation, Plaintiffs-Appellants,

v.

C.F.B., INC., a purported South Dakota corporation, Frank Farrar and Francis Graham, Defendants-Appellees.

No. 13073.

Supreme Court of New Mexico.

Aug. 10, 1981.

Bruce E. Pasternack, Albuquerque, for plaintiffs-appellants.

Moses, Dunn, Beckley, Espinosa & Tuthill, Victor E. Carlin, Daniel Behles, Albuquerque, for defendants-appellees.

OPINION

RIORDAN, Justice.

Plaintiffs Frontier Leasing, Inc. (Frontier Leasing) and Wayne Lovelady's Frontier Ford Corporation (Frontier Ford) filed an action against defendants Francis Graham, Frank Farrar, and C.F.B., Inc. (C.F.B.) for monies due under certain lease agreements with Frontier Leasing and for amounts due for vehicle parts purchased on an open account with Frontier Ford. The trial court granted summary judgment in favor of defendant Graham on the ground that Graham was not liable individually on the debts. Plaintiffs appeal the court's grant of summary judgment in favor of Graham. We reverse.

Frontier Leasing entered into a series of vehicle leasing agreements with a business entity identified at various times as Royal Crown Bottling Corp., Royal Crown Bottling Co. and Royal Crown Bottling Company of New Mexico (Royal Crown). The first two agreements were made with Royal Crown Bottling Corp. and Royal Crown Bottling Co. respectively and were signed by the general manager in the following manner:

Royal Crown Bottling Corp.
(Lessee)
By: /s/ Robert W. Johnson
Robert W. Johnson
General Manager
(Title)

The third and fourth agreements were made with Royal Crown Bottling Company of New Mexico and were signed by defendant Graham as follows:

Royal Crown Bottling Company of New Mexico
(Lessee)
By: /s/ Fran Graham
Pres.
(Title)

On or about August 31, 1979, Royal Crown returned the four vehicles to Frontier Leasing. At the time the vehicles were returned, Royal Crown was in arrears on the monthly lease payments. On or about September 20, 1979, Frontier Leasing notified Farrar and Graham of additional monies due under the termination clause of the leases. Thereafter, suit was filed to recover the monies due under the lease agreements and also to recover amounts due on the open account with Frontier Ford.

Plaintiffs contend that they were dealing with either a partnership or a proprietorship owned by defendants Farrar and Graham and that Farrar and Graham are personally liable on the debts. Graham claims, however, that he was not acting in his individual capacity but as an agent of C.F.B., a South Dakota corporation doing business in New Mexico under the various name derivations of Royal Crown. Plaintiffs claim that they had never heard of C.F.B. until after the leases and accounts were in default. None of the forms of Royal Crown's name are registered with the New Mexico Corporation Commission.

On November 26, 1979, Graham moved for summary judgment on the ground that the liability to Frontier Leasing and Frontier Ford was that of C.F.B. and not his as an individual. On December 11, 1979, C.F.B. filed a voluntary petition in bankruptcy in the United States Bankruptcy Court for the District of New Mexico. Graham states that notice of this filing was entered in the state district court on December 14, 1979. However, this notice was not included in the record on appeal. Graham's motion for summary judgment was heard on January 21, 1980. At that time, the district court was informed that C.F.B. and Farrar intended to remove the case to the federal bankruptcy court. Graham was opposed to its removal. The district court granted Graham's motion for summary judgment and entered an order the same day.

The issues on appeal are:

I. WHETHER THIS COURT HAS JURISDICTION TO CONSIDER THE APPEAL, and

II. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT.

I. *Jurisdiction*

On January 28, 1980, an application for removal of this cause to the federal bankruptcy court was apparently filed by defendants C.F.B. and Farrar. No copy of the removal application was ever filed in the state district court.

On February 19, 1980, the plaintiffs filed a notice of appeal with respect to the state court's grant of summary judgment. On April 1, 1980, *plaintiffs* filed a "notice" with the state court which stated that an application for removal had been filed on January 28, 1980, in the United States Bankruptcy Court for the District of New Mexico. A copy of the application for removal was not attached thereto.

Defendant Graham argues that this Court no longer has jurisdiction to hear this appeal since an application for removal was filed in federal bankruptcy court. We do not agree with this contention. Although the application for removal was apparently filed with the bankruptcy court, the defendants failed to follow the necessary procedure to perfect the removal.

Interim Bankruptcy Rule 7004(c) of the Rules of the United States Bankruptcy Court for the District of New Mexico states:

> Promptly after the filing of the application and bond, when required, the party filing the removal application shall give written notice thereof to all adverse parties and shall file a copy of the applica-

tion with the clerk of the court from which the civil action or proceeding was removed which shall effect the removal and the parties shall proceed no further in that court unless and until the case is remanded.

A copy of the application for removal must be filed in the state court to give the court notice of the removal. Until a state court receives proper notice that the case has been removed, it may continue to hear the case before it. *See generally, Cavanaugh v. Atchison, T. & S.F. Ry. Co.*, 103 F.Supp. 855 (W.D.Mo.1952); *Ramahi v. Hobart Corp.*, 47 Or.App. 607, 615 P.2d 348 (1980).

The district court was told that C.F.B. and Farrar intended to remove the entire case to bankruptcy court. However, neither the district court nor this Court has ever received proper notice of the removal of this case to the federal bankruptcy court. Therefore, the removal is not complete and this Court has jurisdiction to hear this appeal. *See generally, Beleos v. Life & Casualty Insurance Co. of Tenn.*, 161 F.Supp. 627 (E.D.S.C. 1956); *Donlan v. F. H. McGraw & Co.*, 81 F.Supp. 599 (E.D.N.Y. 1948).

Because we hold that removal was not perfected, we do not address the question of whether the Supreme Court of the State of New Mexico can be deprived of jurisdiction to hear an appeal properly docketed in this Court.

II. *Summary Judgment*

Summary judgment is proper when there is no genuine issue as to any material fact and when the moving party is entitled to judgment as a matter of law. N.M.R.Civ.P. 56(c), N.M.S.A.1978 (Repl.Pamp.1980). This Court recently reiterated the standards it imposes in upholding a summary judgment.

> Summary judgment... cannot be substituted for a trial on the merits as long as one issue of material fact is still present in the case. The remedy should not be employed where there is the slightest doubt as to the existence of an issue of material fact. (Citations omitted.)

Fischer v. Mascarenas, 93 N.M. 199, 200, 598 P.2d 1159, 1160 (1979).

This case presents several issues of material fact, not the least of which is whether Graham acted in his individual capacity or only as an agent for C.F.B., Inc. Graham claims that at all times he acted on behalf of a corporation as indicated in the leases by the use of the terms "Corp." and "Company" after the name Royal Crown and that it is immaterial that plaintiffs did not know that the corporation for which he acted was really C.F.B., Inc. Plaintiffs argue that the term "Company" in the name Royal Crown Bottling Company of New Mexico is not necessarily indicative of a corporation and that Graham had told the plaintiffs after the first two leases were signed and before the third and fourth were signed that he had taken over the business and owned the company. The affidavits filed in this case on behalf of the plaintiffs state that they believed, based upon actions and statements made by defendants, that they were dealing with a sole proprietorship. The resolution of this issue is material as to who is liable on the debts for which plaintiffs bring suit and should be considered at trial.

Because of the existence of issues of material fact, the summary judgment in favor of Graham is set aside, and this case is remanded to the district court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

PAYNE and FEDERICI, JJ., concur.

632 P.2d 729

CITY OF ALBUQUERQUE,
Plaintiff-Appellant,

v.

CAUWELS & DAVIS, MANAGEMENT CO., INC., A New Mexico corporation, Hertzmark-Parnegg Realty, Inc., a New Mexico corporation, Winrock Village, Ltd., a limited partnership, Hannes H. Parneg, Sidney S. Hertzberg, Chris Inman, Inc., a New Mexico corporation, Chris Inman, Inc., d/b/a Brooktree Homes, and Chris Inman, individually, Defendants-Appellees.

No. 13379.

Supreme Court of New Mexico.

Aug. 13, 1981.

Malcolm W. deVesty, Asst. City Atty., Albuquerque, for plaintiff-appellant.

Rodey, Dickason, Sloan, Akin & Robb, William C. Schaab, Albuquerque, for defendants-appellees.

OPINION

FEDERICI, Justice.

Taxpayers (appellees) refused to pay gross receipts taxes levied by appellant, the City of Albuquerque (City) upon their income. The City brought suit in the district court to enforce the assessments. The district court entered summary judgment against the City, finding that the assessments violated a state statute and did not apply to these taxpayers in any event. The City appeals. We affirm.

Taxpayers are landlords of rented properties. The parties agree that the City is allowed to assess gross receipts taxes upon businesses in Albuquerque under authority of Section 3–38–3, N.M.S.A. 1978. That section reads as follows:

A. A municipality may impose an occupation tax and classify any occupation, profession, trade, pursuit, corporation and other institution and establishment, utility and business of whatever name or character, like or unlike, and not licensed as authorized in Section 3–38–1, NMSA 1978, or not licensed by the municipality as authorized by any other law.

B. The occupation tax shall not exceed one dollar ($1.00) per annum for each one thousand dollars ($1,000) gross receipts of business done per annum except a minimum tax of five dollars ($5.00) per annum may be levied or an occupation tax in an amount not to exceed twenty-five dollars ($25.00) per annum per business may be levied on each business. A municipality may classify occupations and impose an occupation tax on each occupation. If a municipality chooses to classify for the purpose of levying an occupation tax, the classifications which shall be used are:

(1) manufacturing;
(2) utility;
(3) wholesale;
(4) retail;
(5) banking; and
(6) financial.

The City enacted Albuquerque Municipal Ordinance §§ 4–1–1 to 4–1–13 to levy gross receipts taxes on businesses. Since filing of this suit, the City has repealed the ordinance under attack here and has enacted a new ordinance. The ordinance involved in this suit imposed an "occupation tax on all gross receipts of every person doing business or engaging in business within the City." § 4–1–3. However, the ordinance then listed a series of partial and total "deductions" from the general tax. These deductions were for: (1) retail trade-ins; (2) the sale of motor vehicles; (3) sales outside the city; (4) sales by non-profit cooperatives; (5) intra-corporate transfers; (6) wholesale sales; (7) construction performed inside and outside the city; (8) construction performed inside and outside the city and sale, lease or rental of construction equipment outside the city; (9) certain sales subject to other taxes; and (10) sales by persons under the age of 18. § 4–1–5. The ordinance then listed a series of "exemptions." Exemptions were for: (1) banking; (2) utility franchises; (3) interdepartmental sales within business organizations; (4) unprocessed produce; (5) isolated sales and rentals; (6) nonprofit organizations; (7) certain dues and registration fees; and (8) remuneration for personal services § 4–1–6. Finally, the ordinance included a severability clause, which stated "that if any deduction or exemption granted by this ordinance be held invalid, it is the intent of the Council that the unaffected remainder of the ordinance be continued in force and that the taxpayers theretofore enjoying such deduction or exemption shall thenceforth, from the effective date of the declaration of invalidity, be liable for the rate of tax [that would normally be imposed without the deduction or exemption]." § 4–1–13.

The issues on appeal are:

1. Whether the City's occupation tax is valid; and

2. Whether any invalid portion of the tax is severable from the valid portions.

A number of the deductions and exemptions created by the ordinance were nothing more than a recital of federal and state laws which prevented the City from imposing the occupation tax on some businesses. Others simply recognized that certain transactions did not fall within the category of gross receipts of a business. In addition, the ordinance created classifications for the six types of business set out in Section 3–38–3. The problem here arises because the City imposed a general tax on all businesses, then proceeded to create exemptions and deductions for the six permitted categories plus some additional categories, such as construction, motor vehicles and children. The City admits that construction was an additional category.

The City argues that it enacted a uniform maximum occupation tax on all businesses under Section 3–38–3(A), and the deductions and exemption did not comprise a classification of occupations. Therefore, the classifications set forth in Section 3–38–

3(B) did not need to be followed. In the alternative, the City argues that through Section 3–38–3(A) the Legislature intended that *all* occupations be taxable. The classifications in Subsection (B) of the statute were not meant to be exclusive. Therefore, the City had authority to create additional classifications.

In construing the statute, we are mindful of the general rule that the purpose of construction is to give effect to legislative intent. *See Chavez v. Commissioner of Revenue*, 82 N.M. 97, 476 P.2d 67 (Ct. App. 1970). However, this Court noted in *City of Clovis v. Crain*, 68 N.M. 10, 13, 357 P.2d 667, 669 (1960) that:

> The rule is well established that where the statute directs in definite terms the manner in which municipal acts are to be exercised, such statutory method must be substantially followed. *Fancher v. Board of County Com.*, 28 N.M. 179, 210 P. 237; *Bibo v. Town of Cubero Land Grant*, 65 N.M. 103, 332 P.2d 1020; McQuillin, Municipal Corporations, 3d ed., Vol. 2, § 10.-27, p. 640. Also, the direction of definite and certain method of procedure in the grant of power to the municipality excludes all other methods by implication of law. McQuillin, § 10.27, supra. Moreover, the statute making the grant of power to the municipality must be strictly construed, and the municipality must keep closely within its limits. 38 Am. Jur., § 385, p. 74.

The Court further stated that "a municipality is without power to change, by local law, the method of collecting taxes established by the legislature. "(Citations omitted.)" *Id.* 68 N.M. at 14, 357 P.2d at 669. One of the reasons for strict construction when taxing authority is delegated is that taxpayers should not be subjected to the burden of taxation without clear warrant of law. *City of Miami v. Kayfetz*, 158 Fla. 758, 30 So.2d 521 (1947). *See Beatty v. City of Santa Fe*, 57 N.M. 759, 263 P.2d 697 (1953).

Here, Section 3–38–3 allows municipalities to impose a *uniform* occupation tax on any occupation not otherwise licensed. In the alternative, the statute allows a municipality to impose a *varied* occupation tax upon classes of occupations. The classes which *shall* be used if this latter option is followed are specified in the statute. Our Legislature has directed that the word "shall" in statutes is mandatory, Section 12–2–2(I), N.M.S.A. 1978, and this Court has so held. *Mountain States Tel. v. New Mexico State Corp.*, 90 N.M. 325, 563 P.2d 588 (1977).

The City followed neither of the alternatives required by the statute. Instead, it enacted both a uniform tax and a list of exemptions and deductions. The effect of the exemptions and deductions was to create a varied occupation tax upon classes of occupations. The City admits that at least one of the deductions created was for an occupation not listed in the statute. We hold that the City's occupation tax did not substantially comply with the authority delegated to it by Section 3–38–3. The City acted beyond the scope of its authority when it enacted the occupation tax ordinance, and the ordinance is unenforceable.

The City argues that the ordinance is severable, and only those portions which are unenforceable should be excised from it. While the effect of a declaration of severability in the ordinance creates a presumption that the ordinance is divisible, we cannot dissect invalid portions and reframe an ordinance from the valid portions where the remaining features will be substantially affected by the removal. *Safeway Stores v. Vigil*, 40 N.M. 190, 57 P.2d 287 (1936). Here, the valid portions are inextricably intertwined with the invalid portions of the ordinance and we cannot separate them without substantially affecting the ordinance. It is beyond the power of the courts to rewrite an ordinance. We hold that the entire ordinance is invalid.

This decision shall be given modified prospectivity and it shall not be retroactive. That is, it shall apply only to the case at bar and all similar pending actions. It affords no remedy for taxes previously paid by persons unless they have a pending judicial

action against the City concerning the ordinance.

The trial court is affirmed.

IT IS SO ORDERED.

SOSA, Senior Justice, and RIORDAN, J., concur.

632 P.2d 732

Thomas T. MILLER, Petitioner-Appellant,

v.

Karen A. MILLER, Respondent-Appellee.

No. 13433.

Supreme Court of New Mexico.

Aug. 17, 1981.

Robinson, Stevens & Wainwright, George F. Stevens, Albuquerque, for petitioner-appellant.

Clayburgh, Ashby, Rose & Paskind, Myra C. Lynch, Albuquerque, for respondent-appellee.

OPINION

EASLEY, Chief Justice.

In this divorce case, the trial court held the husband's military retirement pay, earned in Texas, to be community property and awarded a portion of it to the wife, along with granting the wife alimony. The husband appeals. We affirm in part and reverse in part.

The issues presented are:

1. Whether Veterans Administration (VA) compensation benefit is community property subject to division upon dissolution of marriage.

2. Whether a trial court may, in its discretion, award alimony where the sole source of funds for its payments is disability compensation benefits received from the VA and Social Security.

The parties were married in October of 1958, one year after husband's entry into the military service of the United States. Husband received a disability retirement from the U. S. Army on April 11, 1977,

having completed nineteen years, six months and one day of service. He subsequently waived his U. S. Army disability benefit in order to receive VA disability compensation benefit. The couple were divorced in New Mexico on November 14, 1980.

The parties have stipulated that Texas law will determine whether the disability compensation received by husband can be characterized as community property. *Otto v. Otto*, 80 N.M. 331, 455 P.2d 642 (1969).

In *Ex parte Johnson*, 591 S.W.2d 453 (Tex.1979) and *Ex parte Burson*, 615 S.W.2d 192 (Tex.1981), the Texas Supreme Court considered our precise question and held that the supremacy clause of the United States Constitution preempts a division of appellant's VA benefits as community property. That Court found that the intent of Congress was that the benefits were intended for the use of the recipient. *Johnson* at 456.

Comparing the language in the applicable section of the U.S.Code, 38 U.S.C. § 3101(a) (1976), with the language contained in the Railroad Retirement Act, 45 U.S.C. § 231m (1976), and citing the U.S. Supreme Court's decisions with respect to the Railroad Retirement Act, *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979), the Texas Court concluded that "the award to [appellant's] ex-spouse of 50 percent of his anticipated future disability benefits from the Veterans Administration conflicts with the clear intent of Congress that these benefits be solely for the use of the disabled veteran." *Johnson* at 456.

In *Burson* the husband retired from the U. S. Air Force and, although his regular retirement was a vested right, he elected to receive disability retirement benefits from the Air Force pursuant to 10 U.S.C. §§ 1201–1221 (1976 & Supp. III 1979), *as amended by* Act of Sept. 8, 1980, Pub.L.No. 96–343, Act of Dec. 12, 1980, Pub.L.No.96–513. Following his retirement he was divorced. Under Texas cases which held that military retirement benefits, even though paid for disability retirement, were community property, he was ordered to make payments out of those benefits to his ex-wife as her share of the community assets. However, after the divorce he waived his Air Force disability benefits in order to receive disability compensation from the VA, pursuant to 38 U.S.C. § 3105 (1976). He thereafter ceased making payments to his ex-wife and she brought suit for contempt. In reversing the contempt order the Court distinguished between those disability benefits received from the Air Force and those subsequently received from the VA. Citing *Johnson*, the Court held that VA benefits were not divisible or assignable as property. *Burson* at 194, 196.

In the case before us, husband, at the time of his divorce, was already receiving his disability compensation from the VA pursuant to 38 U.S.C. § 3105 in lieu of U.S. Army disability retirement benefits under 10 U.S.C. § 1201 *et seq.* We conclude that, under Texas law, those benefits were not divisible or assignable as community property.

Wife argues that the benefits here at issue were actually awarded in lieu of regular retirement benefits which, under Texas law, should be considered as community assets. She asserts that his choice of receiving disability benefits rather than regular retirement benefits does not serve to remove those benefits from the assets of the community, whether they had vested as regular retirement benefits or not. Wife relies on *Dominey v. Dominey*, 481 S.W.2d 473 (Tex.Ct.App.1973), *Marshall v. Marshall*, 511 S.W.2d 72 (Tex.Ct.App.1974) and *Cearly v. Cearly*, 544 S.W.2d 661 (Tex.1976). This reliance is misplaced. Under Texas law, the decisive act is the change of disability retirement benefits from those payable by a Military Department to those payable by the VA. Once this is done, the payments may not be characterized as community property. *Burson, supra; Johnson, supra; see also Arrambide v. Arrambide*, 601 S.W.2d 197 (Tex.Ct.Civ.App.1980).

The second issue raised by husband is whether a trial court in New Mexico may, in its discretion, award alimony when the

sole source of funds for payment are the federal disability compensation benefits received by the husband. The Supreme Court of the United States has recently addressed the question as to what extent state courts may attach benefits awarded under federal programs. In *McCarty v. McCarty*, —— U.S. ——, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), petitioner was a retired commissioned officer of the U.S. Army. Two years prior to his regular retirement he was divorced. As a party of the property settlement, the California Superior Court awarded the ex-wife an interest in his future retirement pay, holding that a serviceman's military pension and retirement rights were subject to division as community property. The U.S. Supreme Court reversed, holding that federal law precludes a California court from dividing military retirement pay pursuant to state community property laws. *McCarty, supra.*

However, the Court went on to address the question whether federal benefits could be subject to legal process for spousal support. The Court first noted that Congress, in 1972, had refused to single out military retirement pay for the enforcement of court orders for spousal support, which was not imposed on any other federal employee or retired employee. Instead, "Congress determined that the problem of the attachment of military pay should be considered in the context of legislation that would require all federal pays to be subject to attachment." *McCarty*, —— U.S. at ——, 101 S.Ct. at 2740.

In 1975 Congress amended the Social Security Act to provide that ". . . moneys . . . payable by, the United States . . . (including any agency, subdivision or instrumentality thereof) to any individual, including members of the armed services, shall be subject . . . to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments." 42 U.S.C. § 659(a) (Supp. III 1979). In 1977 Congress added a new definitional section, 42 U.S.C. § 662(c) (Supp. III 1979) which provided that the term "alimony" in § 659(a) "does not include any payment or transfer of property . . . in compliance with any community property settlement. . . ." *McCarty*, —— U.S. at ——, 101 S.Ct. at 2740. The U.S. Supreme Court concluded that "Congress, in adopting [§ 662(c)] thought that a family's need for support could justify garnishment, even though it deflected other federal benefits from their intended goals, but that community property claims, *which are not based on need*, could not do so." *McCarty*, —— U.S. at ——, 101 S.Ct. at 2740, quoting *Hisquierdo*, 439 U.S. at 587, 99 S.Ct. at 811. (Emphasis added.)

In the case at bar, the disability compensation benefits which husband receives from the VA fall within those "federal benefits" which the Congress contemplated in its 1975 amendments to the Social Security Act, and which the U.S. Supreme Court held could be subject to attachment for spousal support. We find no federal bar to the award of alimony where the source for its payment is disability compensation payable under federal programs. Husband asserts that these benefits should be considered in the same light as proceeds from any accident or health insurance policy, and as such should be held exempt under New Mexico law from attachment or garnishment, citing Section 42–10–3, N.M.S.A.1978. We do not agree. As we have noted, the Congress has seen fit to create an exemption to the general provision of non-assignability of benefits received under 38 U.S.C. § 3105, to allow for spousal support. The public policy concerns which led the Congress to adopt the amendments to the Social Security Act cited *supra*, are no less operative at the state level. To create the distinction argued for by husband would have the anomalous effect of frustrating the intent of the Congress through definition.

We find no abuse of discretion in the trial court's awarding alimony, where the sole sources of payment are disability compensation benefits payable by the VA and Social Security.

Wife requests that she be awarded reasonable attorney fees and costs incurred

incident to this appeal. Section 40–4–7(A), N.M.S.A.1978 provides, in pertinent part, that the Court may make an order relative to the expenses of the proceedings, as will insure either party an efficient preparation and presentation of his case. This Court has held that section applicable to costs and fees incurred on appeal as well. *Jones v. Jones*, 67 N.M. 415, 356 P.2d 231 (1960), *Fitzgerald v. Fitzgerald*, 70 N.M. 11, 369 P.2d 398 (1962). The trial court found that there was a need for the wife to receive assistance with her lawyer's fees at the trial level, we find a similar need here.

The decree of the district court that wife is entitled to a portion of husband's disability benefits as community property is reversed. The case is remanded with instructions to recompute the property settlement consistent with this opinion, and following that, and if deemed necessary by the court, to reassess the wife's need for alimony and make such adjustments as are indicated. The wife is awarded attorney fees and costs for this appeal in the amount of $1,770.

IT IS SO ORDERED.

FEDERICI and RIORDAN, JJ., concur.

632 P.2d 735

EVANS PRODUCTS COMPANY, a corporation, Plaintiff-Appellant,

v.

Gene O'DELL, Richard D. Evans and Jim O'Dell, Defendants-Appellees.

No. 13323.

Supreme Court of New Mexico.

Aug. 17, 1981.

Glenn G. Stiff, Roswell, for plaintiff-appellant.

Atwood, Malone, Mann & Cooter, P.A., Paul A. Cooter, William P. Lynch, Ralph Shamas, Roswell, for defendants-appellees.

OPINION

EASLEY, Chief Justice.

Evans Products had obtained a judgment for $30,464.69 on an open account plus $6,000 attorney fees and costs against a limited partnership, Cactus Wholesale Builders Supply (Builders Supply). Evans Products thereafter brought suit to obtain a judgment in the same amount against each of the individual partners of Builders Supply, Richard Evans, Gene O'Dell, and Jim O'Dell, jointly and severally. Following trial, the court (1) awarded judgment to Evans Products against Richard Evans in the full amount of the prior judgment; (2) awarded judgment to Evans Products against Jim O'Dell, one of the alleged limited partners, for $7,500; and (3) dismissed the suit as to the other limited partner, Gene O'Dell. Evans Products appeals.

The issues presented are: (1) whether there is substantial evidence to support the trial court's finding that Cactus Wholesale Trucks and Equipment (Trucks and Equipment) was a partnership separate and distinct from Builders Supply, and therefore not liable for the debts of the latter; and (2) whether there is substantial evidence to support the trial court's finding that Gene O'Dell did not receive $7,500 from the sale of his partnership interest and hence was not liable for the debts of the partnership in that amount.

Builders Supply was a limited partnership originally consisting of Richard Evans, general partner, and Gene O'Dell, limited partner. Sometime after formation of the partnership, Gene O'Dell assigned one-half of his interest (*i. e.*, a one-fourth interest in the partnership) to his son, Jim O'Dell. Evans and Gene O'Dell thereafter went into the business of buying and selling used trucks and equipment under the name Cactus Wholesale Trucks and Equipment. In November, 1975, Evans and Gene O'Dell contracted to sell the assets and liabilities of Builders Supply to Sidney Badger (not a party). Under the original agreement, Evans was to receive $15,000 for his interest in the partnership, and Gene and Jim O'Dell were to receive $7,500 each. This agreement was amended when additional liabilities of the partnership were discovered. As amended, the agreement provided that Evans and Gene O'Dell would personally assume one of the partnership debts of approximately $22,000; that Evans would receive $15,000 for his interest; and further provided:

> BADGER hereby agrees to pay to GENE O'DELL the sum of $7,500 for his interest in [Builders Supply], which sum the parties hereto agree has been paid in full by the delivery of various supplies and merchandise to JIM O'DELL, for which JIM O'DELL shall not be required to pay.

The cancellation of a debt owed by Jim O'Dell to Builders Supply was the sole consideration received by Gene O'Dell for the sale of his interest in the partnership. Additionally, Gene O'Dell agreed to personally guarantee a loan obtained by Badger for the purpose of reducing the liabilities of Builders Supply. Builders Supply was insolvent at the time of the sale.

Richard Evans and Gene O'Dell continued to operate Trucks and Equipment after the sale of Builders Supply. Evans subsequently retired and Gene O'Dell took over as managing partner.

In 1976, Evans Products obtained a judgment in the amount of $30,649.69 plus attorney fees and costs against Builders Supply. The indebtedness had been incurred prior to the sale of Builders Supply to Badger. None of the individual partners were named as defendants in that suit.

Evans Products instituted the present action to enforce the prior judgment against the individual partners of Builders Supply. The trial court imposed liability for the full amount of the prior judgment on Richard Evans and liability to the extent of $7,500 upon Jim O'Dell. The court held that Gene O'Dell was not liable in any amount for the partnership debt.

Evans Products sought to impose liability on Gene O'Dell for the full amount of the earlier judgment on the theory that Trucks and Equipment was not a separate partnership, but was in fact merely a division of Builders Supply. Evans Products contends that when Richard Evans retired and Gene O'Dell continued the business with his consent, Gene O'Dell lost his limited partner status and became liable for the debts of the partnership.

We find that there is substantial evidence to support the trial court's finding that Trucks and Equipment was a partnership separate and distinct from Builders Supply. The evidence shows that Richard Evans and Gene O'Dell intended to form a separate partnership; that Jim O'Dell was not a partner in Trucks and Equipment; that Trucks and Equipment was maintained at a separate location; that the Certificate of Limited Partnership of Builders Supply would not allow that partnership to engage in the trucks and equipment business; that Trucks and Equipment maintained separate bank financing and bank accounts and its assets were not commingled with Builders Supply.

Evans Products points to evidence which conflicts with the above and tends to show that Trucks and Equipment was merely a division of Builders Supply. It is well established that on appeal all disputed facts are resolved in favor of the successful party, all reasonable inferences indulged in support of the verdict, all evidence and inferences to the contrary disregarded, and although contrary evidence is presented which may have supported a different verdict, the appellate court will not weigh the evidence or foreclose a finding of substantial evidence. *Toltec Intern., Inc. v. Village of Ruidoso*, 95 N.M. 82, 619 P.2d 186 (1980). We therefore hold that the trial court's finding that Builders Supply and Trucks and Equipment were separate and distinct partnerships was supported by substantial evidence.

As an alternative basis for liability, Evans Products contends that Gene O'Dell should be held personally liable in the amount of $7,500 as consideration received from the sale of the partnership to Badger.

Under the provisions of the Uniform Partnership Act (UPA) pertaining to limited partnerships, Sections 54–2–1 through 54–2–30, N.M.S.A.1978, a limited partner is not personally liable for the debts of the partnership except under certain circumstances. A limited partner is liable as a general partner if he takes part in the control of the business. § 54–2–7. Although a limited partner may transact business with the partnership, he has committed a fraud on the creditors of the partnership if he received any payment, conveyance, or release from liability when the partnership was insolvent. § 54–2–13. He may not receive any share of profits or compensation by way of income when the partnership is insolvent. § 54–2–15. Finally, a limited partner may not receive a return of any part of his contribution when the partnership is insolvent. § 54–2–16.

Applying these provisions to the facts of this case, the trial court properly placed liability to Evans Products for the cancellation of Jim O'Dell's $7,500 debt to the partnership upon Jim O'Dell rather than Gene

O'Dell. Since the partnership was insolvent at the time of the sale to Badger, the liability of Jim O'Dell could properly be predicated upon Section 54–2–13 (release of liability to partnership). The record is clear that the cancelled debt was owed by Jim O'Dell and not Gene O'Dell.

It is equally clear from the record that there was no basis under the UPA for holding Gene O'Dell personally liable. There was no assertion that he took part in the control of the business of Builders Supply. The undisputed evidence established that he received neither cancellation of a personal debt, payment of profits, nor return of contribution from the sale to Badger. The record shows that he agreed to receive nothing for the sale, and even agreed to personally assume some of the partnership's liabilities and to personally guarantee a loan obtained by Badger to pay off other partnership liabilities. The mere recitation in the contract of consideration to Gene O'Dell by way of cancellation of Jim O'Dell's debt was insufficient to overcome this evidence. We hold that there was substantial evidence to support the trial court's finding that Gene O'Dell did not receive $7,500, or any amount, for the sale of his partnership interest and was therefore not liable for the debts of the partnership.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

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

632 P.2d 738

Alfredo MARQUEZ, Jesus Marquez, Reynaldo Marquez, William Frank Marquez, Dora Lovato, Rose Garcia, Annie Gonzales, Mary Pruitt and Steven Marquez, Plaintiffs-Appellants,

v.

JUAN TAFOYA LAND CORPORATION, Ruth M. Armijo, Fidelia B. Griego, Severo Martinez, William Gonzales and Andrew Romero, Defendants-Appellees.

No. 13387.

Supreme Court of New Mexico.

Aug. 17, 1981.

Peter C. Chestnut, Albuquerque, for plaintiffs-appellants.

Robert H. McBride, Albuquerque, for defendants-appellees.

OPINION

FEDERICI, Justice.

In 1973, an action was filed on behalf of the heirs of the Juan Tafoya Land Grant against the Trustees of the Grant. This action was consolidated with another pending action and the trial court appointed a Special Master to hear the consolidated cases. The Special Master's report was adopted in the judgment of the trial court by order dated September 11, 1975. One of the Special Master's recommendations was that the members of the Grant incorporate. This was subsequently accomplished. The trial court retained jurisdiction over the matter "pending final disposition of this matter and that all actions, including contracts entered into by the Board of Trustees be presented to this Court for approval."

In May of 1978, the court ordered the community lands to be transferred to the newly-formed Juan Tafoya Corporation. Appellants, who are some of the heirs, moved to intervene, as they felt that the corporation was not properly dividing the heirs' interests according to the Special Master's recommendations. The motion to intervene was denied without prejudice, whereupon appellants filed a complaint in the District Court of Bernalillo County for a declaratory judgment as to their interest in the corporation. The Bernalillo County court transferred the cause to the Valencia County court, which granted summary judgment for the corporation, and appellants appeal. We affirm.

In his report, the Special Master found that only forty-six individuals, without formal hearing or court approval, had conducted the affairs of the tract, and that there was no logical basis for this. He further found and listed a group of "trunk heirs" (Exhibit B attached to his report) in the tract. Most of these "trunk heirs" were deceased. He deemed it necessary to list all living heirs in a separate exhibit (Exhibit C attached to his report). He then recommended that certain steps be taken to ensure participation by all living heirs in the affairs of the tract. He also recommended "[t]hat one share be granted to each of the individuals shown on Exhibit "C" and that said shares should be a property right and subject to the New Mexico laws of descent and distribution."

The subsequently-formed corporation divided "shares" by giving "trunk heirs," if living, one share in the corporation. Children of "trunk heirs" received one share in the corporation if both of their parents were from the community of Marquez. If only one parent was from Marquez, the child received a half share. If the child of a "trunk heir" was deceased, the child's children divided their parent's share equally among the number of children in the family.

The issues on appeal are:

I. Whether the District Court of Bernalillo erred in transferring the cause to Valencia County;

II. Whether summary judgment was properly granted against appellants.

I.

Appellants claim that by dismissing their motion to intervene without prejudice, the Valencia County court waived exclusive venue over their claims; that since this is a transitory action to recover shares of stock, it can be brought where the corporation had its registered office, Bernalillo County, § 38–3–1(A), N.M.S.A. 1978; and that four of the six defendants who are members of the Board of Directors reside in Bernalillo County. Thus, appellants claim that both venue and jurisdiction are appropriate in Bernalillo County and it was error to transfer the matter.

Appellees, on the other hand, contend that this is not a transitory action, but concerns an interest in lands under Section 38–3–1(D)(1). They further claim that appellants should have appealed the denial of the motion to intervene, and since they did not, they are precluded from arguing that the Valencia County court waived venue, that the Bernalillo County court had inherent power to transfer the cause, and that this power was properly exercised by the Bernalillo County court.

Appellants do not contest the right of the Valencia County district court to retain venue "pending final disposition of this matter." Rather, they state that the Valencia County district court waived venue when it dismissed their complaint in intervention without prejudice. We disagree.

Waiver is the intentional relinquishment of a known right. *Ed Black's Chevrolet Center, Inc. v. Melichar*, 81 N.M. 602, 471 P.2d 172 (1970). Even if waiver can be applied to the present situation, we do not see any intentional relinquishment here, because a dismissal without prejudice contemplates the right to further proceedings. *Ortega v. Transamerica Ins. Co.*, 91 N.M. 31, 569 P.2d 957 (Ct.App.1977). The trial court could not have intended to relinquish its rights if it contemplated further proceedings. The Valencia County district court did not waive venue in this matter.

Since venue was properly in the Valencia County district court, and that was the court which heard this case on the merits, we need not consider the disposition of appellant's claims in the Bernalillo County court.

II.

Appellants contend that if summary judgment should have been granted at all, it should have been in their favor, because the Special Master's report unambiguously required distribution of "one share" to each of them, rather than the portion of a share they received under the corporation's method of allocation according to descent and distribution. Appellants further contend that summary judgment was not proper since there remained in the cause genuine issues of material fact concerning proper implementation of the prior decree.

The sole controverted question requiring consideration is whether the directors of the corporation have properly interpreted the prior decree concerning distribution of shares in the Juan Tafoya Land Tract. Here, the prior decree listed the "trunk heirs" in the land tract, then listed the "heirs." Finally, it required a division of the tract among the heirs "subject to the New Mexico laws of descent and distribution."

Appellants make much of the language in the Special Master's findings which requires "one share be granted to each [heir]." However, in construing a judgment, it must be read in its entirety and construed as a whole. *See Mundy & Mundy, Inc. v. Adams*, 93 N.M. 534, 602 P.2d 1021 (1979).

Ownership of a share in a corporation is ownership in a definite, measurable portion of the corporation. However, at the time the decree here was issued, it involved ownership of a land tract by co-tenants. In construing the document as a whole, we do not think it required each person listed in Exhibit C to receive one share in the corporation, if and when it was formed. Rather, it required the governing body of the tract to allow all individuals owning an interest in the tract to participate. Each person's property right was to be subject to the New Mexico laws of descent and distribution.

While the trial court in the present appeal granted summary judgment without specific findings and conclusions, it necessarily had to determine that the method of distribution of corporate shares was in accordance with the previous decree. We agree. By looking to the entire judgment, incorporating the Special Master's report, it is apparent that the method of distribution of shares adopted by the corporation was in accord.

Further issues raised by appellants are deemed beyond the scope of the present appeal and are therefore not addressed by this Court.

The trial court is affirmed.

IT IS SO ORDERED.

SOSA, Senior Judge, and PAYNE, J., concur.

632 P.2d 741

STATE of New Mexico, Petitioner,

v.

Ruperto SANDOVAL, Respondent.

No. 13469.

Supreme Court of New Mexico.

Aug. 20, 1981.

Jeff Bingaman, Atty. Gen., Carol Vigil, Asst. Atty. Gen., Santa Fe, for petitioner.

Martha A. Daly, Appellate Defender, Andrea L. Smith, Asst. Appellate Defender, Santa Fe, for respondent.

OPINION

PAYNE, Justice.

The defendant, Ruperto Sandoval, was convicted of trafficking in heroin contrary to Section 30–31–20(A)(2), N.M.S.A.1978 (Repl.Pamp.1980). The defendant sought review by the Court of Appeals which reversed and remanded to the trial court. The State petitioned this Court for certiorari to review the Court of Appeals' application of Rule 510 of the New Mexico Rules of Evidence, N.M.S.A.1978. We granted certiorari.

The defendant's conviction stemmed from a transaction where he allegedly sold quantities of heroin to an undercover agent. Present during this transaction was a confidential informant who assisted the agent in setting up the purchase. During the course of the trial, the defendant sought a court order requiring the State to identify and produce the confidential informant. The trial court determined that the informant was a material witness and, pursuant to Rule 510, ordered the State to produce him for an *in camera* hearing to determine whether his identity should remain confidential. A continuance was allowed so that the *in camera* hearing could be held.

The State was unable to locate the informant and indicated it did not believe it could locate and produce him for the *in camera* hearing. The court then entered an order that the State would have to either disclose the identity and last known address of their informant or suffer dismissal of its case. The State then disclosed the name and last known address of its informant, whereupon the defendant moved for dismissal, alleging a failure by the State to use due diligence in locating the informant. The trial court denied this motion, holding that due diligence is only necessary when there is no disclosure of the informant's identity.

The issue on certiorari is whether the remand by the Court of Appeals to determine whether the State exercised due diligence was beyond the scope of Rule 510. Although we agree that the case must be remanded, we feel it necessary to modify the standards set forth by the Court of Appeals.

The function and purpose of Rule 510 was stated by this Court in *State v. Robinson*, 89 N.M. 199, 201–202, 549 P.2d 277, 279–80 (1976):

> Our evidentiary Rule 510 provides a systematic method for balancing the state's interest in protecting the flow of information against the individual's right to prepare his defense. It gives the trial court the opportunity to determine through an *in camera* hearing whether the identity of the informer must be disclosed or not. Where it appears that the informer's testimony will be relevant and helpful to the defense of an accused, or necessary to a fair determination of the issue of guilt or innocence, then *the trial judge can order the state to either reveal the identity of the informer or suffer a dismissal of the charges to which the testimony would relate.* On the other hand, where it appears to the trial judge from the evidence that the informer's testimony will not be relevant and helpful to an accused's defense, or necessary to a fair determination of the issue of guilt or innocence, then the identity of the informer can remain undisclosed, and that person is not exposed unnecessarily to the highly dangerous position of being a known informant. (Emphasis added.)

Rule 510 creates a privilege in this state or any of its subdivisions to refuse to reveal the identity of a person who has furnished information or assisted in the investigation of a possible criminal violation. This privilege is subject to exceptions as set forth in Subsection (c)(1), (2), and (3). The rule extends only to a determination of when an informer's identity will be required by the court to be disclosed. Here, the identity of the informer and his last known address were disclosed to the defendant pursuant to the court's order. The United States Supreme Court has held that this type of order is a proper limitation on the informer's privilege. *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

In the present case, Rule 510 no longer has any applicability because full disclosure, as required by *Roviaro, supra,* has been made. However, the fundamental requirements of fairness include a duty on the part of the prosecution and the police to "give reasonable assistance to defendants and their counsel in making it possible for them to procure the informer as their witness." (citation omitted.) *United States v. Fancutt* 491 F.2d 312, 314 (10th Cir. 1974).

Roviaro did not foreclose the possibility of a higher duty to assist the defense where disclosure of the informer's identity is not useful. In *United States v. Williams,* 496 F.2d 378, 382 (1st Cir. 1974) the court stated that "the government's duty under *Roviaro* to produce names and addresses requires it to produce correct information or at least to have exercised diligence reasonable under the circumstances to locate the informer.... How far it must go to keep tract of, or search for, an informer is less easily stated; that depends on many factors including the extent of the government's control over the witness, the importance of the witness' testimony, the difficulty of finding him, and similar matters.

The California Supreme Court has "recognized the futility of a rule requiring disclosure of the information which the police know about a material witness informer without a further requirement that the police make efforts to obtain information useful in locating the informer as well." *People v. Goliday,* 8 Cal.3d 771, 778, 106 Cal. Rptr. 113, 118, 505 P.2d 537, 542 (1973). There, the police agent learned only the first names of two witness-informants, purposely avoiding any further information to assure that the informants could not be called as witnesses.

The Court of Appeals properly recognized that the government has a duty to act with due diligence in locating the informant where it refuses to disclose the informant's identity. *State v. Ramirez,* 95 N.M. 202, 619 P.2d 1246 (Ct.App.1980); *State v. Alvarez,* 93 N.M. 761, 605 P.2d 1160 (Ct.App.1978); *State v. Carrillo,* 88 N.M. 236, 539 P.2d 626 (Ct.App.1975). However, once the government has disclosed the informant's identity and last known address, the threshold for finding due diligence is lowered. After disclosure, the government must show only that it made reasonable attempts to acquire the information needed to locate the informer and that it disclosed all the information it possesses which is useful in locating the informer. Failure to make such a showing where the court has determined that disclosure of the informer's identity is necessary under Rule 510 would justify dismissal of the charges.

The case is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

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

RIORDAN, J., not participating.

632 P.2d 743

CELEBRITY, INC., Plaintiff-Appellant,

v.

Dale KEMPER, d/b/a K-Drugs, Defendant-Appellee.

No. 13301.

Supreme Court of New Mexico.

Aug. 20, 1981.

Earl Norris, Mirrer, Ryan, Orleans & Vener, Albuquerque, for plaintiff-appellant.

Menig, Sager, Curran & Sturges, Paula J. West, Albuquerque, for defendant-appellee.

OPINION

PAYNE, Justice.

Appellant Celebrity sold goods on open account to appellee Kemper, a retailer, with whom it had been doing business over a period of four or five years. Immediately after delivery, Kemper noticed some defective items in the shipment. These were set aside. In past dealings when shipments had contained defective goods, Kemper would set aside the defective items and Celebrity's salesman would check the items and make an adjustment to the account. In this instance, Celebrity's salesman refused to make an adjustment when notified of the defective goods. The invoice for the goods specified that all returns were to be made within five days after receipt and would be accepted only with prior written authorization. Kemper took no further action until he received a demand for payment and threat of lawsuit from Celebrity (approximately three months after the meeting with the salesman). At this time Kemper reboxed all of the unsold and returned goods, whether defective or not, and returned them to Celebrity. Celebrity sent them back, but Kemper refused to accept them. Celebrity sued for the purchase price and judgment was entered for Kemper. We reverse.

This case raises the question of whether there was an adequate rejection of goods under Section 55–2–602, N.M.S.A. 1978. The trial court found a course of dealing between the parties whereby damaged or defective goods were rejected if Kemper brought the damaged or defective goods to the attention of Celebrity's salesman on his next visit to Kemper's place of business following receipt of the merchandise. However, where the express terms of a contract cannot be reconciled with an established course of dealing, the express terms control. § 55–1–205(4), N.M.S.A. 1978. Kemper was justified in acting pursuant to the established course of dealing until notified that the express terms of the contract were to be invoked by Celebrity. The salesman's refusal to make the requested adjustments constituted such notice to Kemper. Under the Uniform Commercial Code, all parties in commercial dealings have obligations of good faith, diligence, reasonableness and care which must be met. § 55–1–102, N.M.S.A.1978. Kemper's failure to respond to the salesman's notification until threatened with suit does not accord with these obligations. Kemper failed, as a matter of law, to give Celebrity seasonable and particular notice of rejection as to the entire shipment. § 55–2–602(1) and § 55–2–605, N.M.S.A.1978.

Recognizing that Kemper was justified in acting according to the established course of dealing until notified of a change, we find that only those items set aside and presented to the salesman were properly rejected. We remand for a determination of what items were rejected in this manner.

On appeal, Kemper relied upon Section 55–2–601, N.M.S.A.1978, as justification for his eventual rejection of all of plaintiff's goods. The statute provides that where the

seller's tender fails in any respect, the buyer has three alternatives: reject the whole, accept the whole, or accept any commercial unit or units and reject the rest. Since defendant failed to properly reject all but certain specific items, those items not rejected were accepted. § 55–2–606(1)(b), N.M.S.A.1978. He thus chose the third alternative under Section 55–2–601 and was unjustified in returning the whole.

Kemper also claims he had insufficient opportunity to inspect the goods because they were packaged for sale, but the law does not permit an indefinite period for inspection where inspection may be difficult. The law provides the buyer a reasonable opportunity to inspect. § 55–2–606(1)(b), N.M.S.A.1978. We do not decide whether the five-day contractual period is reasonable, but Kemper's delay after Celebrity's invocation of the contract provision was unreasonable. In addition, under Section 55–2–601, Kemper had the opportunity to reject the entire shipment when he learned upon receipt that some of the items were defective. He failed to do so; instead, he accepted most of the shipment and rejected the rest.

Celebrity sought the full contract price. We leave to the trial court the determination of whether any attempt was made by Celebrity to sell the goods in its possession and the applicability of §§ 55–2–703, 55–2–706, 55–2–709, N.M.S.A.1978.

The case is remanded for further action consistent with this opinion.

IT IS SO ORDERED.

SOSA, Senior Justice, and RIORDAN, J., concur.

632 P.2d 745

Gilbert Louis ATENCIO, Petitioner-Appellant,

v.

Hon. Elizabeth LOVE, Metropolitan Court Judge, Respondent-Appellee.

No. 13458.

Supreme Court of New Mexico.

Aug. 21, 1981.

Ralph C. Binford, Albuquerque, Martha A. Daly, Appellate Defender, Melanie Kenton, Michael Dickman, Ellen Bayard, Asst. Appellate Defenders, Santa Fe, for petitioner-appellant.

Albert N. Theil, Asst. City Atty., Albuquerque, Jeff Bingaman, Atty. Gen., Art Encinias, Asst. Atty. Gen., Santa Fe, for respondent-appellee.

OPINION

RIORDAN, Justice.

This appeal is from the district court's refusal to grant a writ of prohibition directed to the Bernalillo County Metropolitan Court. We affirm.

On July 1, 1980, the municipal court in which this case was filed was consolidated with other courts to form the Bernalillo County Metropolitan Court. Since this case was filed prior to July 1, 1980, it is governed by the rules of procedure for the court in which it was filed. N.M.Metro. R.P., N.M.S.A.1978 (Orig.Pamp.1980).

The petitioner-appellant Gilbert Atencio (Atencio) was arrested on March 23, 1980, and charged with driving while intoxicated and making an illegal left turn. He was arraigned on March 28, 1980. On May 1, 1980, Atencio was tried and found guilty. A pre-sentence report was ordered and sentencing was scheduled for May 28, 1980. The sentencing was continued twice and finally reset for October 2, 1980. Atencio moved for a dismissal on grounds that he was not sentenced within six months from the date arraigned as required by Rule 20(b) of the Rules of Procedure for the Municipal Courts, N.M.S.A.1978. When his motion was denied, Atencio instituted this proceeding in district court.

Municipal Court Rule 20(b) provides that:

> Any charge which is pending for six months from the date of the arraignment of the defendant without disposition by the municipal court shall be dismissed with prejudice unless, after a hearing, the municipal judge finds that the defendant was responsible for the inability of the court to complete the disposition of the proceeding. If a complaint or citation is dismissed pursuant to this paragraph, a charge for the same offense shall not thereafter be filed in any court.

On appeal, the issue is whether the word "disposition" as used in this rule encompasses the sentencing proceeding before the municipal court. We hold that it does not.

At the outset, we point out that Atencio's claim is not based on constitutional grounds. Rather, he claims that our procedural rule guarantees him a dismissal of this action. We do not agree. One of the reasons we adopted the above rule was to assure prompt handling of matters before the municipal courts of this state. The rule is not only for the benefit of the defendant, but also for the court system and the public in general. We decline to interpret the rule in a manner that favors the defendant at the expense of everyone else. We have also included a similar rule for magistrate courts, N.M.Magis.R.Crim.P. 17(b), N.M.S.A.1978, district courts, N.M.R.Crim.P. 37(b), N.M.S.A.1978 (Repl.Pamp.1980), children's courts, N.M.Child.R.P. 46, N.M.S.A.1978 (Repl.Pamp.1980), and now the metropolitan courts, N.M.Metro.R.P. 55(b), N.M.S.A. 1978 (Orig.Pamp.1980).

We also point out that the rule requires the "charges" to be disposed of and not the "case", "matter" or "cause". Accordingly, failure to sentence the defendant within six months of his arraignment does not require a dismissal under Municipal Court Rule 20(b).

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

SOSA, Senior Justice and PHILIP R. ASHBY, District Judge, concur.

632 P.2d 746

STATE of New Mexico, Plaintiff-Appellee,

v.

Manuel J. ULIBARRI, Defendant-Appellant.

No. 4968.

Court of Appeals of New Mexico.

May 19, 1981.

Certiorari Quashed Aug. 21, 1981.

John B. Bigelow, Chief Public Defender, Melanie S. Kenton, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Marcia E. White, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of operating a motor vehicle while under the influence of intoxicating liquor contrary to § 66–8–102, N.M.S.A.1978 (Supp.1980), defendant was sentenced to a term of nine months and fined $500.00 as a second offender. Defendant appeals claiming that under *Baldasar v. Illinois*, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169 (1980), his first offense, a guilty plea in Clovis Municipal Court to a charge of driving while intoxicated, could not be used to enhance his penalty because he was not represented by counsel. We agree and reverse.

The sole issue we decide is whether an enhancement raising the subsequent penalty from a petty misdemeanor to a high misdemeanor comes within the prohibition of *Baldasar*. The State suggests that the defendant could not benefit from the ruling in *Baldasar* if he had waived counsel. However, we do not understand the State to be asserting that defendant in fact had waived his right to counsel. The record is silent and presuming a waiver of counsel from a silent record is impermissible. *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). Secondly, this issue was not the basis of the ruling in the trial court. The trial court ruled that *Baldasar* does not apply to the defendant because the enhancement involved was not from a misdemeanor to a felony.

The State also contends that *Baldasar* is distinguishable because the enhanced penalty in that case was a felony, whereas we do not have a felony charge in this case. Consequently, the State maintains that neither *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), nor *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979), is violated because the defendant was not jailed for his uncounseled conviction.

We read *Baldasar* to mean that even if the enhanced offense is a misdemeanor with a light penalty, an accused may not be sentenced to serve a term of imprisonment unless he was afforded the benefit of assistance of counsel in the prior as well as the predicate offense. All instances where an enhancement follows a prior offense in

which the defendant did not have the assistance of counsel in his defense are controlled by *Baldasar*. The fact of the prison term and not the gravity of the offense is the controlling criterion. *Argersinger v. Hamlin, supra; Scott v. Illinois, supra.*

The State invites our attention to *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980). There, the defendant was not allowed to collaterally attack a firearm violation by showing that his status of being a criminal was constitutionally infirm because he was not afforded counsel. The Supreme Court recognized *Burgett* and other cases for the proposition that an invalid conviction under *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), could not be used for enhancement purposes. Nevertheless, the Supreme Court held that the clear intent of Congress was not to limit the coverage of the firearm statute to persons whose convictions are not subject to collateral attack:

> The statutory language is sweeping, and its plain meaning is that the fact of a felony conviction imposes a firearm disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action, such as a qualifying pardon or a consent from the Secretary of the Treasury. The obvious breadth of the language may well reflect the expansive legislative approach revealed by Congress' express findings and declarations, in 18 U.S.C.App. § 1201, concerning the problem of firearm abuse by felons and certain specifically described persons.

Finally, we note that *Lewis* was decided on February 27, 1980, and *Baldasar* was decided on April 22, 1980. The dissent in *Baldasar* points to *Lewis*. Thus, although sympathetic to the position taken by the State in suggesting that there is no clear policy enunciated by the Supreme Court in these two cases, nevertheless, we are not free to disregard the latest pronouncement by the United States Supreme Court in this area. The latest pronouncement seems to be that an uncounseled prior conviction, felony or misdemeanor, may not be used to enhance a subsequent offense. We are not unmindful of the contention that in *Lewis* the prior conviction was much more relevant to the firearm conviction. That fact does not lead to a different conclusion. In fact, it might be considered a basis for distinguishing *Lewis* from *Baldasar*. In *Lewis*, the Supreme Court reasoned: "Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm." Even in that decision, the court expressly reaffirmed the holding in *Burgett* that an uncounseled conviction is not valid for enhancement purposes.

Accordingly, we reverse and remand.

IT IS SO ORDERED.

LOPEZ and WALTERS, JJ., concur.

632 P.2d 748

STATE of New Mexico, Plaintiff-Appellant,

v.

James R. GONZALES, Defendant-Appellee.

No. 5154.

Court of Appeals of New Mexico.

July 2, 1981.

Certiorari Denied Aug. 5, 1981.

Jeff Bingaman, Atty. Gen., Art Encinias, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

C. N. Morris, Silver City, for defendant-appellee.

OPINION

HENDLEY, Judge.

The State appeals from the trial court's dismissal of a grand jury indictment for perjury. Summary affirmance was proposed. The State responded with a timely memorandum in opposition; however, we are not persuaded by the arguments as to the target notification issue and we affirm on that point.

The facts recited in the docketing statement which are not challenged are accepted as the facts on appeal. *State v. Calanche*, 91 N.M. 390, 574 P.2d 1018 (Ct. App.1978). Defendant was a witness in a grand jury investigation in September and October, 1980. On the basis of his testimony, he was indicted on October 8, 1980, by the same grand jury for perjury, contrary to § 30–25–1, N.M.S.A. 1978. That indictment was dismissed as legally insufficient on February 20, 1981. The district attorney presented the matter several days later and a second indictment was returned February 25, 1981. The second indictment was based on transcripts of the previous investigation submitted to the grand jury by the district attorney.

After defendant filed several motions to dismiss, the trial court dismissed the second indictment. The first issue raised by the State deals with whether, under § 31–6–11(A), N.M.S.A. 1978 (Supp.1980), a grand jury may only indict upon "oral testimony". The second issue is whether the target notification requirement under § 31–6–11(B), *supra*, applies to persons whom the grand jury investigates on its own initiative. Because the second issue is dispositive, we need not address the first. However, in regard to the first issue, see *State v. Evans*, 89 N.M. 765, 557 P.2d 1114 (Ct.App.1976).

While conceding that notice and an opportunity to testify must be given to targets of a grand jury investigation, *Rogers v. State*, 94 N.M. 218, 608 P.2d 530 (Ct.App.1980), the State distinguishes between matters brought before the grand jury by the district attorney and charges initiated by the grand jury. The State seems to say that the grand jury should not have to target a witness who testifies before them on one investigation and then reconvene to "allow the witness *cum* target another opportunity to testify".

We see no reason why this should *not* be the procedure. First, there is no indication in the statutes (§ 31–6–1 *et seq.*, N.M.S.A. 1978) that the Legislature intended that those investigated by the grand jury on its own initiative have fewer rights than others who are indicted as a result of a district attorney's actions. These statutes do not operate solely as a check on the district attorney; rather, they are intended to afford procedural rights in the grand jury system as a whole. Second, once the grand jury proceeds to investigate a matter, the focus of that investigation becomes the target, regardless of how the matter arose before the grand jury.

Within the language and intent of the statutes governing grand jury procedures,

we see no distinction between witnesses who may perjure themselves before the grand jury and those who are investigated for other crimes. The trial court's decision is affirmed.

IT SO ORDERED.

WOOD and WALTERS, JJ., concur.

632 P.2d 750

STATE of New Mexico, Plaintiff-Appellee,

v.

John DOE, a Child, Defendant-Appellant.

No. 5052.

Court of Appeals of New Mexico.

July 21, 1981.

Michael R. Gernsheimer, Granat, Gernsheimer & Hartmann, P. A., Santa Fe, for appellant.

Jeff Bingaman, Atty. Gen., Carol Vigil, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

HENDLEY, Judge.

The child appeals an order transferring him to the district court for prosecution as an adult. He contends the motion to transfer was untimely filed and that the trial court erred in finding that he was not amenable to rehabilitation. We affirm.

Transfer Motion

On December 19, 1980, a petition was filed alleging delinquency for the acts of armed robbery of a store, escape from custody of a peace officer, and resisting an officer. On the same day, the child was ordered detained. The detention order recited that the public defender was appointed to represent him and that a motion requesting that he be tried as an adult would be forthcoming.

On December 30, 1980, an amended petition was filed. The amended petition was almost verbatim as the original—the only difference being a different victim's name in the armed robbery count. Simultaneously, a motion to transfer the child to district court was filed. The transfer hearing was held January 21, 1981.

The child relies on *State v. Doe*, 94 N.M. 446, 612 P.2d 238 (Ct.App.1980), *cert. not applied for*, for the proposition that a motion to transfer under N.M. Children's Court R. 43, N.M.S.A.1978 (Repl.1980), is a "preadjudicatory motion" which must be filed within ten days under N.M. Children's Court R. 14, N.M.S.A.1978 (Repl.1980). That statement in Headnote (3) at page 449 is wrong and is to be disregarded in the future. The remainder of the opinion stands. For three reasons, we now hold that Rule 14 does not apply to the *filing* of motions to transfer.

First, preadjudicatory motions may be analogized to "pretrial motions." *See*, Committee Commentary to Rule 14 and *State v. Doe*, 93 N.M. 143, 597 P.2d 1183 (Ct.App.1979). The concept of pretrial motions traditionally embodies rulings that are conducive to the orderly flow of trials. Such motions contemplate a subsequent trial, just as preadjudicatory motions contemplate a subsequent hearing on the merits of a petition. A transfer motion is filed with the expectation that there will be no adjudication in the Children's Court.

Second, the fact that Rule 43 requires a transfer motion to be made prior to the adjudicatory hearing does not make the motion a preadjudicatory motion for purposes of Rule 14. The chronology involved is premised on the prohibition against double jeopardy. *See Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975); *State v. Doe*, 91 N.M. 506, 576 P.2d 1137 (Ct.App. 1978).

Third, neither Rule 43 nor § 32–1–30, N.M.S.A.1978 (discretionary transfer by the Children's Court) indicate that such motions are to be considered as actions under Rule 14. Neither the rule nor the statute provides a time limit for filing motions to transfer.

Because a transfer motion is not a Rule 14 motion and because no time limit for filing a transfer motion has been provided, we construe a limit consistent with the philosophy of the Children's Court Rules. We hold that reasonableness is the test when there is an issue concerning the timeliness of the filing of a motion to transfer. *See, State v. Doe*, 94 N.M. 446, 612 P.2d 238, *supra*.

At the hearing below, the trial court found that there were legitimate reasons for filing the amended petition and explicitly ruled the refiling "reasonable." The detention order put counsel on notice that a transfer motion would be forthcoming. Counsel did not claim lack of adequate preparation time, surprise, or prejudice, nor was a continuance requested. Under these circumstances, we find no abuse of discretion in the court's refusal to dismiss the transfer motion. The transfer hearing was held within the proper time limitation. *Contrast, State v. Doe*, 94 N.M. 466, 612 P.2d 238, *supra*.

Amenable to Rehabilitation

The child states this point as follows:

The trial court erred in finding the delinquent not amenable to rehabilitation. The court incorrectly required the defense to carry the burden of persuasion and affirmatively prove the child *in fact would* benefit from extant treatment with New Mexico juvenile facilities. Future actions are simply not predictable. The correct burden of proof, if at all upon the defendant-appellant, is proof that the child *could* well benefit from such treatment.

First, the transcript does not support this contention. The order of proceedings was the calling of the witnesses by the State to show that the child was not amenable to treatment in any New Mexico facilities, followed by the defense trying to show the contrary.

The record reflects an agonizing attempt by the trial judge to identify what might be the most salutory path to take with the child. In *State v. Doe*, 94 N.M. 446, 612 P.2d 238, *supra*, we commended the Children's Court for its consideration of the best interest of the child when considering the motion to transfer. Based on the record in this case, we do no less. We find no merit to the claim that the Children's Court did not use the proper test in making his decision to transfer. From the testimony, the court could have found "reasonable grounds to believe that . . . the child is not amenable to treatment or rehabilitation as a child through available facilities." *Contrast, State v. Doe*, 93 N.M. 481, 601 P.2d 451 (Ct.App.1979).

In light of the foregoing, we affirm.

IT IS SO ORDERED.

HERNANDEZ, C. J., and LOPEZ, J., concur.

632 P.2d 752

PLUMBERS SPECIALTY SUPPLY COMPANY, a New Mexico Corporation, Plaintiff-Appellee,

v.

ENTERPRISE PRODUCTS COMPANY, a California Corporation, Defendant-Appellant.

No. 4849.

Court of Appeals of New Mexico.

July 23, 1981.

Peter B. Shoenfeld, Shoenfeld & Engel, P. A., Santa Fe, for defendant-appellant.

F. Joel Roth, Roth, VanAmberg & Gross, Sante Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

Ramona Romero sought damages from Aranda, Plumbers (Plumbers Specialty Supply Company, the plaintiff herein) and Enterprise (Enterprise Products Company, the defendant herein) on the basis of injuries allegedly suffered as the result of the defective manufacturing or defective packaging of a bottle of "Drain Devil". Enterprise refused to defend Plumbers in the Romero suit, which was settled during the jury selection process. Both Plumbers and Enterprise contributed $7,500.00 to the Romero settlement. In this suit, Plumbers sued Enterprise for its costs in defending the Romero suit and the amount that Plumbers paid in the settlement of the Romero suit. The trial court awarded judgment in favor of Plumbers; Enterprise appeals. We discuss: (1) procedural matters, (2) jurisdiction, and (3) indemnity.

Procedural Matters

(a) Enterprise does not attack the findings made by the trial court. Those findings are the facts in this appeal. *Lerma v. Romero*, 87 N.M. 3, 528 P.2d 647 (1974).

(b) Enterprise questions the inclusion of two depositions in the appellate record because neither party formally moved the depositions be admitted as evidence. The trial court found that the attorneys for the parties agreed upon the use of the depositions; that the depositions were submitted to the trial court for its consideration; that the parties, without objection, referred to the depositions in their arguments and requested findings; that the trial court utilized the depositions in considering the merits of the case. There being no attack on these findings, they are facts in this appeal. These findings support the conclusions (1) that the depositions were properly before the trial court by agreement, and (2) that the depositions should be included as a part of the appellate record.

(c) The trial court did not specifically find that it was Enterprise's product that caused Romero's injuries. Enterprise claims that such a finding was necessary in order for it to be liable. This contention is based on evidence that prior to June, 1975, Plumbers obtained Drain Devil from Enterprise's predecessor. Enterprise's argument is that it cannot be liable unless it supplied the bottle of Drain Devil on which Romero's claim was based. See *Winward v. Holly Creek Mills, Inc.*, 83 N.M. 469, 493 P.2d 954 (1972). This argument is answered by unattacked findings which are: 1. "At all material times hereto, Enterprise * * * manufactured, labeled, packaged, and sold a product known as 'Drain Devil', a drain solvent, to Plumbers * * * for the purpose of resale." 2. "On or about February 20, 1976, Ramona Romero purchased a bottle of 'Drain Devil' from a plumber who had purchased it from * * * [Plumbers] who in turn had purchased it from * * * [Enterprise]". These unattacked findings dispose of the contention that Enterprise's product was not involved.

(d) Plumbers' dealings with Enterprise were through Rubin. There was testimony of Plumbers' conversations with Rubin and there were letters from Enterprise to Plumbers, signed by Rubin as "Vice President, Administration". Rubin's deposition was before the trial court. Enterprise's liability was based on Rubin's dealings with Plumbers.

The trial court did not specifically find that Rubin had the authority to act on behalf of Enterprise. In the absence of such a finding, Enterprise asserts it cannot be held liable for Rubin's actions. Enterprise relies on *Rekart v. Safeway Stores, Inc.*, 81 N.M. 491, 468 P.2d 892, 38 A.L.R.3d 354 (Ct.App.1970), which dealt with the out-of-court admission of an acting manager, and the absence of any showing as to the acting manager's speaking authority. That is not the situation in this case; Rubin testified to his authority in his deposition which was before the court. This trial testimony was sufficient to establish Rubin's authority. See *Ronald A. Coco, Inc. v. St.*

Paul's Methodist Church, 78 N.M. 97, 428 P.2d 636 (1967); *State v. Kelly*, 27 N.M. 412, 202 P. 524, 21 A.L.R. 156 (1921). Inasmuch as the evidence as to Rubin's authority was not controverted, a finding as to that authority was not required; the findings, which refer to Enterprise's representations and communications (these being the representations and communications of Rubin), were sufficient findings on which to base Enterprise's liability.

Jurisdiction

(a) Plumbers' complaint alleged that Enterprise was a California corporation; it is not disputed that Enterprise was served with process in California. Enterprise moved in the alternative for dismissal of the complaint or for quashing service of process. After both parties filed legal memoranda, the trial court, by letter, informed counsel that the motion would be denied. Enterprise then asked for a "factual hearing" or in the alternative, for opportunity to make a tender of proof. Enterprise objected to entry of the formal order denying the motion "for lack of hearing". Enterprise complains of the denial of its motion.

Enterprise relies on *State ex rel. Anaya v. Columbia Research Corp.*, 92 N.M. 104, 583 P.2d 468 (1978), which held that where jurisdiction is based on process served under our long-arm statute, the plaintiff has "the burden to prove the jurisdictional allegations at the hearing on * * * [defendant's] motion to dismiss." Although a plaintiff must prove the jurisdictional facts when those facts are in issue, we have reservations about a procedure which puts the burden on a plaintiff to prove a portion of his case in advance of trial. When a defendant moves to dismiss, in advance of trial, it would seem that defendant should have the burden of persuasion as to the absence of jurisdictional facts. Nevertheless, we must follow the *Columbia*, supra, decision. *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973).

Neither the absence of a hearing on the pretrial motion to dismiss nor the denial of the pretrial motion was error. Among the grounds for jurisdiction under our long-arm statute, § 38–1–16, N.M.S.A. 1978, are: (1) the transaction of any business within the state; (2) the commission of a tortious act within the state; and (3) the contracting to insure a risk located within the state at the time of contracting. Each of these three grounds were alleged in Plumbers' complaint. Enterprise's motion to dismiss, supported by affidavit, directly challenged the "doing business" ground and, by inference, challenged the "insurance" ground. The "tortious act" ground was not challenged. Inasmuch as one ground of alleged jurisdiction was not challenged, see *Columbia*, the trial court did not err in failing to put Plumbers to its jurisdictional proof in advance of trial.

(b) During the trial, Enterprise again moved to dismiss, contending that Plumbers had failed to prove facts necessary for jurisdiction under § 38–1–16, supra. The trial court ruled that plaintiff had proved the "doing business" ground, pointed out the similarity of the proof to the facts in *Blount v. T D Publishing Corporation*, 77 N.M. 384, 423 P.2d 421 (1966). *Blount* states:

> When a manufacturer voluntarily chooses to sell his product in a way which will be resold from dealer to dealer, transferred from hand to hand and transported from state to state, he cannot reasonably claim that he is surprised at being held to answer in any state for the damage the product causes.

Telephonic, Inc. v. Rosenblum, 88 N.M. 532, 543 P.2d 825 (1975), points out that "doing business" has been defined as doing a series of similar acts for the purpose of realizing a pecuniary profit, or otherwise accomplishing an object. The evidence showed that Enterprise solicited Plumbers' business; that Plumbers began doing business with Enterprise in the summer of 1975 (the Romero injury occurred in the early part of 1976); that Drain Devil was Plumbers' private label, supplied to Plumbers by Enterprise on a regular basis. The evidence met the doing business ground for jurisdiction.

(c) Enterprise asserts there is nothing showing that Plumbers' claim arose from business done by Enterprise in New Mexico. See *Winward v. Holly Creek Mills, Inc.*, supra. In doing business in New Mexico, Enterprise represented to its customers that it carried products liability insurance; that its products were covered under that insurance and that Plumbers "was covered under said coverage"; that if a customer desired verification of the coverage, a certificate of coverage would be provided the customer; that in consideration of this coverage, Enterprise charged Plumbers an additional sum which was included in the cost of the Drain Devil sold to Plumbers. The foregoing recitation is taken from the unchallenged findings. Another unchallenged finding, which we quote in the following subsection, goes to the contents of the protection to be afforded Plumbers. The unchallenged findings show that Plumbers' claim was directly related to the representations and actions of Enterprise in doing business in New Mexico.

(d) It is undisputed that after Enterprise refused to defend Plumbers in the Romero suit, Plumbers incurred attorney fees in providing its own defense. Enterprise asserts that these attorney fees could not be charged to it. Enterprise cites *Worland v. Worland*, 89 N.M. 291, 551 P.2d 981 (1976), for: "Statutory authority is the exclusive means by which the courts may obtain personal jurisdiction of persons outside the State." Section 38–1–16(C), supra, states: "Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction is based upon this section." Enterprise asserts that § 38–1–16 does not authorize an award of attorney fees.

If Plumbers' legal expenses in defending the Romero suit were causally connected to Enterprise's doing business in New Mexico, the fees were properly awarded as a part of Plumbers' recovery. We have previously referred to Enterprise's representation as to products liability coverage and its charge to Plumbers for the asserted coverage. Unattacked finding No. 5 reads in part:

> Said products liability insurance coverage, among other things, was to provide and pay for legal defense on behalf of Plumbers * * * if Plumbers * * * was made a party to a claim of damages resulting from the use of the product "Drain Devil" and pay any damages which Plumbers may pay or be required to pay as a result of any claims concerning said product.

Enterprise's refusal to defend Plumbers was contrary to its representations to Plumbers in selling Drain Devil to Plumbers. The legal expenses incurred by Plumbers were directly tied to the business Enterprise did in New Mexico. Under these circumstances, Enterprise could properly be held to pay Plumbers' legal expenses incurred in defending the Romero suit.

(e) Enterprise contends the trial court failed to make "the finding required to support jurisdiction." This claim is frivolous. Not only did the trial court make numerous evidentiary findings as to doing business, it found the ultimate fact—Enterprise was served with process in California "pursuant to the laws of New Mexico." Both the evidentiary findings and the ultimate finding support the trial court's conclusion that it had jurisdiction over the parties and the subject matter.

Indemnity

Enterprise had charged Plumbers a fee as consideration for its promise to provide and pay for Plumbers' defense in the Romero suit, and its promise to pay for damages that Plumbers was required to pay. The trial court awarded judgment in favor of Plumbers on the basis that Enterprise had agreed to indemnify Plumbers. Enterprise does not challenge the proof which showed a contract of indemnity. Enterprise claims that the findings were insufficient to support the conclusion of indemnity. See *Goldie v. Yaker*, 78 N.M. 485, 432 P.2d 841 (1967).

(a) Enterprise states that it is basic indemnity law that a defendant, *in order to be required to indemnify another*, must be "primarily liable" vis-a-vis the other party,

citing *Rio Grande Gas Company v. Stahmann Farms, Inc.*, 80 N.M. 432, 457 P.2d 364 (1969) and *Harmon v. Farmers Market Food Store*, 84 N.M. 80, 499 P.2d 1002 (Ct. App.1972). This contention is correct in cases of joint tort-feasors; where there are joint tort-feasors, one joint tort-feasor has the right to secure repayment from another joint tort-feasor "who, as between themselves, is primarily liable." *Rio Grande Gas Company v. Stahmann Farms, Inc.*

Plumbers was awarded judgment on the basis that Enterprise contracted to indemnify Plumbers, and not on the basis of indemnity between joint tort-feasors. This argument disregards the facts of the case and relies on an inapplicable legal theory.

(b) Enterprise points out that there was no finding that (1) the Drain Devil supplied by Enterprise caused injury to Romero, (2) Romero was actually injured, and (3) Plumbers was liable to Romero. Reminding us that the Romero suit was settled, Enterprise contends that in the absence of findings to the effect that Plumbers was actually liable to Romero, it could not obtain indemnity from Enterprise. A related argument is "that as a matter of law the Plaintiff failed to prove an essential element of its case, namely the compulsion under which it settled."

Enterprise relies on *Morrissette v. Sears, Roebuck & Co.*, 114 N.H. 384, 322 A.2d 7 (1974), which states:

> While a prejudgment payment in settlement does not extinguish a right of indemnity * * * the * * * [party seeking indemnification] must show that the settlement was made under legal compulsion, rather than as a mere volunteer, for indemnity is not available for payment voluntarily made.

In determining whether the settlement was made under "legal compulsion," the question arises as to what must be shown—actual liability or potential liability. *Morrissette* states:

> [I]f it appears that Sears was not afforded the alternative of participating in the settlement or conducting the defense, then Morrissette will have the burden of establishing her actual liability to * * * [plaintiff] rather than the lesser burden of showing potential liability. In either event, the reasonableness of the amount of the settlement must be established by Morrissette.

The indemnity claim in *Morrissette* was based on negligence warranty and strict liability. The indemnity claim in *Trim v. Clark Equipment Co.*, 87 Mich.App. 270, 274 N.W.2d 33 (1978), was based on a contract of indemnity. *Trim* held that:

> [T]o recover on the contract of indemnity, Clark need show only its potential, as opposed its actual, liability * * *.
>
> * * * * * *
>
> Potential liability actually means nothing more than that the indemnitee acted reasonably in settling the underlying suit. The reasonableness of the settlement consists of two components which are interrelated. The fact finder must look at the amount paid in settlement of the claim in light of the risk of exposure. The risk of exposure is the probable amount of a judgment if the original plaintiff were to prevail at trial, balanced against the possibility that the original defendant would have prevailed. [Citations omitted.] If the amount of the settlement is reasonable in light of the fact finder's analysis of these factors, the indemnitee will have cleared this hurdle. The fact that the claim may have been successfully defended by a showing of contributory negligence, lack of negligence or otherwise, is but a part of the reasonableness analysis and, therefore, subject to proof.

The above quotation from *Trim* is consistent with *St. Louis Beef Co. v. Casualty Co.*, 201 U.S. 173, 26 S.Ct. 400, 50 L.Ed. 712 (1906): "But a sum paid in the prudent settlement of a suit is paid under the compulsion of the suit as truly as if it were paid upon execution."

Tankrederiet Gefion A/S v. Hyman-Michaels Company, 406 F.2d 1039 (6th Cir. 1969), points out that where there is a contract of indemnification the "ultimate deci-

sion turns upon the language of the contractual undertaking." However, the discussion suggests that a "reasonable" or "prudent" settlement is still a requisite for indemnity.

The trial court found that Enterprise was to "provide and pay" for Plumbers' defense and Enterprise was to pay any damages "which Plumbers may pay or be required to pay". Several findings are to the effect that Enterprise was notified of the Romero suit; that it told Plumbers it would "take care of the matter"; that it did not do so; that when Enterprise appeared in the suit, it appeared only for itself and not for Plumbers, and refused to defend Plumbers. In these circumstances, Plumbers was required to show only a potential liability to Romero, not an actual liability. To satisfy the requirement of potential liability, Plumbers was only required to show that it acted reasonably.

Trim v. Clark Equipment Co., supra, points out that reasonableness is determined by looking at the amount paid in settlement in light of the risk of exposure, and the risk of exposure "is the probable amount of a judgment if the original plaintiff were to prevail at trial". Mr. Cohen, the executive vice-president of Plumbers at the time of the settlement, testified that his decision to settle was based on his exposure to loss; that if Romero recovered judgment against all three defendants in her suit, and the other two parties did not pay, Plumbers "could get slapped with the whole thing"; that he settled because of his exposure to loss; that the liability claim had become "very large." Mr. Cohen explained that Plumbers decided to settle after selection of the jury; that because of the jury make-up "there was the high degree of probability that the jury would award * * * [Romero] something" and because of the increase in the damage claim the "risk exposure factor had become unreasonable". There is nothing suggesting Cohen's view was unreasonable; the fact that Enterprise settled Romero's claim against it for the same amount that Plumbers paid, and at the same time, supports the reasonableness of the settlement made by Plumbers.

The evidence substantially supports a potential liability on the part of Plumbers; this answers Enterprise's contention that Plumbers failed to prove an element essential to obtain indemnification from Enterprise. The question of sufficient findings remains.

The trial court refused Enterprise's requested findings: (1) that there was no showing respecting the compulsion under which settlement was made in the Romero case; (2) that the settlement was a voluntary payment; and (3) that the settlement was not the result of any "probable" liability. These refusals would be deemed findings against Enterprise if it had the burden of proof, *Gallegos v. Wilkerson*, 79 N.M. 549, 445 P.2d 970 (1968), however, Enterprise had no such burden. The burden of persuasion was on Plumbers to prove it had a potential liability, *Trim v. Clark Equipment Co.*, supra, and it met that burden.

This is not a case where a party waives findings on a particular issue by not requesting such findings. *Goldie v. Yaker*, supra. Plaintiff did request findings, which the trial court adopted, that went generally to the question of potential liability. These findings went to Romero's claim of negligence, and the default judgment (subsequently set aside) of over $100,000.00 entered against Plumbers because Enterprise failed to defend Plumbers after promising to take care of the matter. While evidentiary and not ultimate findings, see *Goldie v. Yaker*, Plumbers did request findings directed to its potential liability. Although these findings are imprecise, when considered in relation to the refused findings, they are sufficient to support the conclusion that Enterprise must indemnify Plumbers.

The judgment in favor of Plumbers is affirmed. Enterprise is to bear its appellate costs.

IT IS SO ORDERED.

HERNANDEZ, C. J., and LOPEZ, J., concur.

632 P.2d 1162

VILLAGE OF CAPITAN, a Municipality in the State of New Mexico, Petitioner-Appellant,

v.

Ernest KAYWOOD and Bobbie Kaywood, husband and wife, Respondents-Appellees.

No. 13475.

Supreme Court of New Mexico.

Aug. 18, 1981.

Payne, Mitchell & Quigley, Gary C. Mitchell, Ruidoso, for petitioner-appellant.

Witham & Wall, Donald J. Wall, Carrizozo, for respondents-appellees.

OPINION

EASLEY, Chief Justice.

The Village of Capitan (Village) sued to obtain a permanent injunction against the Kaywoods to prevent them from obstructing a public road. The trial court dismissed the petition and granted the Kaywoods the right to maintain a fence across the road. The Village appeals. We reverse.

The issue presented is whether there was substantial evidence to support the trial court's conclusion that the Village had not established a public right-of-way by prescriptive easement.

The Kaywoods' property is a tract of relatively modest size situated in an inhabited subdivision. The road runs along an easement designated and granted on the subdivision plat for the purposes of construction and maintenance of a water line. The evidence showed that the road had been used continuously by the public and the Village for other purposes for a period in excess of ten years.

The trial court held that a prescriptive easement had not been established on the basis that the use had been by express

consent and approval. However, we have reviewed the record and cannot find any evidence that either the Kaywoods or their predecessors-in-interest had expressly consented to the use of the road.

A public right-of-way by prescription may be established by usage by the general public continued for the length of time necessary to create a right of prescription if the use had been by an individual, provided that such usage is open, uninterrupted, peaceable, notorious, adverse, under claim of right, and continued for a period of ten years with the knowledge, or imputed knowledge of the owner. *Lovelace v. Hightower*, 50 N.M. 50, 168 P.2d 864 (1946).

A right-of-way by prescription cannot grow out of a strictly permissive use, no matter how long the use. *Garmond v. Kinney*, 91 N.M. 646, 579 P.2d 178 (1978). In *Garmond* the evidence before the trial court showed that express permission for the usage of the roadway had been granted by the owner.

In the absence of proof of express permission, the general rule is that the use will be presumed to be adverse under claim of right. *See Castillo v. Tabet Lumber Company*, 75 N.M. 492, 406 P.2d 361 (1965); *Hester v. Sawyers*, 41 N.M. 497, 71 P.2d 646 (1937). An exception to this presumption exists where the claimed right-of-way traverses large bodies of open, unenclosed, and sparsely populated privately-owned land. *Hester v. Sawyers, supra.*

Since the Kaywood's property is a relatively small tract in a populated subdivision, we must apply the usual presumption that, in absence of evidence of express consent or approval, the use will be presumed to be adverse under claim of right. The trial court therefore erred in holding that a public right-of-way by prescriptive easement had not been established.

We reverse and remand with directions to enter judgment in favor of the Village.

IT IS SO ORDERED.

PAYNE and RIORDAN, JJ., concur.

632 P.2d 1163

Wendell WOOD, Plaintiff-Appellee,

v.

MILLERS NATIONAL INSURANCE COMPANY, a corporation, Defendant-Appellant.

No. 13165.

Supreme Court of New Mexico.

Aug. 24, 1981.

Crouch, Valentine & Ramirez, Jerald A. Valentine, Las Cruces, for defendant-appellant.

Walter R. Parr, Las Cruces, for plaintiff-appellee.

OPINION

PAYNE, Justice.

The defendant, Millers National Insurance Company, has appealed an order denying its motion to compel arbitration, or in the alternative, to stay proceedings of the district court. The suit arose from a collision between the plaintiff Wood and an uninsured motorist, Gonzales. Both Wood and Gonzales were injured. Wood was operating a vehicle insured by Millers. Millers undertook Wood's defense in a suit initiated by Gonzales, and suggested that Wood counterclaim. Wood's personal attorney demanded that in addition to providing a defense, Millers cover Wood's own injuries under the uninsured motorist provisions of the policy. He also demanded arbitration if Millers refused to pay. Millers denied coverage for Wood's injuries and expressed a willingness to arbitrate, but suggested avoiding arbitration costs through agreement that the determination of liability between Wood and Gonzales in the pending

litigation would determine Wood's claim for uninsured motorist coverage. Wood made a further demand for coverage, without response from Millers. Wood then filed suit, alleging that Millers' denial of coverage was not in good faith. Millers filed a motion to dismiss which was denied. Millers then filed its motion to compel arbitration. The latter motion is the subject of this appeal.

A.

The trial court concluded as a matter of law that there was no valid agreement of arbitration between Wood and Millers. However, the policy under which Wood makes his claim specifies that matters upon which Millers *and any person making a claim under the policy* disagree shall be settled by arbitration. Wood argues that since he did not sign the policy, he should not be bound by its terms. We fail to see how this argument has any validity in the circumstances of this case. *See Jeanes v. Arrow Insurance Company*, 16 Ariz.App. 589, 494 P.2d 1334 (1972).

B.

The trial court also found that Millers waived its right to compel arbitration. We affirm the trial court on this issue.

This Court discussed the question of waiver in *United Nuclear Corp. v. General Atomic Co.*, 93 N.M. 105, 597 P.2d 290 (1979). As indicated in *United Nuclear*, this Court has encouraged arbitration and "all doubts as to whether there is a waiver must be resolved in favor of arbitration." *Id.* at 114, 597 P.2d at 299 [citations omitted]. *See also Dairyland Ins. Co. v. Rose*, 92 N.M. 527, 591 P.2d 281 (1979); *Bernalillo Cty. Med. Center Emp. v. Cancelosi*, 92 N.M. 307, 587 P.2d 960 (1978). Also, "dilatory conduct by the party seeking arbitration, unaccompanied by prejudice to the opposing party, does not constitute waiver." *United Nuclear, supra*, 93 N.M. at 115, 597 P.2d at 300 (citation omitted). The type of prejudice usually invoking a waiver involves trial preparation based on the belief that the other party does not desire or intend to make a demand for arbitration. *Id.* at 117, 597 P.2d at 302. Thus, the extent of court action taken is an important inquiry. In *Cancelosi, supra*, this Court found no waiver of arbitration where "[t]he case was not at issue and since no hearings had been held, the judicial waters had not been tested prior to the time the motion for arbitration had been filed." *Id.* 92 N.M. at 310, 587 P.2d at 963.

With reference to waiver of arbitration, the pertinent dates and proceedings consisted of the following:

October 15, 1979: Complaint filed by Wood

November 20, 1979: Entry of Appearance by Millers

December 3, 1979: Order for Enlargement of Time

December 14, 1979: Motion to Dismiss by Millers

January 21, 1980: Order to Deny Motion to Dismiss

January 29, 1980: Motion to Compel Arbitration or Stay Proceedings filed by Millers

March 6, 1980: Motion for Default Judgment or for a Partial Summary Judgment filed by Woods

April 30, 1980: Order Denying Motion for Default Judgment

May 9, 1980: Order Denying Motion to Compel Arbitration

Between October 15, 1979 (the date the complaint was filed), and January 21, 1980 (the date the motion to compel arbitration was filed), the trial court held a hearing on Millers' motion to dismiss. After the court denied Millers' motion, Millers moved to compel arbitration. The question then is whether, having invoked the court's discretionary power, Millers may thereafter seek to compel arbitration. We hold that it cannot.

The mere instigation of legal action is not determinative for purposes of deciding whether a party has waived arbitration. The point of no return is reached when the party seeking to compel arbitra-

tion invokes the court's discretionary power, prior to demanding arbitration, on a question other than its demand for arbitration. Millers passed this point, and thereby waived arbitration. To hold otherwise would permit a party to resort to court action until an unfavorable result is reached and then switch to arbitration. We cannot sanction such a procedure.

C.

Millers also appeals the denial of its motion to stay proceedings. The power to stay proceedings pending the outcome of other litigation is within the discretion of the court, and we will only find error when the lower court has abused its discretion. *See Flinchum Const. Co. v. Central Glass & Mirror*, 94 N.M. 398, 611 P.2d 221 (1980). Millers claims that Wood's action should be stayed because the suit between Gonzales and Wood will settle the dispute between Millers and Wood. In essence, Millers is challenging Wood's right to bring a direct action against Millers for uninsured motorist benefits.

Different jurisdictions have focused on various factors in determining whether an insured has a right to bring a direct action against the insurer for uninsured motorist benefits. Among these factors are: 1) legislative intent in enacting the statute requiring uninsured motorist coverage; 2) the insurer's intent in drafting the provision; 3) judicial economy; 4) the meaning of the phrase "legally entitled to recover"; and 5) the effect of an arbitration provision. *See generally* Annot., 73 A.L.R.3d 632 (1976). Review of the cases indicates that there is no single prevailing view. We have considered the various factors as they relate to New Mexico law and conclude that a direct action against an insurer for uninsured motorist benefits is permissible.

1.

In *Chavez v. State Farm Mutual Automobile Ins. Co.*, 87 N.M. 327, 329, 533 P.2d 100, 102 (1975), we stated that " 'the legislative purpose in creating compulsory uninsured motorist coverage was to place the injured policyholder in the same position, with regard to the recovery of damages, that he would have been in if the tortfeasor had possessed liability insurance.' *Bartlett v. Nationwide Mutual Ins. Co.*, 33 Ohio St.2d 50, 52, 294 N.E.2d 665, 666 (1973)." In *Sandoval v. Valdez*, 91 N.M. 705, 580 P.2d 131 (Ct.App.1978), *cert. quashed*, April 13, 1978, the Court of Appeals noted that the statute does not mention any limitations on actions except that the insured must be legally entitled to recover damages and the negligent driver must be uninsured. Accordingly, we cannot find any legislative intent that an insured must obtain a judgment against the uninsured motorist before bringing an action for uninsured motorist coverage.

2.

The intent of the insurer in this case is clear from the wording of its policy and from the actions of its counsel. The relevant portion of the contract states:

> [D]etermination as to whether the insured . . . is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured . . . and the company or, if they fail to agree, by arbitration.
>
> No judgment against any person or organization alleged to be legally responsible for the bodily injury . . . shall be conclusive, as between the insured and the company, of the issues of liability of such person or organization or of the amount of damages to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company.

Millers intended that claims under the uninsured motorist provisions should be settled between it and the insured, with the possibility that a suit between the insured and the uninsured motorist could be conclusive if prosecuted by the insured with the company's written consent. No provision is made for the situation where arbitration fails, as it did here, nor is there indication that a judgment against an uninsured motorist is a prerequisite for recovery.

Wood never agreed to Millers' proposed arrangement whereby the results of the litigation between Gonzales and Wood would be determinative of Wood's claim for uninsured coverage. The fact that Millers deemed it necessary to seek such an arrangement indicates that the parties did not intend under the contract that the separate suit would be inclusive.

3.

Judicial economy might favor a stay of these proceedings, but the notion should not be invoked where it substantially impairs a party's rights. *See* 1 Am.Jur.2d *Actions* § 97 (1962). The trial judge is in the best position to make the relevant determinations. We cannot hold as a matter of law that judicial economy is the overriding consideration or that the lower court's balancing of economy against harm to the plaintiff was erroneous.

4.

The phrase "legally entitled to recover" has been interpreted both as permitting direct action and as not permitting direct action. *See* Annot., 73 A.L.R.3d 632, §§ 8 and 9 (1976). We hold that the phrase merely requires that the determination of liability be made by legal means. Millers recognizes that agreement by the parties directly or through arbitration may result in a determination of what the insured is legally entitled to recover. No judgment against the uninsured motorist is necessary under this procedure. We hold that the same phrase does not constitute a barrier to court action where agreement and arbitration have failed.

5.

The contract provision requiring arbitration in the present case specifies that the parties shall submit to arbitration "upon written demand of either." Millers waived its right to make such a demand, as discussed *supra.* Under the circumstances of this case, Wood was not required to further pursue the arbitration procedure where Millers made no attempt to negotiate Wood's claim and failed to timely pursue arbitration on its own.

D.

We conclude that the trial court did not abuse its discretion by its denial of Millers' motion to stay proceedings. We recognize the difficult position Millers faces in defending two separate lawsuits which might subject Millers to a different liability than it would face if the present case were stayed. However, we cannot deny Wood his day in court because Millers failed to properly demand arbitration. Wood has made allegations of bad faith against Millers which are separate from the issue involved in the Gonzales litigation. Thus we cannot say as a matter of law that the motion to stay should have been granted.

E.

The judgment is reversed in part and affirmed in part, and the cause remanded for further proceedings consistent with this opinion.

BE IT SO ORDERED.

EASLEY, C. J., and SOSA, Senior Justice, concur.

632 P.2d 1167

Carroll G. CUNNINGHAM, Petitioner-Appellant and Cross-Appellee,

v.

Joanne CUNNINGHAM, Respondent-Appellee and Cross-Appellant.

No. 13383.

Supreme Court of New Mexico.

Aug. 24, 1981.

Stephen Joseph Rose, Taos, Pickard & Singleton, Lynn Pickard, Santa Fe, for petitioner-appellant and cross-appellee.

Brandenburg & Johnson, Clifford J. Johnson, Taos, for respondent-appellee and cross-appellant.

OPINION

FEDERICI, Justice.

This is an appeal from the District Court of Bernalillo County. The suit involved the dissolution of marriage and subsequent property settlement. From the decree granting the property settlement, the husband appeals and the wife cross-appeals.

The principal assets of the parties include stock in a corporation formed by the husband, a seventy-acre ranch and a house which was the residence of the parties. The district court awarded the entire ranch to the wife with a provision that the wife pay the husband $100,000 plus interest over a seven-year period. The husband appeals the property division made by the district court and claims the community assets should have been divided in kind. We affirm.

Although appellant presents four issues, the basic issue is whether there was substantial evidence to support the judgment of the trial court.

The points presented on appeal are:

I. Whether the court below adequately considered the tax consequences involved in the property settlement.

II. Whether there is substantial evidence to show that the distribution made was the best under the circumstances.

III. Whether the court has a duty to distribute the community assets equally, and if so, whether such an equal distribution was accomplished by the court below.

IV. Whether the property settlement adequately served the purpose of bringing a complete and final end to the marriage between the parties.

I.

The general rule is that the court should consider tax consequences when deciding a property settlement upon dissolution of marriage. *See* Annot., 51 A.L.R.3d 461 (1973). Husband claims that the property settlement made by the district court has tax consequences for him because he will receive a note or cash rather than continued ownership in land. Husband will pay tax on whatever gain he makes in the transaction. We agree that the consequences should be considered by a trial court in arriving at a property settlement in a divorce proceeding. In this case, the record shows that the trial court did consider the tax consequences.

II.

Both parties cite *Ridgway v. Ridgway*, 94 N.M. 345, 610 P.2d 749 (1980). That case establishes the rule that the distribution of the property at the time of the dissolution of marriage should be according to the

method best suited under the circumstances of each case.

Husband claims that the standard set forth in *Ridgway* must be supported by substantial evidence and that in this case such evidence was lacking in two important instances. First, the court ordered that the entire ranch be set aside to the wife, based on the wife's declaration that she intended to use the ranch for riding trails and a restaurant. Second, the court heard expert testimony regarding tax consequences to husband, and husband contends that this testimony was not substantial evidence for the following reasons: (1) the expert did not give a satisfactory explanation as to how she arrived at her opinion; (2) the expert opinion was based on erroneous factors; and (3) the expert opinion was based on an inadequate factual basis. Specifically, husband claims that the expert witness, who incidentally was a tax lawyer, did not know how much tax husband would have to pay because the expert did not know what basis husband had in the land, nor did expert know the tax bracket of husband. However, we note from the record that this witness did conclude as her opinion that the $100,000 payment to the husband would equalize the husband's community interest in the ranch. Also, the trial court itself questioned husband about his basis in the ranch, his salary at his job and other factors affecting husband's taxes.

III.

Husband claims that in an action to dissolve a marriage, the court has a duty to divide equally the property of the community. *Michelson v. Michelson*, 86 N.M. 107, 520 P.2d 263 (1974). We have no quarrel with the rule announced in *Michelson*.

Husband also contends that the proper and equitable method of dividing the property would be to divide it *in kind*. In *Ridgway, supra*, at 346, 610 P.2d at 750, this Court said:

> Even if the dollar amount of the property distribution is unequal . . . there is no requirement that each party receive exactly the same dollar value as long as the community property is equally apportioned by a method of division best suited under the circumstances. [Citations omitted.]

Under all the circumstances, we cannot say that the trial court abused its discretion or that it committed error as a matter of law in ordering that the ranch should go to the wife and that the husband should be paid $100,000 by the wife.

IV.

Under this point, husband contends that based on policy considerations the court is under a duty to ease the transition of the parties after the divorce and that this is best accomplished by giving each spouse complete and immediate control over his or her share of the community property. He further reasons that it would be inconsistent with that policy to create a seven-year indebtedness on the part of the wife to the husband as was ordered in this case. We believe this to be a sound principle of law. However, we hesitate to interfere with the discretion of the trial court even if we were to have a different opinion of our own. The trial court has heard all of the evidence and we cannot say that under the circumstances in this case the trial court abused its discretion.

On cross-appeal, the wife contends that the finding of the trial court as to the value of Dyma Engineering was not warranted by substantial evidence. We disagree. In *Hurley v. Hurley*, 94 N.M. 641, 615 P.2d 256 (1980), we held that the good will of a business should be evaluated in order for the wife to get her fair share of the community property. In the present case, the trial court heard the evidence of expert witnesses who testified to the value of the business. Not only was there the testimony of expert witnesses, but the husband also testified concerning the value of the business. The trial court considered both book value and market value and we conclude that there was substantial evidence to sustain the trial court's determination.

The wife's attorney fees on appeal are allowed in the amount of $1,000.00.

The trial court is affirmed.

IT IS SO ORDERED.

EASLEY, C. J., and SOSA, Senior Justice, concur.

632 P.2d 1170

In re Petition of LOWER VALLEY WATER AND SANITATION DISTRICT:

LOWER VALLEY WATER AND SANITATION DISTRICT, Petitioner-Appellant and Cross-Appellee,

v.

PUBLIC SERVICE COMPANY OF NEW MEXICO, Western Coal Company, Utah International and Tuscon Electric Power Company, Respondents-Appellees and Cross-Appellants.

and

Paragon Resources, Inc., Valencia Energy Company and San Juan Coal Company, Intervenors.

No. 13316.

Supreme Court of New Mexico.

Aug. 24, 1981.

Tansey, Rosebrough, Roberts & Gerding, Byron Caton, Farmington, for petitioner-appellant and cross-appellee.

Briones & Pittard, Felix Briones, Farmington, Keleher & McLeod, Robert H. Clark, Albuquerque, Steven Banzhaf, Tucson, Ariz., for respondents-appellees and cross-appellants and intervenors.

OPINION

PAYNE, Justice.

This appeal presents important questions regarding the statutory scheme for creation of water and sanitation districts.

Citizens in the Lower Valley of the San Juan River in San Juan County petitioned the district court for the creation of the Lower Valley Water and Sanitation District (Lower Valley) pursuant to the Water and Sanitation District Act, Sections 73–21–1 through 73–21–54, N.M.S.A.1978 (Orig. Pamp. and Cum.Supp.1980). The water and sewage situation there has deteriorated with the rapid population increase caused by development related to the energy industry. The situation is dangerous and unhealthy; in some areas, effluent material from septic tanks is surfacing.

As described in the petition, the proposed district would include a substantial area owned by the protestors, Public Service Company of New Mexico, Western Coal Company, Utah International and Tucson

Electric Power Company. The trial court found that the protestors had no "actual and impending" need for the proposed sewer improvements. It modified the petition to exclude their land for purposes of the sewer improvements. This land was retained for water district purposes, however. Under the petition as filed, the protestors would bear 98% of the construction and purchasing costs associated with the formation of the district. The estimated costs total $7.4 million, with $6.4 million for sewage facilities and $1.0 million for water. Under the petition as modified, the protestors would bear a similar percentage of only the $1.0 million for water improvements.

Lower Valley appeals the modification order excluding the protestors' land from the sewage district, asserting that it was based on improper criteria. The protestors cross-appeal on grounds that the trial court erred in not granting their motion to dismiss. This motion was based on allegations that the original petition did not meet the statutory requirements. The protestors also appeal the modification order on grounds that the protestors' land should not be included in the water district. There are five basic issues presented: 1) whether the order appealed from is a final order; 2) whether the trial court applied the proper criteria for determining the boundaries of the sewage district; 3) whether the statutory requirements for a valid petition are constitutional; 4) the extent of the trial court's statutory duty to consult with related state agencies; and 5) whether the trial court abused its discretion by including the protestors' lands within the water district.

I.

The protestors argue that the order appealed from is not a final judgment and is not therefore appealable. There is no statutory language determinative of this question. The protestors base their view on the fact that the court must enter additional orders before the district is actually created.

The procedure for creating water and sanitation districts includes three distinct steps requiring action by the district court. First, the court conducts a hearing to determine the validity and merits of the petition to establish the district. §§ 73–21–8 and 73–21–9, N.M.S.A.1978. At the conclusion of the hearing, the court may grant, modify, or deny the petition. Second, if the court grants or modifies the petition, it must submit the question of organization of the district to the voters. § 73–21–9(F). Third, if approved by the electors, the court must declare the district organized, give it a corporate name, and designate the first board of directors. § 73–21–9(I). The statute specifies that no appeal shall lie from the entry of an order establishing the district, Section 73–21–9(J), N.M.S.A.1978, but is silent as to the appealability of prior court actions in this process.

The only step in the process which requires full exercise of the court's discretion is the first one. After the court's disposition of the petition, all its subsequent actions are ministerial.

The Court of Appeals considered the factors relevant to a determination of finality in *Johnson v. C & H Construction Company*, 78 N.M. 423, 432 P.2d 267 (Ct.App.1967).

> A judgment or order is not final unless all the issues of law and of fact necessary to be determined, were determined, and the case completely disposed of so far as the court has power to dispose of it. In determining whether there is a final judgment or order, we look to the substance and not the form of the judgment or order.
>
> * * * The current proceeding must have been completely disposed of so far as the court has power to dispose of it. (Citations omitted.)

Id. at 425, 432 P.2d at 269.

Applying these factors to the instant case, we hold that the modification order was final and therefore appealable. The court had determined all issues of law and fact regarding the petition and had completely disposed of the matter. The remaining steps would constitute further ac-

tion on the proposed district, but could in no way alter the court's modification order. There was no further action contemplated with respect to determining the boundaries of the district.

II.

Lower Valley claims that since the statute is intended to promote the health, safety, prosperity, security and general welfare of the inhabitants of the districts, Section 73–21–1, N.M.S.A.1978, it differs from those statutes which assess taxes for a specific purpose based on an assessment of the "benefit" to the land in question. Instead, the statute provides for ad valorem taxes against all the taxable property within the district. § 73–21–17, N.M.S.A.1978. Therefore, Lower Valley contends that the proper criteria for determination of water and sewage districts is the area which must be included to assure community health and welfare and not whether each specific area will receive a special benefit. We recognize that the districts formed under the Act are intended to promote the general health and welfare of the inhabitants of the districts. However, we cannot ignore the statutory procedure for creation of the district. Section 73–21–9(E) specifies conditions which, if existent, permit the district court to deny or modify the petition. Adoption of Lower Valley's proposition would render this section of the statute ineffective. Broad considerations of community health and welfare cannot be invoked to override the specific considerations set out by the Legislature. In the present case, the court found that the protestors' lands had no need for the proposed sewage improvements and accordingly modified the petition to exclude these lands. We find substantial evidence to support this determination and hold that the court followed the statutory procedure.

Lower Valley argues that the same considerations applicable to exclusion of land from an organized district should apply to exclusion of land from a proposed district. In order to exclude land from an organized district, the owner must persuade the board of directors that it is in the best interests of the district to have the land excluded. § 73–21–24, N.M.S.A.1978. This statutory scheme sets forth different considerations from those specified for creation of a district. We cannot say that the Legislature acted improperly by specifying that the court should have relatively free discretion to consider all relevant factors when considering a proposed district, but that in changing a district once it has been voted on and organized, the best interests of the district should be paramount.

Accordingly, we affirm the trial court on this issue.

III.

The protestors asserted by way of a motion to dismiss that there was no showing that the signers of the petition were taxpaying electors of the area included in the proposed district and that therefore the required twenty-five percent of such persons' signatures were not accumulated. § 73–21–6(A), N.M.S.A.1978. The court took this motion under advisement and requested that the matter be briefed. This motion was never formally ruled on or addressed in the court's Findings and Conclusions, and was therefore denied by implication. We are unable to conclude on this record whether the trial court denied the motion because he considered the requirements unconstitutional, or for some other reason. We will discuss this issue and remand for appropriate proceedings so that the district court may consider evidence and make the appropriate finding or dismiss the petition.

Lower Valley cites numerous cases for the proposition that the procedure and requirements for obtaining signatures on the petition are unconstitutional. *Hill v. Stone*, 421 U.S. 289, 95 S.Ct. 1637, 44 L.Ed.2d 172 (1975); *Phoenix v. Kolodziejski*, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 (1970); *Kramer v. Union School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969); *Prince v. Board of Ed. of Cent. Con. Ind. Sch. D. No. 22*, 88 N.M. 548, 543 P.2d 1176 (1975); *Board of Education of Vil. of Cimarron v. Maloney*, 82 N.M. 167, 477 P.2d 605 (1970). These cases hold that direct

restrictions on the right to vote, such as limiting of the franchise to property owners, are unconstitutional even where the election relates to specialized governmental entities such as school boards. Since numerous New Mexico statutes, (*e. g.*, § 73–1–3 (artesian conservancy districts), § 73–6–1 (drainage districts), and § 73–9–3 (irrigation districts)), in addition to Section 73–21–6(A), limit the category of persons who may sign petitions for the creation of special districts, we find it necessary to address the issue.

In *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), the United States Supreme Court held that the equal protection clause requires adherence to the principle of one-person-one-vote in elections of state legislators. The *Reynolds* rule was later extended to the election of county government officials in *Avery v. Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968). In *Hadley v. Junior College District*, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970), the Court applied *Reynolds* to the election of trustees of a community college district because those trustees "exercised general governmental powers" and "performed important governmental functions" that had significant effect on all citizens residing within the district. *Id.* at 53–54, 90 S.Ct. at 793–94. However, the Court has found that certain types of entities are so specialized and so disproportionately affect certain portions of the public that the franchise may be limited to those members of the public peculiarly affected. *Ball v. James*, —— U.S. ——, 101 S.Ct. 1811, 68 L.Ed.2d 150 (1981). *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973).

The United States Supreme Court has held state laws tying voting eligibility to property ownership for certain types of elections to be invalid. *Hill v. Stone, supra* (election to approve issuance of bonds to finance a city library); *Phoenix v. Kolodziejski, supra*, (issuance of general obligation bonds secured by a lien on real property); *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969) (bonds to finance a municipal utility). Those cases, however, involved elections relating to the operations of traditional municipalities exercising the full range of normal governmental powers. They are controlling only where it is first determined that the governmental entity is not a special-purpose entity under *Salyer* and *Ball*. In *Kramer v. Union School District, supra*, the Court held unconstitutional a scheme limiting the right to vote in school district elections to owners or lessees of real property and parents of enrolled children. The limitation denied equal protection because it did "not meet the exacting standard of precision" since it was both under- and over-inclusive. *Id.* 395 U.S. at 632, 89 S.Ct. at 1892.

In *Maloney, supra*, this Court held that a state constitutional clause restricting to land owners the right to vote on creation of school district debt violated the equal protection clause of the United States Constitution. Later, in *Prince v. Board of Ed. of Cent. Cont. Ind. Sch. D. No. 22, supra*, this Court adopted a rule from *Hill v. Stone, supra*, that "as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest." *Id.* 88 N.M. at 552, 543 P.2d 1176. The Court concluded that the election in *Prince*, a school board election and bond issue, was one of general rather than special interest. Accordingly, the Court considered whether the State's interest in excluding non-taxpaying Indian reservation residents was sufficient under this test. It held that there was no compelling state interest, and upheld the election in which reservation residents participated.

Pursuant to the principles outlined above, we must first determine whether the proposed district is of general or special interest. If it is of general interest, we must decide whether the *Reynolds* rule extends beyond actual voting to the preliminary step of petition qualification.

A governmental entity may be considered of general interest where it performs functions traditionally at the core of government service or where it performs a variety of functions normally performed by the government. For example, "the provision of electricity is not a traditional element of governmental sovereignty, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353, 95 S.Ct. 449, 455, 42 L.Ed.2d 477 (1974), . . . and so is not in itself the sort of general or important governmental function that would make the government provider subject to the doctrine of the *Reynolds* case." (Footnote omitted.) *Ball v. James, supra* 101 S.Ct. at 1819. Other types of powers and services, however, do invoke the strict demands of *Reynolds*. For example, authority to impose ad valorem property taxes or sales taxes, or to enact laws governing the conduct of citizens, are at the core of governmental sovereignty. Administration of normal governmental functions such as operation of schools, street maintenance, or sanitation, health, or welfare services may bring an entity within the *Reynolds* requirements. On the other hand, storage and delivery of water, without a concurrent power to control the use of such water, is not such a central governmental function, even where the entity possesses a nominal public character. *Ball, supra*, and *Sayler, supra*.

Applying these considerations to Lower Valley, we note that Section 73–21–17 gives the district authority to impose ad valorem taxes. The proposed district is essentially an expansion of a private water users cooperative association organized in 1966. This expansion is considered essential primarily because of significant health risks present in the area. Thus it involves administration of sanitation and health services. Accordingly, we hold that the district is of general, not special, interest.

Having determined that the *Reynolds* rule must apply to the creation of a water and sanitation district, we now must decide whether *Reynolds* attaches at the petition stage. A district cannot be formed until a petition which conforms to statutory requirements is filed in a district court. The question we address is whether the statutory requirement that twenty-five percent of the taxpaying electors of the district sign the petition denies equal protection. We conclude it does not.

We note that this precise question has not been addressed by the United States Supreme Court. The cases discussed *supra* deal with direct limitations on the right to vote, whereas the restriction here involves not the right to vote but rather the right, created by the Legislature, to propose a district to the voters. Being a step removed from the actual voting process, we conclude that the State need not show a compelling interest but that a rational basis justification will suffice.

While the public generally will benefit upon creation of a water and sewage district, it is the taxpayers who bear the substantial financial burden. The Legislature may properly determine that in order to protect these taxpayers, any petition for the creation of a district must be approved by at least twenty-five percent of this class. The United States Supreme Court noted that "most States find it possible to protect property owners from excessive property tax burdens by means other than restricting the franchise to property owners." *Phoenix, supra* 399 U.S. at 213, 90 S.Ct. at 1996. The petitioning procedure adopted by the Legislature exemplifies this notion of protecting property owners.

We do not decide whether the voting procedure set out in Section 73–21–9(C) is constitutional since it is not at issue here.

We remand on this issue for further consideration consistent with this opinion.

IV.

Section 73–21–9(D) specifies that in addition to the findings relating to petition validation, Section 73–21–9(A), the trial court must consult and request an opinion from:

(1) the state engineer, to determine whether the proposed district has adequate water rights . . . ; and

(2) the environmental improvement agency as to the technological feasibility of the proposed improvements. . . .

The protestors contend that there was not sufficient evidence presented to the trial court to enable it to fulfill these statutory requirements. We also remand on this point for further consideration consistent with the following guidelines. The statute requires that the district court "consult and request an opinion from" the state agencies indicated. The Legislature intended that these specific agencies have an opportunity to present their views to the district court. Failure to afford this opportunity is reversible error. We cannot determine on this record whether an opportunity was adequately provided to the State Engineer and the Environmental Improvement Agency for presentation of their views in this case. We remand to the trial court for a determination as to whether these requirements were met.

V.

The protestors seek reversal of that portion of the modification under which retains their land within the water district. However, the district court's decision is supported by substantial evidence and we affirm.

Affirmed in part and remanded for the limited purposes specified.

IT IS SO ORDERED.

EASLEY, C. J., and SOSA, Senior Justice, concur.

632 P.2d 1176

AETNA FINANCE COMPANY, Plaintiff-Appellee,

v.

Menardo A. GUTIERREZ, Defendant,

and

Patsy G. Gutierrez and Annie Benavidez, Defendants-Appellants.

No. 13269.

Supreme Court of New Mexico.

Aug. 26, 1981.

Clark de Schweinitz, Juan R. A. Valenciz, Santa Fe, William S. Keller, Las Vegas, for defendants-appellants.

Glass & Fitzpatrick, Charles N. Glass, Stephen K. Kortemeier, Albuquerque, for plaintiff-appellee.

OPINION

EASLEY, Chief Justice.

Aetna Finance Company (Aetna) sued the Gutierrezes in Bernalillo County alleging default on a consumer loan contract. The Gutierrezes moved to dismiss claiming improper venue under Section 38–3–1, N.M.S.A.1978. The court denied the motion and the Gutierrezes appealed. We reverse.

This case presents issues of first impression in New Mexico: (1) whether a foreign corporation, authorized to do business in this state, is a resident of the county of its principal place of business for the purpose of laying venue; and (2) if not, since the statute allows a domestic corporation to sue in the county of its residence, whether the

venue statute unreasonably discriminates against foreign corporations so as to deny them equal protection.

Aetna is a Delaware corporation licensed to do business in this state. It maintains offices throughout the state, including offices in Albuquerque and Santa Fe. The Albuquerque office is listed with the Corporation Commission as its principal place of business.

None of the defendants reside in Bernalillo County; all reside in Santa Fe County except one whose residence is unknown. The loan contract which is the subject of this action was negotiated and entered into at Aetna's Santa Fe office. The property which Aetna seeks to replevy is also located in Santa Fe County.

1. *Status of Foreign Corporations for Purpose of Venue.*

As a general rule, a corporation is considered a resident only of its state of incorporation, and cannot be a resident of any other state. *Seaboard Co. v. Chicago, etc., Ry. Co.*, 270 U.S. 363, 46 S.Ct. 247, 70 L.Ed. 633 (1926). Various exceptions have been carved into this rule, however, and the question of whether a foreign corporation has acquired a local residence may depend upon the particular context in which the question arises. *See* 36 Am.Jur.2d, *Foreign Corporations*, § 34 (1968) and cases collected therein. No clear trend appears among the decisions of the courts of other states which have considered this question. The apparent inconsistencies in these cases are attributed to the differences in venue statutes and the construction of those statutes by the various courts. 20 C.J.S. *Corporations* § 1906 (1940). Our case is one which turns solely on construction of New Mexico's venue statute.

Section 38–3–1 provides, in part:

> All civil actions commenced in the district courts shall be brought and shall be commenced in counties as follows, and not otherwise:
>
> A. first, except as hereinafter provided in Subsection F of this section, relating to foreign corporations, all transitory actions shall be brought in the county where either the plaintiff or defendant or some one of them, in case there be more than one of either, resides; or second, in the county where the contract sued on was made or is to be performed, or where the cause of action originated or indebtedness sued on was incurred; or third, in any county in which the defendant or either of them may be found in the judicial district where the defendant resides;
>
> * * * * * *
>
> F. suits may be brought against transient persons or nonresidents in any county of this state, except that suits against foreign corporations, admitted to do business and which designate and maintain a statutory agent in this state upon whom service of process may be had, shall only be brought in the county where the plaintiff or some one of them, in case there be more than one, resides or in the county where the contract sued on was made or is to be performed or where the cause of action originated or indebtedness sued on was incurred, or in the county where the statutory agent designated by such foreign corporation * * *.

Aetna argues that Subsection F applies, by its own terms, only to suits *against* foreign corporations. Since this action was brought *by* a foreign corporation, Subsection A applies and the action may be brought in the county where either the plaintiff or defendant resides. Aetna contends that it has established "residence" in Bernalillo County as the county of its principal place of business in this state.

We agree that Subsection F applies only to suits brought *against* foreign corporations and therefore does not govern venue in this action. However, the salient point here is that Subsection F places foreign corporations within the class of nonresidents. It provides: "suits may be brought against *transient persons* or *nonresidents* in

any county of this state, *except* that suits against *foreign corporations* * * *." [Emphasis added.] This phrase places foreign corporations within a class of persons defined as "transient persons" and "nonresidents." By definition, neither transient persons nor nonresidents have a legal residence within the jurisdiction. *See Black's Law Dictionary* 953 and 1343 (5th ed. 1979).

The language of the Legislature controls and must be read and understood according to its grammatical sense, unless it is clear that something different was intended. *See In re Goldsworthy's Estate*, 45 N.M. 406, 115 P.2d 627 (1941). The plain grammatical meaning of Subsection F is that foreign corporations are nonresidents. No contrary intention appears. In fact, by the inclusion of Subsection F the Legislature clearly intended to treat foreign corporations (as well as other nonresidents and transient persons) somewhat differently than residents. Thus the conclusion that foreign corporations are nonresidents is consistent with the distinction drawn in the statute between residents and foreign corporations.

We hold that, under the plain and unambiguous language of Section 38–3–1, foreign corporations are considered nonresidents of this state for the purpose of venue.

Since Subsection F provides venue rules only for suits *against* foreign corporations, we must return to Subsection A to determine where venue is proper in suits brought by foreign corporations. It provides that suit may be brought in the county where either the plaintiff or defendant resides, where the contract sued on was made or is to be performed, or where the cause of action or indebtedness was incurred.

The only basis for venue in Bernalillo County in this action was that it was the county of Aetna's alleged "residence." Since Aetna has no legal residence in this state for venue purposes, the trial court erred in denying the motion to dismiss.

2. *Constitutionality of Venue Statute.*

In the alternative, Aetna contends that the statute denies it equal protection of the laws because a domestic corporation is allowed to bring suit in the county of its residence while a foreign corporation is not.

A presumption exists in favor of the validity of legislation. *Espanola Housing Authority v. Atencio*, 90 N.M. 787, 568 P.2d 1233 (1977). The equal protection clause does not prohibit different classifications for legislative purposes. *Shope v. Don Coe Const. Co.*, 92 N.M. 508, 590 P.2d 656 (Ct.App.1979). A legislative classification may not be arbitrary or unreasonable and will be struck down "if [it] is so devoid of reason to support it, as to amount to a mere caprice. * * * [Citation omitted.] If any state of facts can be reasonably conceived which will sustain the classification, there is a presumption that such facts exist." *Board of Trustees of Town of Las Vegas v. Montano*, 82 N.M. 340, 343, 481 P.2d 702, 705 (1981).

The United States Supreme Court held in *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 96 S.Ct. 1800, 48 L.Ed.2d 263 (1976), a Texas venue statute which allowed suits against a domestic corporation outside of the county of its domicile only if the plaintiff proved, by a preponderance of the evidence, the elements of his cause of action at a preliminary venue hearing did not violate equal protection. The statute allowed suit to be brought against a foreign corporation in any county in which it had an agency or representative without requiring the plaintiff to make this preliminary showing. The Court upheld the statute against a claim that it constituted unreasonable discrimination against foreign corporations, stating:

> [I]t is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a State may see proper to designate for the enforcement and protection of such rights. Given therefore a condition where funda-

> mental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the State has deemed best to provide for a trial in one forum or another. It is not under any view the mere tribunal into which a person is authorized to proceed by a State which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the State has provided equal laws prevail.

Id. at 644–45, 96 S.Ct. at 1804 (quoting *Cincinnati Street R. Co. v. Snell*, 193 U.S. 30, 36–37, 24 S.Ct. 319, 321–22, 48 L.Ed. 604 (1904)).

Aetna relies on *Power Co. v. Saunders*, 274 U.S. 490, 47 S.Ct. 678, 71 L.Ed. 1165 (1927), in which the Court struck down an Arkansas statute which allowed suit against foreign corporations in any county of the state, but allowed suit against domestic corporations only in counties in which the corporation did business or maintained an office or agent.

The Court in *American Motorists Ins. Co., supra* at n. 6, pointed out that the continued validity of *Power Co.* had been questioned, citing *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959); *Metropolitan Cas. Ins. Co. v. Brownell*, 294 U.S. 580, 55 S.Ct. 538, 79 L.Ed. 1070 (1935); *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 51 S.Ct. 228, 75 L.Ed. 482 (1931). At any rate, we believe that *Power Co.* is distinguishable from the present situation. The Court there emphasized the "real and substantial" discrimination which resulted from the venue statute, noting that "[i]f [a foreign corporation] be present in a single county, * * it is made subject to suit not merely in that county, but in any of the 74 other counties although it be not present in them in any sense." 274 U.S. at 493, 47 S.Ct. at 679.

Examining Section 38–3–1 in this light, we conclude that the statute does not discriminate against foreign corporations in any "real and substantial" manner. Foreign corporations may sue a resident in the county of the defendant's residence, in the county where the contract was made or to be performed, or in the county where the cause of action originated or the indebtedness was incurred. Aetna maintains an office in Santa Fe County and the defendants dealt solely with the Santa Fe office. Venue would thus be appropriate in Santa Fe County, where the defendants reside and the contract was made. Aetna's fundamental right to access to our courts is thus fully protected.

We hold that the classification of foreign corporations in the venue statute is not so arbitrary or unreasonable as to constitute a denial of equal protection.

The cause is reversed and remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

SOSA, Senior Justice, and PAYNE and RIORDAN, JJ., concur.

FEDERICI, J., respectfully dissenting.

[redacted]

632 P.2d 1182

Floyd STOCK, dba Four Corners Rental & Sales, Plaintiff-Appellee,

The Pierce Agency, Inc., a corporation, Defendant-Appellee.

v.

ADCO GENERAL CORPORATION, A corporation, and Stuyvesant Insurance Company, a corporation, Defendants-Appellants.

No. 4755/4756.

Court of Appeals of New Mexico.

June 30, 1981.

Certiorari Denied Aug. 5, 1981.

Robin D. Strother, Richard L. Gerding, Tansey, Rosebrough, Robert & Gerding, P. C., Farmington, for plaintiff-appellee Floyd Stock.

Paul L. Butt, Deborah S. Davis, Shaffer, Butt, Thornton & Baehr, Albuquerque, for defendant-appellee, The Pierce Agency, Inc.

Damon L. Weems, Farmington, for defendant-appellant, ADCO General Corp.

Ray H. Rodey, Rodey Dickason, Akin & Robb, Albuquerque, for defendant-appellant, Stuyvesant Ins. Co.

OPINION

WALTERS, Judge.

Floyd Stock owned a fleet of tractor-trailer units, one of which was destroyed in an accident on May 8, 1978. Following denial of his claim for collision loss, he instituted this suit against his insurance agent, Pierce Agency (Pierce); Pierce's broker and Stuyvesant's general agent, ADCO General Corporation (ADCO); and the insurer, Stuyvesant Insurance Company (Stuyvesant). This appeal by ADCO and Stuyvesant followed the trial court's award of damages in favor of Stock against all three defendants, with judgment over in favor of Pierce against ADCO and Stuyvesant on Pierce's cross-claim for indemnity and reformation of the policy, and recovery of Pierce's attorney's fees.

The facts upon which plaintiff complained are these: Stock, in August 1977, sought physical damage insurance for his fleet. After requesting and receiving bid proposals from several different insurance agencies, he obtained an application for insurance from Pierce, which had been furnished to the agency by ADCO. Stock completed it and submitted it to Mary Finley at Pierce Insurance Agency, Inc., providing with it a list of the drivers who would be operating the units. Subsequently, Pierce obtained coverage from two separate companies, Canal Insurance Company and Stuyvesant Insurance Company. The Stuyvesant policy was the one acquired through ADCO. Pierce had no agency agreement with Stuyvesant and had had no prior dealings with that company; in this transaction it dealt only with ADCO and had no direct contact with Stuyvesant.

The Stuyvesant policy, as issued, was not what was quoted to Pierce nor was it what the insured reasonably expected from the quotation. It contained a "named driver" endorsement which had not been requested or discussed, and the application form did not indicate the endorsement would be included in the contract of insurance. Knowing that the named driver endorsement is a departure from the usual provisions in policies, Stuyvesant furnished ADCO with a supply of special red stickers to be attached to the face page of the policy, which warned of the endorsement and its limited coverage. The sticker was not attached to Stock's policy.

When the policy was received in the mail, neither Mary Finley nor Stock read it. Finley examined the declarations on the face sheet, and Stock simply placed the unopened policy in his office file. The premium for coverage was based on the value of the insured vehicles, not upon the driving records of the named drivers; therefore, neither Finley nor Stock was alerted to the endorsement by the amount of the premium charge. Consequently, neither Pierce nor Stock was aware of the named drivers limitation, nor that the name of one of Stock's drivers, Joe Wisenbaler, was not added to the list of drivers. It was a tractor driven by Joe Wisenbaler that was destroyed, and upon which this suit arose.

By the date of the accident Stock had had the policy for approximately seven months. Following the loss, he read the policy and

clearly understood the provisions of the named driver endorsement. Suit was filed after Stuyvesant refused to pay for loss of the unit because Wisenbaler's name was not listed on the policy.

Stuyvesant and ADCO assert that the trial court erred in refusing to adopt requested findings relating to Stock's acceptance and retention of the policy and his contributory negligence; in finding that Pierce acted as the agent-broker of Stuyvesant; and in finding Stuyvesant negligent. Stuyvesant appeals the judgment entered against it on Pierce's cross-claim for attorney's fees.

I.

Appellants, relying on *Western Farm Bureau Mut. Ins. Co. v. Barela*, 79 N.M. 149, 441 P.2d 47 (1968), argue that Stock received the policy prior to the accident, and had an opportunity to examine it for a reasonable time. Therefore, he had accepted its terms. They contend that the policy provisions were plain, clear, and free from ambiguity, and by his contributory negligence he is barred from recovery.

Stock admits the facts of receipt and retention and the clear language of the policy. Nevertheless, he points to *Pribble v. Aetna Life Ins. Co.*, 84 N.M. 211, 501 P.2d 255 (1972), as support for his position that because he was never made aware of the existence of the named driver endorsement, and had reason to expect that the policy would be like others he had received insuring similar equipment against physical damage, he was required only to make such examination of the documents as would be reasonable under the circumstances.

In *Pribble, supra*, plaintiff's employer obtained an accident-health policy from defendant company. After the plaintiff was seriously injured, company executives met with the insurer's agent and were assured that the insurance policy would cover excess hospitalization and medical expenses beyond the workmen's compensation benefits available to Pribble.

When plaintiff sought to recover medical and hospital expenses for treatments he would not have undertaken without this assurance, it was learned that the policy excluded occupational injury coverage. The company asserted that plaintiff had the obligation to read the policy. The Supreme Court refused to "mechanically charge" plaintiff with the duty of reading and understanding a contract of insurance, holding, instead, that under the facts of that case the insured was

> . . . only bound to make such examination of such documents as would be reasonable for him to do under the circumstances; that he will only be held to that which he would be thereby alerted; and if the language is such that a layman would not understand its full impact were he to attempt to plow through it, the documents will yield the maximum protection consistent with their language and the reasonable expectation of [the insured].

84 N.M. 211, 216, 501 P.2d 255.

Stock, like the plaintiff in *Pribble*, did not reasonably expect the insurance policy to contain a named driver provision. He thought he would receive a physical damage insurance contract like those he had received previously from other agents and other companies. He was not advised by Pierce that the Stuyvesant policy was different from policies he had received in the past. He was not bound to read the policy word for word. *Accord Olszak v. Peerless Insurance Company*, 119 N.H. 686, 406 A.2d 711 (1979); *Batesville Insurance & Finance Co., Inc. v. Butler*, 248 Ark. 776, 453 S.W.2d 709 (1970); *Rider v. Lynch*, 42 N.J. 465, 201 A.2d 561 (1964). *See Stoes Brothers, Inc. v. Freudenthal*, 81 N.M. 61, 463 P.2d 37 (Ct. App. 1969), and *White v. Calley*, 67 N.M. 343, 355 P.2d 280 (1960). "An insured has a right to presume that the policy received by him is in accordance with his application, and his failure to read it will, under this rule, not relieve the insurer or its agent from the duty of so writing it." 17 Appleman, Insurance Law & Practice 32, § 9406.

The trial court could properly refuse to adopt requested findings that Stock's fail-

ure to read the policy constituted contributory negligence.

II.

Stuyvesant attacks Finding 7, that Pierce acted as agent and broker for ADCO and Stuyvesant. It argues that since there was no agency relationship between Stuyvesant and Pierce, liability could not be passed on to Stuyvesant.

We consider Finding 7 superfluous when all of the findings are read together. Findings 3 and 4 reflect negligence independent of any agency concept, i. e., ADCO failed to follow company practice to notify of a restrictive endorsement by red-flagging the policy, and Stuyvesant issued a policy different from the one quoted to Pierce.

ADCO's liability rests upon its breach of an agent's duty to "obey all reasonable instructions [of its insurer] and . . . [to] exercise reasonable care in carrying out its orders." *National Grange Mut. Ins. Co. v. Wyoming County Ins. Agency*, 156 W.Va. 521, 195 S.E.2d 151, 154 (1973). Stuyvesant's negligence resulted from the issuance of a policy at variance with the policy quoted; thus it breached company policy itself in failing to attach a red sticker or notifying ADCO of its obligation to do so. *See Appleman, supra.*

The liability of ADCO and Stuyvesant, therefore, need not be considered under agency concepts. Their liability is sufficiently rooted in negligence to support the court's decision, regardless of Finding 7.

III.

As a kindred argument to the one above, Stuyvesant contends the trial court imposed a "duty to warn" upon the appellants. ADCO, in its brief, does not contest liability to Stock on any ground other than Stock's contributory negligence. That issue was decided against defendants when the trial court refused their requested findings on contributory negligence, and we have found no error in the court's denial of those instructions. The attack on Findings 2 and 4, therefore, relates only to Stuyvesant's liability.

Stuyvesant's argument necessarily is based on Findings 2 and 4:

> 2. Issuing an insurance policy covering vehicles which contains a "named driver endorsement" is such a departure from the usual provisions of policies and is so restrictive that a warning or flag should have been used to call attention to the "named driver endorsement," not only to alert or warn the insured, but to warn the insured's agent of the restrictive endorsement.
>
> * * * * * *
>
> 4. The policy as issued was not what was quoted to the Defendant, The Pierce Agency, Inc., nor was it what the insured reasonably expected from the quotation. It did not conform to the policy issued by Canal Insurance Company. Such a variance should have been called to the attention of The Pierce Agency, Inc., or Floyd Stock, by ADCO General Corporation or Stuyvesant Insurance Company.

When these findings are considered in the context of other findings, it becomes clear that rather than prescribing an affirmative duty to warn, the findings enunciate the appellants' negligent conduct in issuing a policy which deviated from the one applied for, and in failing to follow the insurer's policy of attaching the red-flag notification of the restrictive endorsement. See our discussion in Part II above. The practical effect of findings of negligence in this area of the law will be to encourage warnings of some kind when an insured is issued a policy different from that which he reasonably expects; it is not a specific duty which these findings establish or impose.

IV.

Stuyvesant also objects to the award of attorney's fees made to plaintiff. The basis for such an award is found in § 39–2–1, N.M.S.A. 1978:

> In any action where an insured prevails against an insurer who has not paid a claim on any type of first party coverage, the insured person may be awarded rea-

sonable attorney's fees and costs of the action upon a finding by the court that the insurer acted unreasonably in failing to pay the claim.

The trial court entered a finding that "Stuyvesant was at all times directly involved in decisions to deny payment of plaintiff's loss, which decisions were unreasonable and unconscionable." Stuyvesant contends the finding is totally unsupported and that it reasonably and in good faith interpreted its policy provisions.

The trial court could properly have found denial unreasonable and unconscionable. Stuyvesant was informed by Pierce Agency, both in a telephone call and by letter, that Pierce and Stock believed the policy covered the loss; that Pierce had never seen a named driver endorsement attached to a policy in its 27 years in the insurance business; that insurers should "by all means" point out [such restrictive endorsements] to the agent by "letter or by stamping in RED on the face of the policy that IT IS LIMITED—PLEASE READ." Thus Stuyvesant was specifically informed that the policy issued was not what Stock or Pierce ordered or expected. Stuyvesant knew also that the red sticker alerting its insured of the endorsement was not attached, contrary to its instructions, by its general agent ADCO. Under principles of agency, ADCO's negligence was Stuyvesant's. *Stewart v. Potter*, 44 N.M. 460, 104 P.2d 736 (1940).

Whether or not the trial court was correct in finding that Pierce was Stuyvesant's agent and broker is not material. There was ample evidence to show that Stuyvesant adamantly refused coverage after learning it had issued a policy at variance with its insured's wishes and without notice to the insured by it or its general agent of the variance. There is also sufficient evidence of the communications between plaintiff and the Pierce agency regarding the policy to support the finding that Stuyvesant's denial was unreasonable and unconscionable.

The trial court did not err in assessing attorney's fees for plaintiff against Stuyvesant.

V.

Both ADCO and Stuyvesant point to the finding of Pierce's negligence as a proximate cause of plaintiff's loss as a bar to the indemnity allowed Pierce on its cross-claim. *Rio Grande Gas Company v. Stahmann Farms, Inc.*, 80 N.M. 432, 457 P.2d 364 (1969), recognizes the propriety of permitting indemnity to one tortfeasor against another who is primarily liable. The issue of indemnity is not concerned with a tortfeasor's liability to the plaintiff; it is a remedy solely concerned with the equities existing among the tortfeasors. *See* discussion in *Dessauer v. Memorial General Hosp.*, 96 N.M. 92, 628 P.2d 337 (Ct.App. 1981). Dean Leflar, in his article entitled "Contribution and Indemnity Between Tortfeasors," at 81 U. of Pa.L.Rev. 130, catalogs a series of cases wherein a tortfeasor held proximately liable for his own negligence in failing to discover and remedy a dangerous condition created by another has been allowed indemnity. That result follows from a determination that the wrongdoers were not *in pari delicto*, that is, negligent in an equal degree, even though all may have been guilty of wrongdoing toward the plaintiff. *See Harmon v. Farmers Market Food Store*, 84 N.M. 80, 499 P.2d 1002 (Ct. App. 1972), for an analysis of indemnification in circumstances of negligence in creation of a dangerous condition vis-a-vis negligence in failing to discover and remedy that condition.

Thus, we acknowledge there exists in the law the principle of indemnity in certain instances. The frailty in this case is the absence of findings which indicate the basis relied on by the trial court for the indemnity award. We must remand that portion of the judgment for findings on that matter.

VI.

Finally, we consider Stuyvesant's challenge to the court's conclusion that the contract of insurance should be reformed to include the driver of the destroyed truck in the named driver endorsement. Stuyvesant refers us to *Kimberly, Inc. v. Hays*, 88 N.M.

140, 537 P.2d 1402 (1975), wherein reformation was held proper if (1) there has been a mutual mistake, or (2) a mistake by one party accompanied by fraud or other inequitable conduct by the other party. *Kimberly* cited *Wright v. Brem*, 81 N.M. 410, 467 P.2d 736 (Ct.App. 1970), and *Morris v. Merchant*, 77 N.M. 411, 423 P.2d 606 (1967), but overlooked *Buck v. Mountain States Inv. Corp.*, 76 N.M. 261, 414 P.2d 491 (1966), which has never been overruled. That case held that where evidence disclosed that the policy issued did not conform to the order placed by the insured and the insured was never advised that the policy differed from what he expected, the evidence would be evaluated as establishing clear, convincing and satisfactory proof of inequitable conduct by one party accompanying the other party's mistake. (76 N.M. at 265, 414 P.2d 491.)

Since, however, the policy was issued for only a one-year period, and expired long before this suit was tried, we see no prejudice to Stuyvesant in the judgment, which includes by reference the matter of reformation.

The judgment, in all respects except the award of indemnity to Pierce, is affirmed. That issue is remanded to the trial court for entry of findings showing the basis for the award, which findings, of course, are subject to further appellate proceedings in the discretion of the litigants.

Since § 39–2–1, *supra*, permits the award of attorney fees, and the statute does not appear to limit the allowance to success at trial only, Stock is awarded an additional fee for his attorneys' defense on appeal in the amount of $2,500.00, against Stuyvesant.

It is so ordered.

WOOD, J., concurs.

HERNANDEZ, C. J., dissents.

HERNANDEZ, Chief Judge (dissenting).

I respectfully dissent.

In addition to the facts set forth in the majority opinion I think it necessary to mention the following: Pierce had never had any business dealings with Stuyvesant prior to the time that it submitted Stock's application for insurance. The application was on a Stuyvesant form and was signed by Stock and was dated August 4, 1977. The form consisted of one printed page with spaces for the insertion of the information requested. One of the questions asked was "Years experience in this business." The type written answer was 36 years. There were a series of boxes asking the type of coverage requested and another series listing the vehicles to be insured. There was a section entitled "Driver Information (complete for all operators)", and the names of three drivers were listed. On an attached sheet the names of five other drivers were listed with notations as to any traffic citations they had received. Also attached to the application, on a separate sheet, was a list of the trucks to be insured and a copy of the lease form used by Stock in renting his trucks. Aside from furnishing the information requested on the form and that on the attachments Stock did not submit any questions as to the type of coverage, nor did he submit any special requests as to coverage.

Stuyvesant's first point of error is that the trial court erred in refusing to adopt the following requested findings of fact:

12. Plaintiff received the policy and on receipt, did not examine, read or review the policy but, rather, placed it in a file drawer with other insurance papers.

13. Plaintiff accepted and retained the policy without objection to its terms for a period of seven months.

14. Plaintiff did not examine, read or review the policy at any time until a loss occurred on or about March 16, 1978, when for the first time, plaintiff reviewed, examined and then read the policy.

15. Upon the reading, review and examination of the policy, Plaintiff understood the language thereof and all provisions of the policy, including the named-driver endorsement and all terms were clear and unambiguous to him.

* * * * * *

21. Plaintiff was negligent in his failure to examine, read and review the policy.

Stock admitted that he did not read the policy and neither did Mary Finley, the person at Pierce who received the policy from ADCO and mailed it on to Stock.

Our Supreme Court in *Western Farm Bureau Mutual Ins. Co. v. Barela*, 79 N.M. 149, 441 P.2d 47 (1968) stated:

> [W]e are firmly committed to the principle that receipt and retention of the policy without objection, by one who has had an opportunity to examine it for a reasonable time, is regarded as an acceptance of its terms * * *. It is no excuse that the insured neglected to read the policy or to familiarize himself with its terms * * *.
>
> [T]he application bears the signature of the applicant and it must be presumed that he read the agreement and was aware of its contractual import. *Mofrad v. New York Life Ins. Co.*, 206 F.2d 491 (10th Cir. 1953).
>
> It is usually considered that when the insured applies for a contract, he has a reasonable time after receipt thereof to examine its terms and to return it if unsatisfactory. Particularly is this true where the company sends a contract which is substantially different from the one applied for. 1 Appleman, Insurance Law and Practice, § 172, p. 272.

The application was dated August 4, 1977. The policy was mailed to Stock in August of 1977 and the accident occurred on March 16, 1978. Stock had ample time to read the policy and to determine if it was what he had applied for. He had never bought insurance from Stuyvesant before so there can be no question of reliance on past dealings. The majority rely on *Pribble v. Aetna Life Insurance Company*, supra, to support their conclusion in this regard. This reliance, in my opinion, is misplaced. The factual situation in *Pribble* was far different than in the instant case. The corporation that Mr. Pribble worked for had a group policy with Aetna. After Mr. Pribble was injured the General Agent for Aetna, when asked, stated that the $10,000.00 hospitalization benefit would be available to Mr. Pribble. The policy which covered 50 pages had a provision that only non-occupational injuries were covered. Mr. Pribble's injuries were work related. Mr. Pribble did not receive a copy of the policy; he and the other employees were given a certificate which stated the coverage in general terms. The certificate covered 29 pages. Aetna denied coverage and Pribble sued to recover hospital and medical expenses. The trial court granted Aetna's motion for summary judgment and our Supreme Court reversed. The principal issue was the General Agent's authority to waive or change a provision of the policy. Our Supreme Court held that the issue of the authority of the General Agent was one fact. Aetna argued that Mr. Pribble was charged with a duty to read the policy and thereby become chargeable with notice of its content upon his acceptance and retention. It was in this context, that our Supreme Court stated the following:

> We will not simply mechanically charge Mr. Pribble with the duty of reading and understanding the policy and certificate and then bar him from recovery by a literal application of its terms and provisions. Rather, based on the facts before us, we hold that Mr. Pribble, himself or through his authorized representatives was only bound to make such examination of such documents as would be reasonable for him to do under the circumstances; that he will only be held to that which he would be thereby alerted; and if the language is such that a layman would not understand its full impact were he to attempt to plow through it, the documents will yield the maximum protection consistent with their language and the reasonable expectation of Mr. Pribble.

The Stuyvesant policy consisted of three pages and three half pages one of which was the Named Driver Endorsement which reads as follows:

> Named Driver Endorsement
>
> It is understood and agreed that while the vehicle(s) are being operated, cover-

age only applies when being operated by a driver listed herein, or any new driver hired subsequent to the effective date of this policy subject to the name of such driver being reported to the Company or its agent prior to his date of employment. The acceptance of new drivers shall be evidenced by the issuance of an endorsement naming such drivers. The non-acceptance of any new driver or any drivers listed herein, will also be evidenced by the issuance of an endorsement excluding such drivers granting ten days advance notice.

Name of Driver_____

I also take issue with the following statement made by the majority: "The policy as issued was not what was quoted to Pierce." The person in the Pierce Agency who obtained the quotation from ADCO and who filled out the application furnished by Stuyvesant was Mary Finley, and her testimony in this regard was as follows:

Q. Is there any reason why you didn't take Mr. Stock's application and policies through one of the other general agents other than—

A. We had received the cheapest quotation from ADCO.

Q. So you were just seeking to find him the cheapest deal; is that right?

A. Yes.

Q. Now, so as to obtain the insurance from Stuyvesant through ADCO, did you fill out an application form for Mr. Stock?

A. Yes, sir.

Q. Where did that come from?

A. From ADCO in Denver.

* * * * * *

Q. As I understand it, during the time you were involved with this particular policy you had no direct contact with Stuyvesant; is that right?

A. This is correct.

Q. All your dealings were with—

A. —ADCO.

* * * * * *

Q. I take it when you were discussing with ADCO the quote that they were going to give you, or did give you, that there was no conversation pertaining to a Named Driver Endorsement?

A. No, there was not.

The only part of the application relating to coverage was the following:

Coverage	Limits of Liability	Premium Unit 1 etc.
Comprehensive	ACV or $ Less $ Ded	$
Collision or Upset	ACV or ~~$1000~~. Less $1000 Ded.	$
Theft, CAC	250. Ded.	$
Downtime		$
Mobile Equipment		$
		Total Premium

An application for insurance is a mere offer which does not ripen into a contract until accepted by the insurance company. If the company issues a policy materially different from that applied for, in the eyes of the law, the policy is a rejection of the offer and is a counter-offer which becomes a binding contract only when accepted by the original offeror—the would-be insured.

Life Insurance Company of Georgia v. Miller, 292 Ala. 525, 296 So.2d 900 (1974).

It is a well recognized rule that, where one applies for a policy of insurance, he is presumed to apply for the form of policy in use by the company and that the parties so contract. When the policy was issued, the rights of the parties became fixed by it and its definite contents and meaning are controlling.

Dawson v. Metropolitan Life Ins. Co., 9 So.2d 252 (La.Ct.App. 1942).

In my opinion Stuyvesant's first point of error is well taken.

Stuyvesant's second point of error is that the trial court erred in finding that Pierce acted as agent-broker for Stuyvesant. I agree.

An insurance broker, like other brokers, is primarily the agent of the first person who employs him, and is therefore ordinarily the agent of the insured . . . .

III Couch On Insurance 2d, § 25:94, p. 405.

One who procures another to obtain insurance for him thereby makes such person

his agent and assumes full responsibility for his acts performed pursuant to the agency thus created. *Adams v. Manchester Insurance & Indemnity Company*, 385 S.W.2d 359 (Mo.Ct.App. 1964).

In my opinion, under the facts of this case Pierce was the agent of Stock. Pierce placed the order for the insurance policy for Stock and had the duty to inspect it to see that it was what Stock wanted. *Butler v. Scott*, 417 F.2d 471 (10th Cir. 1969).

Mr. White, the general manager of the Pierce Agency, testified in part as follows:

Q. Had you at any time prior to August of 1977 dealt with or written any insurance through the Stuyvesant Insurance Company?

A. No, sir.

* * * * * *

Q. Do you as an agency contract with those companies to write their insurance for them?

A. Well, we broker policies.

Q. Was the business which was written with Stuyvesant the kind that you would enter into a contract with or broker through someone else?

A. That would be a brokered business.

* * * * * *

Q. Were you an agent?

A. For Stuyvesant?

Q. For Stuyvesant in this particular instant.

A. No, sir, not a licensed agent for them, no.

* * * * * *

Q. After writing a policy, and assuming its (sic) delivered to the insured, do you consider your job as an agent over?

A. No, sir.

Q. Do you consider yourself a continuing representative for that insured?

A. Yes, sir, I do.

Stuyvesant's fifth point of error is that the trial court erred in imposing upon it a duty to warn. This point has reference to the two following findings made by the trial court:

2. Issuing an insurance policy covering vehicles which contains a "named driver endorsement" is such a departure from the usual provisions of policies and is so restrictive that a warning or flag should have been used to call attention to the "named driver endorsement," not only to alert or warn the insured, but to warn the insured's agent of the restrictive endorsement.

4. The policy as issued was not what was quoted to the Defendant, the Pierce Agency, Inc., nor was it what the insured reasonably expected from the quotation. It did not conform to the policy issued by Canal Insurance Company. Such a variance should have been called to the attention of The Pierce Agency, Inc., or Floyd Stock, by ADCO General Corporation or Stuyvesant Insurance Company.

In my opinion, the assertion in finding No. 2 that "a warning or flag should have been used to call attention to the named driver endorsement, not only to alert or warn the insured, but to warn the insured's agent of the restrictive endorsement" constitutes a conclusion of law and not an averment of fact. A declaration of a right or duty arising from certain facts is a conclusion of law. As a conclusion of law it is subject to independent review by this court.

> In the absence of a statutory requirement regulating the size and other characteristics of the type employed to state the policy contract or prescribing the color of the printing, an insurance policy or application may be printed in any size of type or color of printing.

Southern Guaranty Insurance Company v. Gipson, 275 Ala. 538, 156 So.2d 630 (1963).

Section 59–16–14(A), N.M.S.A. 1978, provides:

> On and after the effective date of this act no policy of life, annuity, casualty, fidelity, surety, fire, marine, vehicle and title guaranty shall be delivered or issued for delivery in this state, nor shall any endorsement, rider or application which becomes a part of any such policy be

> used, until a copy of the form and the classification of risks pertaining thereto have been filed with the superintendent of insurance.

This section was enacted in 1961. The record shows that Stuyvesant's "named driver endorsement" was approved by the Superintendent of Insurance for the State of New Mexico on February 22, 1977. The only duty imposed by an insurer as to the language, form and arrangement that a policy of insurance should take, absent some statutory requirement, is that:

> The policy should be read as a layman would read it and not as it might be analyzed by an attorney or an insurance expert. [Citations omitted.] An exclusionary clause must be conspicuous, plain and clear [Citations omitted] and must be construed strictly against the insurer and liberally in favor of the insured.

Crane v. State Farm Fire and Casualty Company, 5 Cal.3d 112, 485 P.2d 1129, 95 Cal.Rptr. 513 (1971).

"Insurance contracts have been characterized as adhesion contracts whose terms often are unintelligible to the insured. [Citations omitted.] Insurance companies have a duty to make policy provisions plain and prominent, especially those relating to coverage." *Wells v. Wilbur B. Driver Company*, 121 N.J.Super. 185, 296 A.2d 352 (Law Div. 1972).

Mr. Stock admitted, that if he had read the policy, he would have readily understood the driver endorsement provision. The fact that Stuyvesant had prepared red warning stickers to be attached to a policy when the named driver endorsement was incorporated did not enlarge the duty imposed upon them by the citations quoted above or create a new duty. Consequently, ADCO's failure to attach this sticker to Stock's policy was without legal consequence.

As to the trial court's finding No. 4, I have previously discussed it and find it completely without evidentiary support in the record.

For all of these various reasons I would reverse the judgment of the trial court entered on June 23, 1980, and remand this cause with instructions to vacate said judgment and to enter judgment in favor of ADCO and Stuyvesant, both as to the claim of Stock and the cross-claim of Pierce and that costs be assessed against Pierce.

632 P.2d 1191

STATE of New Mexico, Plaintiff-Appellee,

v.

Anthony J. CRESPIN, Defendant-Appellant.

No. 5230.

Court of Appeals of New Mexico.

July 23, 1981.

John L. Walker, Teel & Walker, P. A., Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

This proceeding involves appeal procedures, to the district court and to this Court, when the underlying charge was brought in the metropolitan court.

Defendant was charged in metropolitan court with violating an ordinance of the City of Albuquerque. See § 34–8A–3, N.M.S.A. 1978 (1980 Cum.Supp.). The metropolitan court found the ordinance unconstitutional and dismissed the charge; an appeal was taken to the district court. The district court held that the ordinance was constitutional and remanded the case to the metropolitan court for trial.

The merits of the constitutional claim are not involved in this proceeding. Defendant seeks to appeal to this Court from the district court order reinstating the metropolitan court charge. This Court proposed summary dismissal, see R.Crim.App.Proc. 207(d), "for lack of an appealable final order."

1. Defendant claims there is no authority to appeal to the district court from the dismissal by the metropolitan court. The Supreme Court has adopted Rules of Procedure for the Metropolitan Courts. See § 34–8A–6, N.M.S.A. (Cum.Supp.1980). Rule 71(b), N.M.R.Proc.Met.Cts., provides:

> The municipality, county or state may appeal to the district court of the county within which the metropolitan court is located within fifteen days after entry of the judgment of the metropolitan court dismissing the complaint on the basis that an ordinance, statute or section thereof is invalid or unconstitutional, or that the complaint or a part thereof is not otherwise legally sufficient.

Defendant contends this rule has no effect; this contention is based on the view that the State would have had no right to appeal from a dismissal of a complaint in magistrate court and, thus, there is no right

to appeal from a similar dismissal in metropolitan court. Defendant correctly points out that neither statute nor rule specifically authorizes an appeal by the State if the dismissal in this case had been in magistrate court. See R.Crim.Proc., Magis.Cts., Nos. 33 and 41; § 35–13–1, N.M.S.A. 1978. However, for the metropolitan court, an appeal is specifically authorized by rule. Accordingly, we do not consider § 34–8A–6(C), supra, which states: "Any person aggrieved by any judgment rendered by the metropolitan court may appeal to the district court".

Defendant claims the right to appeal provision applicable to a magistrate court dismissal governs when there has been a dismissal by the metropolitan court. He relies on § 34–8A–2, N.M.S.A. 1978 (1980 Cum. Supp.), which reads:

> With respect to the provisions of Sections 1 and 26 of Article 6 of the state constitution and all other provisions of law, the metropolitan court shall constitute a state magistrate court which is inferior to the district courts and is established by law pursuant to the provisions of Section 1 of Article 6 of the state constitution.

Neither this statute nor the constitutional provisions referred to in the statute have the effect of making appeal provisions for magistrate courts applicable to metropolitan court appeals. N.M.Const., art. VI, § 1, states where the judicial power is vested; N.M.Const., art. VI, § 26, provides for the establishment of magistrate courts. Section 34–8A–2 simply classifies the metropolitan court, for constitutional purposes, as a magistrate court inferior to the district courts.

This Court is to give effect to rules adopted by the Supreme Court. *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973). Rule 71(b), N.M.R.Proc.Met.Cts., authorized the appeal to the district court in this case. Neither defendant's argument nor the authority relied on by defendant suggests a valid reason for not giving effect to the rule.

2. Inasmuch as the prosecutor had a right to appeal to the district court, defendant contends he has an "equal right" to appeal the district court's decision to this Court. He relies on Part I of *State v. Santillanes*, 96 N.M. 482, 632 P.2d 359 (1980) (St.B.Bull. Vol. 20 at 163), which held the State had a right to appeal under N.M. Const., art. VI, § 2. See *State v. Santillanes*, 96 N.M. 477, 632 P.2d 354 (1981) (St.B.Bull. Vol. 20 at 712), and *State v. Aguilar*, 95 N.M. 578, 624 P.2d 520 (1981). Defendant contends he is an aggrieved party and not to allow him to appeal the district court's decision would result in a "double standard to appeals". We disagree.

Defendant has a right to appeal. See *State v. Santillanes*. Section 39–3–3(A), N.M.S.A. 1978, states the circumstances when he may either appeal or seek an interlocutory appeal. None of those circumstances appear in this case. Defendant does not claim that final judgment has been entered; conditions of release are not involved; defendant did not seek an interlocutory appeal. No "double standard" is involved; defendant has a right to appeal when final judgment has been entered; that has not yet occurred. See *State v. Garcia*, 91 N.M. 131, 571 P.2d 123 (Ct.App. 1977).

The appeal is dismissed.

IT IS SO ORDERED.

HERNANDEZ, C. J., and HENDLEY, J., concur.

632 P.2d 1194

STATE of New Mexico,
Plaintiff-Appellee,

v.

Eusebio GONZALES,
Defendant-Appellant.

No. 5042.

Court of Appeals of New Mexico.

July 30, 1981.

Rehearing Denied Aug. 4, 1981.

Michael Gernsheimer, Granat, Gernsheimer & Hartmann, P.A., Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Heidi Topp Brooks, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

Gonzales and Ortega were convicted, in a consolidated trial, of larceny of a nail gun over $100.00 in value. Section 30–16–1, N.M.S.A.1978 (1980 Cum.Supp.). Each defendant has appealed. This appeal involves only Gonzales. Issues listed in the docketing statement, but not briefed, were abandoned. *State v. Gallegos*, 92 N.M. 336, 587 P.2d 1347 (Ct.App.1978). Gonzales has briefed two issues which involve: (1) suppression of his statements, and (2) the length of his probation.

Suppression of Statements

Gonzales sought suppression of all statements he made to the police. In the trial court, Gonzales sought suppression on two grounds: (a) that his statements were the result of promises, and (b) his statements were made in the absence of warnings as to his constitutional rights (*Miranda* warnings—*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). The trial court found that no promises had been made; there is no appellate issue concerning promises. On appeal, Gonzales contends his statements should have been suppressed because he was not given the *Miranda* warnings.

State v. Harge, 94 N.M. 11, 606 P.2d 1105 (Ct.App.1979), states: "*Miranda* warnings are required only where there is such a restriction on a person's freedom as to render him 'in custody' and subject to a coercive environment."

State v. Montano, 95 N.M. 233, 620 P.2d 887 (Ct.App.1980), states: "General on-the-scene questioning or other general questioning of citizens in the fact-finding process is not considered custodial, however, and a person in these circumstances need not be informed of his rights before being questioned."

State v. Harge states "it is for the trial court to weigh the evidence and so long as there is substantial evidence to support its ruling, the appellate court will not find error as a matter of law."

There is substantial evidence which supports the trial court's refusal to suppress the statements of Gonzales.

The theft occurred during the noon hour at a construction site. People at the scene during the noon hour were roofers. When the construction superintendent discovered the nail gun was missing he informed the roofers that "if I couldn't find the gun, I'd have to call the Sheriff." When the superintendent was going to neighbors to use the telephone to report the disappearance, two men left the scene in a blue Ford.

Deputy Villareal was sent to investigate. While discussing the matter with the superintendent, Gonzales returned, alone, in the blue Ford. The deputy asked Gonzales what happened. Gonzales stated he had taken "Rudy" to town (not the other defendant—Ortega) and he thought Rudy had taken the gun. Gonzales went with the deputy to locate Rudy; Gonzales told the deputy where to go. They went to two locations, without success. Arriving at a third location, Gonzales went into the house and returned with the gun. Ortega was found hiding in the house and was arrested. Gonzales made an inculpatory statement to Ortega; this statement is not involved because it was not made to the police. The deputy returned both Gonzales and Ortega to the construction site where the superintendent identified them as the men who had left in the blue Ford. The deputy asked Gonzales if he had given Ortega a ride to town and Gonzales said "no". The deputy then arrested Gonzales.

Gonzales' "statements" are included in the preceding paragraph. The trial court could properly rule that none of the statements were made as a result of custodial questioning.

Length of Probation

Gonzales was sentenced to a term of eighteen months in the penitentiary, to be followed by one year parole. All but ninety days of this sentence was suspended. Once the ninety days were served, defendant was placed on probation for two years.

Section 31–20–7(B), N.M.S.A.1978 states: "When the court has suspended the execution of a sentence, in whole or in part, the total period of suspension shall not exceed the maximum length of the term of imprisonment which could have been imposed by sentence against the defendant for the crime of which he was convicted."

This total period of suspension limits the length of probation. Under § 31–20–5, N.M.S.A.1978, the length of probation is for "all or some portion of the period of deferment or suspension", subject to a maximum length of five years.

The dispute thus involves the meaning of the maximum term which could have been imposed. Defendant looks to the sentence that *was* imposed—eighteen months—and asserts that is the maximum probation. The issue, however, involves the imprisonment which "could have been imposed".

Section 31–18–15, N.M.S.A.1978 (1980 Cum.Supp.), in subparagraph A(4), provides a basic sentence of eighteen months imprisonment. Subparagraph C provides for a period of parole in accordance with § 31–21–10, N.M.S.A.1978 (1980 Cum.Supp.). The period of parole for defendant, see § 31–21–10(C), was one year. This parole period is a part of defendant's sentence, but is to be served "after the completion of any actual time of imprisonment." Section 31–18–15(C). A defendant may be imprisoned during his parole period, either for refusing to accept the conditions of parole, § 31–21–10(D), or for violation of conditions of parole, § 31–21–14(C), N.M.S.A.1978. Imprisonment for noncompliance with parole matters, however, is not a term of imprisonment which could have been imposed by sentence; such imprisonment results only after sentence has been imposed. The parole term is not to be utilized in determining the maximum length of probation under a suspended sentence.

Section 31–18–15(B) provides that the term of eighteen months imprisonment was

"[t]he appropriate basic sentence of imprisonment . . . unless the court alters such sentence pursuant to the provisions of Section 31–18–15.1, 31–18–16 or 31–18–17 NMSA 1978." Each of these sections authorize additional imprisonment—§ 31–18–15.1 for aggravating circumstances; § 31–18–16 for use of a firearm; § 31–18–17 for a prior felony conviction. The additional imprisonment authorized by these sections could not have been imposed absent facts making these sections applicable. In this case, there is no suggestion that there are facts making any of these sections applicable. The result is that the maximum term of imprisonment which could have been imposed was eighteen months. Eighteen months being the maximum imprisonment which could have been imposed, eighteen months was the maximum length of his probation.

The conviction and sentence are affirmed. The cause is remanded to correct the length of defendant's probation by reducing the length of the probation to eighteen months.

IT IS SO ORDERED.

HENDLEY and WALTERS, JJ., concur.

632 P.2d 1196

STATE of New Mexico,
Plaintiff-Appellee,

v.

Robert Elliott WYMAN,
Defendant-Appellant.

No. 5066.

Court of Appeals of New Mexico.

Aug. 4, 1981.

Sarah M. Singleton, Pickard & Singleton, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Eddie Michael Gallegos, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

Convicted of criminal penetration, § 30–9–11(C), N.M.S.A. 1978, and burglary, § 30–16–3(A), N.M.S.A. 1978, defendant appeals. Defendant testified. The trial court permitted the prosecutor to cross-examine defendant concerning specific instances of misconduct committed when defendant was a child. See § 32–1–3(A), N.M.S.A. 1978. We (1) discuss the relation of Evidence Rules 608 and 609; and (2) answer other contentions summarily.

Defendant answered "no" when asked:

(a) if he committed embezzlement in Alamogordo on August 6, 1977; and

(b) if he committed school burglary in Alamogordo on October 22, 1974.

Defendant answered "yes" when asked:

(a) if he committed auto theft in Alamogordo on January 21, 1976;

(b) if he committed residential burglary in Alamogordo on October 22, 1974;

(c) if he committed auto theft in Alamogordo on September 26, 1974;

(d) if he committed residential burglary and theft of a knife on February 20, 1973; and

(e) if he committed residential burglary and larceny in Alamogordo on July 28, 1972.

Relation of Evidence Rules 608 and 609

The pertinent part of Evidence Rule 608(b) reads:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness . . . .

For the purpose of attacking the credibility of a witness, Evidence Rule 609 permits cross-examination as to whether the witness had been convicted of certain crimes. Evidence Rule 609(c) states: "Evidence of juvenile adjudications is generally not admissible under this rule."

The prosecutor's questions, outlined above, did not ask about juvenile adjudications, and no evidence as to juvenile adjudications was presented.

The prosecutor's questions went to specific instances of conduct. Such questions were permissible under Evidence Rule 608(b). Defendant claims the questions should not have been permitted because the questions had the effect of circumventing Evidence Rule 609(c). Defendant asserts the prohibition against use of juvenile adjudications was "a policy determination that a minor's conduct is not to be used against him for the rest of his life"; that "allowing

inquiry into the acts underlying a juvenile adjudication is inconsistent with the policy" of Rule 609(c). We disagree.

Evidence Rule 608(b) authorizes specific conduct questioning "other than conviction of crime as provided in Rule 609". This wording indicates that questioning permitted under Evidence Rule 608(b) is separate from, and in addition to, questioning permitted under Evidence Rule 609. Although Evidence Rule 609(c) generally excludes evidence of juvenile adjudications from the permitted questioning concerning prior convictions, this exclusion does not prohibit questioning permitted by Evidence Rule 608(b). If, as defendant contends, the intent was to exclude the specific conduct as well as the adjudication, such intent is not reflected in the wording of Evidence Rule 608, which is silent as to the conduct of juveniles.

■■ Evidence admissible for one purpose is not to be excluded because inadmissible for another purpose. *State v. Padilla*, 90 N.M. 481, 565 P.2d 352 (Ct.App. 1977). Specific conduct, admissible on cross-examination to attack credibility, is not to be excluded because an adjudication based on that conduct is excluded.

Issues Answered Summarily

■ (a) Defendant contends the cross-examination as to specific conduct was inadmissible under Evidence Rule 608(b) because not probative of truthfulness or untruthfulness. Questions concerning embezzlement, burglary, auto theft and larceny involve dishonesty, were probative as to truthfulness and were proper cross-examination under Evidence Rule 608(b). *State v. Miller*, 92 N.M. 520, 590 P.2d 1175 (Ct. App. 1979); *State v. Melendrez*, 91 N.M. 259, 572 P.2d 1267 (Ct.App. 1977).

■ (b) Defendant claims that any questioning under Evidence Rule 608(b) was improper. Defendant does not claim the prosecutor's questions were in bad faith. See *State v. Sluder*, 82 N.M. 755, 487 P.2d 183 (Ct.App. 1971). Rather, the contention is that the trial court did not require the prosecutor to make a showing as to the factual basis for the questions.

The trial court inquired as to the basis for the prosecutor's questions. The prosecutor stated the questions were based on "[p]olice reports, coupled with the Defendant's own confession" and "I have checked it out". When defendant suggested that the prosecutor "put into the record the basis for the information that's going to be asked," the trial court stated that could be done later. We have only a partial record; we do not know whether the basis for the prosecutor's questions were "put into the record" in the trial court. The partial record shows an inquiry as to the "veracity" of the prosecutor's questions; thus, the procedure herein was not contrary to *State v. Christopher*, 94 N.M. 648, 615 P.2d 263 (1980).

■ (c) Defendant asserts the trial court erred in refusing to rule that the prejudicial effect of the questions outweighed their probative value. The partial record shows that the trial court proceeded carefully and exercised its discretion. The trial court limited the type and form of the questions, and permitted the questions outlined above only because defendant had "opened" his good conduct through the testimony of two defense witnesses. The trial court stated:

> [T]hey can't ask him if he has ever been convicted of his juvenile record, but they have a right to show that he is just not a number-one, one hundred percent all American good boy, which is the impression the jury is going to get without asking these questions. And the Court feels that you haven't—you having opened it up, they are entitled to do something about it on impeachment.

■ (d) Defendant contends the trial court should have given an instruction on the limited purpose of the cross-examination. See *State v. Christopher*; Evidence Rule 105; and U.J.I. Crim. 40.27. There is no suggestion that defendant requested such an instruction. See Use Note to U.J.I. Crim. 40.27.

The judgment and sentence are affirmed.

IT IS SO ORDERED.

HERNANDEZ, C.J., and LOPEZ, J., concur.

632 P.2d 1199

STATE of New Mexico,
Plaintiff-Appellee,

v.

Yves Leon DEVIGNE,
Defendant-Appellant.

No. 5051.

Court of Appeals of New Mexico.

Aug. 11, 1981.

Ann Steinmetz, Kennedy & Steinmetz, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Clare E. Mancini, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

The two appellate issues involve (1) defendant's confession after a warrantless arrest, and (2) the length of defendant's probation.

Albuquerque detectives, investigating a series of residential burglaries, acquired information that implicated defendant. Some two weeks after acquiring this information, the detectives arrested defendant in his residence, during daylight, without a warrant. Thereafter, defendant made two oral inculpatory statements and one written confession.

Defendant moved to suppress all of his statements. Among the grounds relied on were: (a) that he was not properly advised of his right to remain silent; (b) that he did not waive his right to remain silent; and (c) that his statements were involuntary. After an evidentiary hearing, the trial court refused to suppress the statements on any of these three grounds; these grounds are not involved in this appeal.

Confession After Warrantless Arrest

Defendant also sought to suppress his statements on the basis they were made after a warrantless arrest. Defendant contended that the April, 1980 decision of the United States Supreme Court in *Payton v. New York* and *Riddick v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), required suppression of his statements. The trial court refused to suppress the statements.

Subsequently, upon agreement by the prosecution and defense, the case was tried to the court upon stipulated facts and defendant was found guilty of five residential burglaries. The tape of this trial reveals that defendant's written confession was admitted into evidence over defendant's objection. Inasmuch as other parts of the stipulation have not been included in the appellate record, we do not know whether any use was made of defendant's oral statements. However, the admission of defendant's written confession over defendant's objection, preserved the issue of the applicability of *Payton and Riddick*.

The trial court's letter rejecting defendant's claim under *Payton* suggests that a way be found to distinguish that decision. The letter states:

> The Payton case to which Defendant refers may be distinguishable from the facts in this case. The Payton decision was six to three, with a very strong dissent being filed. The dissenting Opinion of course is not the law, but it emphatically sets out the possibility of severely hampering the effective law enforcement. The necessity of authorizing a warrantless arrest should be made on the surrounding circumstances of each individual case.
>
> I believe the circumstances in this case should be compared to Payton by our Supreme Court.

At the time of the warrantless arrest, *Payton and Riddick* had not been decided; those decisions were some six months after the arrest. However, by the time defendant was indicted, they had been decided, and there is no suggestion that the law stated in those decisions does not apply to defendant's case.

As the above-quoted portion of the trial court's letter suggests, *Payton and Riddick* do require an analysis of the arrest procedures followed in this case. We recognize that the decision is known as *Payton v. New York*. Heretofore we have referred to both *Payton and Riddick* because the facts of *Riddick* are closer to those in defendant's case. Hereinafter we refer to the decision only as *Payton*; the following facts, however, are from *Riddick*.

The victim of two armed robberies identified Riddick in June, 1973; the police learned Riddick's address in January, 1974. In March, 1974, police went to Riddick's residence. When Riddick's young son opened the door, the police saw Riddick. The police entered and arrested Riddick without a warrant.

In defendant's case, the police made a warrantless arrest of defendant, in his residence, some two weeks after obtaining

probable cause that defendant had committed some of the burglaries being investigated. Asked if he could have secured an arrest warrant, the detective answered: "We probably could have. Myself and Detective Nagy did not feel it was necessary. We had ample probable cause."

Payton holds:

> [T]he Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment [citations omitted], prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.

The majority opinion in *Payton* emphasizes that the arrest occurred in the defendant's residence, thus no "public place" arrest was involved. The majority also point out that consent to enter was not involved and that exigent circumstances were not involved. Under *Payton* the existence of probable cause does not validate the warrantless arrest of a person in that person's residence absent consent to enter or exigent circumstances.

The trial court referred to the strong dissent in *Payton*. That dissent relied on common-law restrictions to regulate warrantless arrests, in these words:

> Today's decision ignores the carefully crafted restrictions on the common-law power of arrest entry and thereby overestimates the dangers inherent in that practice. At common law, absent exigent circumstances, entries to arrest could be made only for felony. Even in cases of felony, the officers were required to announce their presence, demand admission, and be refused entry before they were entitled to break doors. Further, it seems generally accepted that entries could be made only during daylight hours. And, in my view, the officer entering to arrest must have reasonable grounds to believe, not only that the arrestee has committed a crime, but also that the person suspected is present in the house at the time of the entry.

No matter how attractive this dissent may be to the reader, it is not the law.

The majority opinion in *Payton* was reaffirmed in *Steagald v. United States*, —— U.S. ——, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981), in these words:

> The question before us is a narrow one. The search at issue here took place in the absence of consent or exigent circumstances. Except in such special situations, we have consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant. See *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Johnson v. United States*, 333 U.S. 10, 13–15, 68 S.Ct. 367 [368–369], 92 L.Ed. 436 (1948). Thus, as we recently observed, "[i]n terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York, supra* [445 U.S.] at 590, 100 S.Ct. 1371 [at 1382], 63 L.Ed.2d 639.

Payton applies to defendant's case; how it applies has yet to be determined.

Under *Payton*, defendant's warrantless arrest was illegal unless the detectives entered defendant's residence either under exigent circumstances or with consent. Nothing suggests there were exigent circumstances. Whether the detectives entered with defendant's consent is a factual issue which has not yet been determined by the trial court. See *State v. Bidegain*, 88 N.M. 466, 541 P.2d 971 (1975); *State v. Miller*, 80 N.M. 227, 453 P.2d 590 (Ct.App. 1969).

If the detectives' entry was with consent, then defendant's arrest was legal and there is no basis for suppressing defendant's confession. If, however, there was no consent, the arrest was illegal. If the arrest was illegal, another factual issue is involved; that factual issue is whether defendant's written confession was sufficiently an act of free will to purge the primary taint of the illegal arrest.

In this case there is no appellate claim that defendant was not informed of his constitutional rights before confessing, and no claim as to an involuntariness issue involving the privilege against self-incrimination. The issue involves the Fourth Amendment to the United States Constitution—the right of defendant to be secure, in his residence, against an unreasonable seizure. To establish compliance with the Fourth Amendment, the causal chain between the illegal arrest and the subsequent confession must be broken. The causal chain is broken if the confession was sufficiently an act of free will to purge the primary taint.

Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), explains:

> The question whether a confession is the product of a free will . . . must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse . . . . The *Miranda* warnings [of constitutional rights] are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant. . . . The voluntariness of the statement is a threshold requirement. . . . And the burden of showing admissibility rests, of course, on the prosecution.

Not having determined whether the detectives' entry was with or without consent, the trial court did not reach the "purge the taint" issue. If the trial court should determine that the arrest was illegal, it must then determine if the taint has been purged. If the taint was not purged, then the confession should have been suppressed. If the confession should have been suppressed, its admission at trial was error and a new trial is required.

The evidence at the motion to suppress hearing showed two oral statements which preceded the written confession. These oral statements must be considered in determining whether the causal chain between an illegal arrest (if so found) and the written confession has been broken. See *State v. Austin*, 91 N.M. 586, 577 P.2d 894 (Ct.App.1978).

Length of Probation

Defendant was sentenced to three years imprisonment on each of the five counts. Two of the sentences were to be served consecutively, for a total of six years. The other three sentences were to be served concurrently. "Execution of sentence is suspended and Defendant is ordered to be placed on probation for Six (6) years".

Defendant asserts that the maximum length of his probation cannot exceed five years. The State contends the maximum length of probation is three years on each count, thus a total probation of six years is permissible.

When a sentence has been suspended "the total period of suspension shall not exceed the maximum length of the term of imprisonment which could have been imposed by sentence against the defendant for the crime of which he was convicted." Section 31–20–7(B), N.M.S.A.1978. The maximum imprisonment for each of the burglaries, see *State v. Gonzales*, (Ct.App.) 96 N.M. 556, 632 P.2d 1194 (1981), was three years. Section 31–18–15(A)(3), N.M.S.A. 1978 (1980 Cum.Supp.). Thus, the maximum suspension was three years for each of the burglaries.

Section 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.

Section 31–20–5 states two limitations upon the length of probation. First, the probation cannot exceed the period of suspension. Inasmuch as the maximum period of suspension for each burglary could not exceed three years, the maximum probation period for each burglary was three years. Compare *State v. Crespin*, 90 N.M. 434, 564 P.2d 998 (Ct.App.1977). Second, the proviso to § 31–20–5 states "the total period of probation shall not exceed five years."

The dispute goes to the meaning of the limitation stated in the proviso. Defendant asserts the proviso limits the maximum period of probation in the aggregate; the State contends "the five year limitation is to be applied to each crime for which a defendant is convicted.... [J]ust as the trial court may impose consecutive prison terms, ... so may it impose consecutive probation terms." While we agree that the five-year limitation applies to each crime, the question is whether it also applies in the aggregate.

Both the internal wording of § 31–20–5 and the legislative history suggest that the five-year limitation applies in the aggregate.

The wording of § 31–20–5, until the proviso is reached, limits the probation to the length of the suspended sentence for "a crime". The proviso refers to a "total" period of probation without reference to "a crime". If the Legislature intended the limitation in the proviso to apply only to each crime, the proviso would have been worded "the total period of probation, *for each crime*, shall not exceed five years." Inasmuch as the proviso contains no words limiting the word "total", the internal wording of § 31–20–5 supports defendant.

Laws 1957, ch. 172, § 1, dealt with suspended sentences and probation. That law stated: "The period of probation, together with any extension thereof, shall not exceed five years." This statute, enacted subsequent to 1953, does not, of course, appear in original Volume 6 to N.M.S.A.1953. Nor does it appear in Replacement Volume 6 issued in 1964 because, by the time of Replacement Volume 6, this statute had been repealed upon enactment of the Criminal Code. Unless one has access to supplements to original Volume 6, between 1957 and 1963, this statute cannot be found in the 1953 Compilation.

The Criminal Code was enacted by Laws 1963, ch. 303. Section 30–1 of the Criminal Code identifies statutes that were repealed. Laws 1957, ch. 172, § 1, is one of the laws repealed. By process of elimination, it can be ascertained that the 1957 law had been compiled, in supplements to the 1953 Compilation, as § 40–1–11.

The Report of Criminal Law Study Interim Committee (1961–62) identifies what had been compiled, in the 1953 Compilation as § 40–1–11, as the source of § 29–17 of the Criminal Code, which is § 31–20–5 of the 1978 Compilation. The Committee Report states the policy of the Committee to retain provisions of existing criminal laws in the proposed code whenever possible. In sum, the Legislative Committee Report is to the effect that language in the proviso to § 31–20–5 (the total period of probation shall not exceed five years) was not a change in the prior law (the period of probation ... shall not exceed five years). This legislative history supports defendant.

On the basis of the internal wording of § 31–20–5, and the legislative history, we hold that the proviso of § 31–20–5 means that the maximum probation for the five sentences imposed upon defendant, for convictions that occurred at one trial, was five years.

We neither affirm nor reverse the convictions and sentences. The cause is remanded to the trial court to:

(1) determine whether the detectives entered defendant's residence with consent;

(2) if there was a nonconsensual entry, and thus an illegal arrest, determine whether the confession was purged of the taint of the illegal arrest;

(3) if the trial court determines that the confession was properly admitted, it is to correct the probation period by reducing that period to five years; and

(4) if the trial court determines that the confession should be suppressed, then defendant is to be given a new trial.

The above determinations are to be made on the present record without further evidentiary hearing.

IT IS SO ORDERED.

HERNANDEZ, C. J., and HENDLEY, J., concur.

632 P.2d 1204

STATE of New Mexico, Plaintiff-Appellee,

v.

Ronald Lee BEACHUM, Defendant-Appellant.

No. 5016.

Court of Appeals of New Mexico.

Aug. 11, 1981.

Bruce M. Burwell, Roswell, John B. Bigelow, Chief Public Defender, Lynne Corr, Asst. Public Defender, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Clare E. Mancini, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

LOPEZ, Judge.

Ronald Lee Beachum appeals his conviction of criminal sexual contact of a minor in violation of § 30–9–13(A)(1), N.M.S.A. 1978, and aggravated burglary in violation of § 30–16–4(C), N.M.S.A. 1978. The dispositive issue in this case is whether the trial court abused its discretion when it admitted a seven-year-old confession by the defendant into evidence under N.M.R.Evid. 404(b), N.M.S.A. 1978. We hold that it did, and grant the defendant a new trial.

The following is a summary of events leading to the charges against the defendant. The twelve-year-old victim was sleeping on a couch in her darkened living room. She woke up during the night to find a man kissing her face; his hand was on her chest over her clothes. The girl told the man to leave. He got up, looked into the other rooms of the small house where the victim's parents and others were sleeping, and walked out through the kitchen.

The victim went out onto the front porch, where her brother was sleeping. She woke him up and told him someone had been in the house. About that time, a man walked around the side of the house. The brother asked the man if he had been in the house. The man said no, pulled out some money, and apparently tried to put a $100 bill into the victim's shirt. Then he walked away.

A few days later, the brother saw the defendant at a Taco Bell and thought it was the man he had seen outside the house. The police were summoned, and the defendant was arrested at the Taco Bell.

The defendant's defense was an alibi. The trial court admitted into evidence a seven-year-old statement signed by the defendant, in which he confessed to having committed three possible acts of rape. The statement was admitted under Rule 404(b), for the purposes of proving intent and identity. Our review is limited to a determination of whether the trial court abused its discretion by admitting the statement into evidence during the defendant's trial. *State v. Schifani*, 92 N.M. 127, 584 P.2d 174 (Ct.App.), *cert. denied*, 92 N.M. 180, 585 P.2d 324 (1978).

Under Rule 404(b), evidence of other crimes, wrongs, or acts is not admissible to show that the defendant had a propensity to commit those crimes. This evidence may be admissible for purposes other than propensity, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." In order to admit evidence under Rule 404(b), the court must find that the evidence is relevant to a disputed issue other than the defendant's character, and it must determine that the prejudicial effect of the

evidence does not outweigh its probative value, as set out by N.M.R.Evid. 403, N.M. S.A. 1978. *U. S. v. Figueroa*, 618 F.2d 934 (2d Cir. 1980).

INTENT

The trial court found that the defendant's statement was admissible to prove intent, which is an element of both crimes with which the defendant was charged. However, the defendant did not put the element of intent in issue. The defense was that Beachum did not commit the acts at all, not that he committed them without the requisite state of mind. Some jurisdictions allow evidence under Rule 404(b) to prove intent whether or not it is in issue. 2 Weinstein's Evidence § 404[9] (1980). The rule in New Mexico and many other jurisdictions is that evidence is not admissible under Rule 404(b) to prove a material element of the crime charged unless that element is in issue. *State v. Allen*, 91 N.M. 759, 581 P.2d 22 (Ct.App.), *cert. denied*, 91 N.M. 751, 580 P.2d 972 (1978), quoting from *State v. Mason*, 79 N.M. 663, 448 P.2d 175 (Ct.App.), *cert. denied*, 79 N.M. 688, 448 P.2d 489 (1968); *U. S. v. Figueroa; U. S. v. Powell*, 587 F.2d 443 (9th Cir. 1978); *U. S. v. Silva*, 580 F.2d 144 (5th Cir. 1978). Because intent was not controverted and is not a consequential issue in the case, evidence directed to that issue is irrelevant and inadmissible. 2 Weinstein's Evidence § 404[12] (1980).

IDENTITY

The trial court also admitted the statement for the purpose of proving identity. Identity was put into issue by means of the defendant's alibi claim. Assuming the evidence was relevant to prove identity, there must be a further determination that the probative value of the evidence outweighs its prejudicial effect. See Advisory Committee's Notes to Federal Rule 404(b). 2 Weinstein's Evidence § 404[18] (1980). There is no doubt that the admission of the statement was extremely prejudicial to the defendant. Its probative value must be evaluated "in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." Advisory Committee's Notes to Federal Rule 404(b).

In this case, the treatment of the evidence under the identity exception overlaps its possible use under the plan or design exception. *See* 2 Weinstein's Evidence §§ 404[15] and [16] (1980). In this area of overlap, the evidence of other acts is admitted to prove identity if the modus operandi of those acts is sufficiently similar to the charged acts to indicate they were likely done by the same person. In order for evidence to be admissible for this purpose, the similarity required must rise above the level of characteristics common to many incidents of the crime; it must demonstrate a unique or distinct pattern easily attributable to one person. *U. S. v. Powell.* No such characteristics present themselves in this case.

The state claims that the following similarities between the crimes discussed in the statement and the crimes charged bring the statement within the identity exception:

(1) All the incidents occurred inside homes;

(2) All the homes were entered by stealth rather than by force or invitation;

(3) All the incidents occurred late at night or during the early morning hours;

(4) All the victims were asleep;

(5) No attempt was made to obscure the view of the victims or mask the perpetrator;

(6) No weapons were used;

(7) Nothing was taken from the homes, only sexual offenses were committed;

(8) The perpetrator made a determination of whether there were other persons in the home; and

(9) All the incidents occurred within a short distance of the defendant's own home.

It is not clear how the state arrived at the last two "common" characteristics, because there is no evidence in at least one of the incidents that the defendant determined who else was in the house, and there is no

evidence that any of the earlier incidents occurred closer than a mile to the defendant's residence. This list of characteristics is not idiosyncratic or even unusual. *U. S. v. O'Connor*, 580 F.2d 38 (2d Cir. 1978); *Davis v. State*, 376 So.2d 1198 (Fla.App. 1979); *Smith v. State*, 56 Ala.App. 384, 321 So.2d 724 (1975); *People v. Alvarez*, 44 Cal. App.3d 375, 118 Cal.Rptr. 602 (1975). Compare *State v. Allen*, in which certain characteristics were held to be sufficiently individual so as to be admissible under Rule 404(b) to prove identity.

There were "other means of proof" available to prove identity in this case. Advisory Committee's Notes to Federal Rules 403 and 404(b). The state had both the identification by the victim and the identification by the victim's brother to establish identity. It was not necessary to the state's case on identity to bring in the defendant's statement. *State v. Martinez*, 94 N.M. 50, 607 P.2d 137 (Ct.App. 1980); *State v. Fuson*, 91 N.M. 366, 574 P.2d 290 (Ct.App. 1978); *see* also *Redd v. State*, 522 S.W.2d 890 (Tex.Cr. App. 1975).

Another factor which diminishes the probative value of the statement is its remoteness. The statement was made seven years before the trial. *U. S. v. Figueroa; U. S. v. Powell; U. S. v. Carter*, 516 F.2d 431 (5th Cir. 1975); *see U. S. v. Silva.*

Assuming the statement may be relevant to prove identity probative value is questionable for the reasons discussed above. The prejudicial effect of the statement outweighs its probative value. The statement is inadmissible for the purpose of proving identity.

"A person, put on trial for an offense, is to be convicted, if at all, on evidence showing he is guilty of that offense. The defendant is not to be convicted because, generally, he is a bad man, or has committed other crimes. Evidence of other offenses tends to prejudice the jury against the accused and predispose the jury to a belief in defendant's guilt. * * * " *State v. Ross*, 88 N.M. 1, 536 P.2d 265 (Ct.App. 1975), quoting from *State v. Garcia*, 83 N.M. 51, 53, 487 P.2d 1356, 1358 (Ct.App. 1971). The undeniable effect of admission of the statement in this case was to show the jury that the defendant was bad, a sexual deviant who would have been acting in character by touching the victim and who, therefore, must be guilty. The statement was not admissible for this purpose, and it was not admissible for a different purpose under Rule 404(b). The admission of the statement was an abuse of discretion by the trial court.

The judgment of the trial court is reversed, and the defendant is granted a new trial.

IT IS SO ORDERED.

HERNANDEZ, C.J., concurs.

HENDLEY, J., concurring in result only.

632 P.2d 1207

STATE of New Mexico,
Plaintiff-Appellee,

v.

Gerry Dean POWELL and Pam Powell,
Defendants-Appellants.

No. 5071.

Court of Appeals of New Mexico.

Aug. 11, 1981.

John B. Bigelow, Chief Public Defender, Ellen Bayard, Asst. Appellate Defender, Santa Fe, for defendants-appellants.

Jeff Bingaman, Atty. Gen., Marcia E. White, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WALTERS, Judge.

We granted defendants' motion for interlocutory appeal after the trial court denied their motion to suppress. We reverse.

On December 3, 1980, a magistrate issued a warrant to search defendants' home and travel trailer. The affidavit recited, in its first six numbered paragraphs, that on December 2, 1980 the defendants were charged by Texas officials for illicit drug transactions. The transactions, according to the affiant, ran from May 25, 1980 through June 18, 1980, at which time defendants sold controlled substances to two individuals in Coke County, Texas. The affidavit additionally recited that those two individuals from Coke County, Texas came to Carlsbad, New Mexico and purchased methamphetamines from defendants sometime in May 1980.

The affidavit does not establish the reliability of the information given. However, because paragraph 8 recited that the information was received by the affiant from narcotics agents for the Department of Public Safety of the State of Texas, and the affidavit elsewhere stated that the State of Texas had issued warrants for the arrest of the defendants based on those allegations, the New Mexico magistrate could reasonably rely on the information given by the Texas agents. *State v. Martinez*, 94 N.M. 436, 612 P.2d 228 (1980); *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965).

Paragraph 7 concluded: "The affiant has reason to believe, due to the afore-mentioned transactions, that the defendants have in their possession controlled substances which the defendants intend to sell as well as on the above described premises, vehicles, and trailers."

The issues posed are whether the possession and sale of contraband in May and June of 1980 create acceptable probable cause that the defendants possessed the contraband four months later, and whether other information contained in the affidavit meets the test of reliability. We examine whether the information relied on was too stale to show possession. *See State v. Garcia*, 90 N.M. 577, 566 P.2d 426 (Ct.App. 1977).

In examining the affidavit, it appears that, aside from the information given by the Texas narcotics agents, the only additional facts supplied to the magistrate for issuance of the search warrant were:

10) The above mentioned trailer is occupied by the defendants at this time. The affiant did observe vehicles reg-

istered to the defendants and a man and a woman fitting the description as given by agents Don Bush and Tom Finley of the Department of Public Safety of the State of Texas.

11) The defendants have been observed by the affiant and the Agent Sam Garcia of New Mexico State Police in the company of known users of controlled substances.

12) The defendants did use the abovementioned car in El Paso, Texas sometime in September 16 through 17, 1980 to deliver a controlled substance, Methamphetamine, to Karen Fuson.

We do not think that these three paragraphs refute the staleness claim. Paragraphs 10 and 11 are based on the firsthand observation of the affiant, but add nothing to suggest current possession of contraband by the defendants. Paragraph 11 does not specify a time when the affiants were seen in the company of known users of controlled substances; Paragraph 12 recites distribution of controlled substance from September 16 through September 17, 1980, but nothing in the affidavit shows the source of this information or its reliability. *Compare State v. Brown*, 96 N.M. 10, 626 P.2d 1312 (Ct.App. 1981).

The State urges that the issuance of an arrest warrant in Texas on December 2nd answers the argument that the December 3rd search warrant issued in New Mexico was based on stale information. The State confuses issuance of an arrest warrant for crimes committed in the past with the prohibition against issuing a search warrant on stale information. The former interacts with statutes of limitations, whereas the latter requires a showing of probable cause that the contraband be presently possessed by the suspect. Nothing in the facts of this case show "a continuing series of events," to overcome the claim of staleness. *See State v. Garcia, supra.* On the contrary, the activity, according to the reliable information in the affidavit, ended in June, 1980.

It is our opinion that there was insufficient current and reliable information given to the magistrate to establish probable cause that the defendants possessed controlled substances in December 1980. Accordingly, the denial of defendants' motion to suppress is reversed.

It is so ordered.

HERNÁNDEZ C. J., and HENDLEY, J., concur.

632 P.2d 1209

Charlotte R. MARTINEZ, Plaintiff-Appellant,

v.

Bob STOLLER, d/b/a Union Bus Depot, and Transamerica Insurance Company, Workmen's Compensation Insurance Carrier, Defendants-Appellees.

No. 5073.

Court of Appeals of New Mexico.

Aug. 13, 1981.

Roberto C. Armijo, Las Vegas, for plaintiff-appellant.

Robert A. Martin, Gallagher, Casados & Martin, Albuquerque, for defendants-appellees.

OPINION

SUTIN, Judge.

Plaintiff appeals a summary judgment granted defendants in a workmen's compensation case. We reverse.

Plaintiff was employed in defendant's restaurant as a waitress, dishwasher and she cleaned tables. On October 16, 1979, a day off work, plaintiff went to the restaurant to pick up her paycheck. It was defendant's practice to place paychecks in the cash register for employees to pick up. It was customary for plaintiff and other employees to pick up paychecks if payday fell on a day that they did not otherwise work. Upon arrival, one of the waitresses gave plaintiff her check. After receiving her check, plaintiff took about three steps toward the kitchen to pick up a pair of work shoes that needed repair. She fell down and suffered an accidental injury.

It has long been the rule that an employee who comes upon the premises on a off day to receive a paycheck, which is a requirement or custom established by the employer, and is injured while on the premises for that purpose, sustains the injury while in the course of employment. *Texas General Indemnity Company v. Luce*, 491 S.W.2d 767 (Tex.Civ.App.1973); *Singleton v. Younger Brothers, Inc.*, 247 So.2d 273 (La.App.1971); *Elmer E. Stockman Jr., Const. Co. v. Industrial Com'n*, 463 S.W.2d 610 (Mo.App.1971); *Parrott v. Industrial Commission of Ohio*, 145 Ohio St. 66, 60 N.E.2d 660 (1945); *Griffin v. Acme Coal Co.*, 161 Pa.Super. 28, 54 A.2d 69 (1947); *Consolidated Engineering Co. v. Feikin*, 188 Md. 420, 52 A.2d 913 (1947); 1A Larson's Workmen's Compensation Law, § 26.30 (1979).

At the time plaintiff received her check, she was in the course of her employment. The only remaining question is:

> Was plaintiff in the course of her employment after she received her check?

This is an issue of fact for the trial court to determine.

Summary judgment is reversed. Costs of this appeal to be paid by defendants.

IT IS SO ORDERED:

WOOD and LOPEZ, JJ., concur.

632 P.2d 1210

MID–CENTURY INSURANCE COMPANY,
Plaintiff-Appellee,

v.

Andrew VAROS; State Farm Insurance Company, Defendants,

and

Robert Dunn, as Personal Representative of the Estate of Elizabeth M. Dunn; and Robert Dunn, as Personal Representative of the Estate of Sylvia M. Likes, Defendant-Appellant.

No. 5009.

Court of Appeals of New Mexico.

Aug. 18, 1981.

Richard E. Ransom, P. A., Terry M. Word, Smith, Ransom & Gilstrap, Albuquerque, for defendant-appellant.

Norman F. Weiss, Civerolo, Hansen & Wolf, P. A., Albuquerque, for plaintiff-appellee.

OPINION

SUTIN, Judge.

On February 9, 1978, Mid-Century Insurance Company issued a policy of automobile insurance to Scott B. Poland. In addition to Poland as the named insured, the policy covered "any other person while using such automobile . . . provided the actual use of such automobile is by the named insured *or with his permission.*" [Emphasis added.]

On May 13, 1978, Andrew Varos took possession of Poland's automobile and while driving it, an accident occurred in which

two women were killed. Robert Dunn, as personal representative of both decedents' estates, filed suit for damages against Varos and Poland. Poland sought summary judgment. The trial court found:

* * * * * *

3. The automobile was taken by Defendant Varos without the permission of Defendant Poland and, therefore, Defendant Poland cannot be held liable for the deaths of Plaintiff's decedents under the family purpose doctrine or on the ground that he negligently entrusted the automobile to Defendant Varos.

Poland was granted summary judgment. On appeal to this Court, the summary judgment was affirmed by Memorandum Opinion and on August 13, 1980, the Supreme Court denied certiorari.

In an interim period, on July 20, 1978, Mid-Century brought a Declaratory Judgment action against Varos and Dunn to determine whether it had a duty to defend Varos in the Dunn-Varos litigation. Mid-Century had no duty to defend Varos if Varos lacked permissive use. After certiorari was denied in the Dunn-Varos litigation, Mid-Century filed a motion for summary judgment by way of collateral estoppel and *res judicata*. The basis of the motion was that the issue of permissive use to be determined in this Declaratory Judgment proceeding had been previously determined in the Dunn-Varos litigation, i. e., that Varos was not an insured under Mid-Century's insurance policy because he drove Poland's car without Poland's permission.

The trial court found that summary judgment granted Poland in the Dunn-Varos litigation collaterally estopped Dunn and Varos from asserting in the instant case that there was express or implied permission for Varos to use the car so as to bring the case within the omnibus clause of the insurance policy issued by Mid-Century. The omnibus clause also required permissive use. Therefore, there was no coverage of Varos under the Mid-Century policy.

The trial court granted Mid-Century summary judgment and Dunn appealed. We affirm.

If we understand Dunn's position correctly, he claims there were two different causes of action with different parties and different issues; that the Dunn-Varos litigation was an action for damages in which Varos' lack of permissive use relieved Poland of liability under the entrustment theory, whereas this declaratory judgment proceeding denied Varos coverage under the omnibus clause of the insurance policy. Therefore, Dunn claims that he is entitled to a double barrelled shot at permissive use. Dunn is mistaken. He had his day in court. He lost to Poland in the first case on the issue of permissive use and was left with Varos as the sole defendant. Now, Dunn seeks again the right to establish permissive use by Varos in order to afford Varos insurance coverage in the first case. This he cannot do.

Dunn has avoided discussion of the established rule in cases of permissive use. Where plaintiff sues an insured for damages, and then the insurer sues plaintiff to avoid coverage, or vice versa, and it is ultimately determined in either case that the driver of insured's car which caused the damage did not have permissive use of the vehicle, this determination in one action is a bar to relitigation in the other under the doctrine of collateral estoppel. The reason is that the insured's conduct, express or implied, to operate the vehicle is the ultimate and determinative issue in both cases. *Harding v. Carr*, 79 R.I. 32, 83 A.2d 79 (1951), explained in *Zuckerman v. Tatarian*, 110 R.I. 190, 291 A.2d 421 (1972) and *Skrzat v. Ford Motor Company*, 389 F.Supp. 753 (D.R.I.1975); *Hinchey v. Sellers*, 7 N.Y.2d 287, 197 N.Y.S.2d 129, 165 N.E.2d 156 (1959); *Stucker v. County of Muscatine*, 249 Iowa 485, 87 N.W.2d 452 (1958).

New Mexico has continually followed the rule that "estoppel can be applied to bar relitigation of any ultimate facts or issues common to both suits, and actually and necessarily decided in the first." *Torres v. Village of Capitan*, 92 N.M. 64, 68, 582 P.2d 1277 (1978); *Paulos v. Janetakos*, 46 N.M. 390, 129 P.2d 636 (1942).

Hinchey, supra, was cited and discussed in *Barela v. Lopez,* 73 N.M. 121, 385 P.2d 975 (1963), a case relied upon by Dunn. *Hinchey* said:

> The doctrine of collateral estoppel "is essentially a rule of justice and fairness", and the essence of the rule is "that a question once tried out should not be relitigated between the same parties or their privies [citation omitted]." [197 N.Y.S.2d 134, 165 N.E.2d 159.]

An insured and insurer are in privity with each other. *Stucker v. County of Muscatine, supra.*

Under the doctrine of collateral estoppel, the courts look realistically at the relationship of these parties in successive litigation. They are one and the same. In the first case, opposing parties were, in effect, Dunn, Varos and Mid-Century. In the second case, opposing parties were Mid-Century, Varos and Dunn. In both cases the parties were the same. The issue in both cases was whether Varos had permissive use of Poland's vehicle. Permissive use is a factual issue. The depositions taken in the first case were adopted for use in the instant case. The facts are identical. In the first case, the trial court determined that Varos lacked permissive use as a matter of law. This determination became final and conclusive. As no liability can be imposed on Poland, none can be imposed on Mid-Century. If it were not so, the factual issue of permissive use or lack of it could change from judge to judge in each successive suit filed as it did in the instant case before certiorari was denied in the Dunn-Varos litigation. Relitigation of the same issue is not within the spirit of the rule of collateral estoppel. The policy of the law is to end litigation in a proper case.

Dunn relies upon *Barela, supra.* This was an action in garnishment brought by Barela against Atlantic Insurance Company as insurer of the automobile belonging to De Baca, and operated by Lopez at the time of the accident. Barela alleged that Lopez was operating the De Baca automobile with De Baca's permission and was covered by the omnibus clause of Atlantic's insurance policy. Atlantic claimed that this issue had been resolved in the prior case of *Barela v. De Baca,* 68 N.M. 104, 359 P.2d 138 (1961). Atlantic was mistaken.

The prior *De Baca* case decided that Lopez was acting beyond the scope of his employment, if any employment existed. There was no determination of permissive use. However, a default judgment was entered against Lopez individually. Permissive use not having been determined, Barela was not estopped to litigate that issue in its action against Atlantic.

Barela distinguished *Hinchey, supra,* which supports Mid-Century, but Dunn was silent on its application.

Dunn also misinterprets *Phillips v. United Serv. Auto. Ass'n,* 91 N.M. 325, 573 P.2d 680 (Ct.App.1977). Here Phillips sued Smith, a seven year old, for negligence and also sued *United,* Smith's insurer, for breach of contract for failure to pay an alleged settlement made with Phillips on Phillips' loss. Trial was severed. Phillips recovered $3,000.00 against Smith which was affirmed on appeal. *Phillips v. Smith,* 87 N.M. 19, 528 P.2d 663 (Ct.App.1974). Phillips then pursued *United* for breach of contract. The trial court granted *United* summary judgment. No reasons were stated therefor. On appeal, *United* raised the defense of collateral estoppel. In reversing the summary judgment, omitting citations, the court said:

> Collateral estoppel means that when an issue of ultimate fact has been decided by a valid judgment, that issue cannot be litigated again between the same parties. This case does . . . [(not) deleted] involve a second action between the same parties based on different grounds. The first action, based on negligence, was between the plaintiffs and a small boy. This case, based upon breach of contract, is between plaintiffs and an insurance company. Plaintiffs have in no way had a full and fair opportunity for judicial resolution of the issues presented in this case. Defendant's claim that this issue has been actually litigated and determined in the original action flies in the face of what the lower court intended by severing the two

> causes of action. Collateral estoppel does not apply. [Deletion supplied.] [91 N.M. at 328, 329, 573 P.2d 680.]

Dunn says that "the fact that the first was in negligence and the second in contract seems to have been a factor in denying the claim of collateral estoppel." Not at all. Collateral estoppel failed because the issue of breach of contract by *United* had not been determined in Phillips' claim against Smith for damages. This result would follow even though *United* was considered to be a party defendant in *Phillips v. Smith, supra.*

Summary judgment is affirmed. Dunn shall bear the costs in this appeal.

IT IS SO ORDERED.

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

633 P.2d 685

Rhonda VELKOVITZ, Petitioner,

v.

PENASCO INDEPENDENT SCHOOL DISTRICT, a corporation, Respondents.

No. 13114

Supreme Court of New Mexico.

Aug. 11, 1981.

As Corrected Aug. 11, 1981.

Smith, Ransom & Gilstrap, Terry M. Word, Albuquerque, for petitioner.

Briggs F. Cheney, Shaffer, Butt, Thornton & Baehr, Albuquerque, for respondents.

OPINION

RIORDAN, Justice.

On certiorari, the sole issue is whether plaintiff's injuries are compensable under the Workmen's Compensation Act. §§ 52–1–1 to 52–1–69, N.M.S.A. 1978 and Cum. Supp. 1980. The trial court and the Court of Appeals both ruled against the plaintiff. We reverse.

For an injury to be compensable it must be caused by an accident "arising out of and in the course of employment." § 52–1–9, N.M.S.A. 1978. The phrase, in the course of employment, relates to the time, place, and circumstances under which the accident takes place. *Walker v. Woldridge*, 58 N.M. 183, 268 P.2d 579 (1954); *McKinney v. Dorlac*, 48 N.M. 149, 146 P.2d 867 (1944). For an injury to arise out of employment, the injury must have been caused by a risk to which the injured person was subjected in his employment. *Gutierrez v. Artesia Public Schools*, 92 N.M. 112, 583 P.2d 476 (Ct.App.1978).

In the instant case, plaintiff filed a workmen's compensation action after she injured her knee while skiing at Sipapu Ski Resort.

At the time she was injured, plaintiff was employed as a school teacher by the defendant Penasco Independent School District (Penasco) and was at the ski area during school hours acting in the capacity of supervisor, sponsor, and chaperone for the school's ski team and ski club. Under the arrangement between Penasco and Sipapu, which had been in effect for approximately ten years, Penasco was obligated to provide transportation for the students to and from the ski area. Once the students were at the ski area, the Sipapu ski instructors were responsible for the ski instruction and supervision of the students while skiing on the mountain. The faculty members escorting the students were instructed by Penasco that their responsibility was only to supervise the students to and from the area and while the students were in the lodge before and after skiing. With the knowledge and permission of the defendant, faculty sponsors had a settled and long-continued custom and practice, for more than ten years, of joining the students and participating with them in the ski instruction. During a period in which the students were allowed to ski on their own, the plaintiff was skiing, fell and injured her knee.

This is a classic case of the enforced lull in work component of the personal comfort doctrine. 1A A. Larson, *The Law of Workmen's Compensation* §§ 21.00 and 21.74 (1979). The leeway accorded an employee during an enforced break in his work extends to a certain amount of wandering around and even undertaking what otherwise might seem to be distinctly personal activities.

This doctrine was previously followed in *Thigpen v. County of Valencia*, 89 N.M. 299, 551 P.2d 989 (Ct.App.1976), *cert. denied* 90 N.M. 7, 558 P.2d 619 (1976), the widow of deputy sheriff Thigpen claimed compensation for the unexplained death of her husband. Thigpen was found dead in the driver's seat of his patrol car, the victim of an apparently accidental shotgun wound. The patrol car was located near a water tank which Thigpen used for watering his horses.

The trial court refused to award death benefits finding that the death did not arise out of and in the course of employment. The trial court also found that the deputy was watering his horses and performing no duties for his employer. The Court of Appeals reversed and ordered a new trial stating that the evidence showed that Thigpen was performing the duties of his employment at the time of the accident. Thigpen's death occurred during a period when he was on-call. During the on-call period, Thigpen could move about and engage in personal activities. Thigpen's superior officers knew that he kept horses and permitted him to water the horses during the period of time when he was on-call. The Court of Appeals held that because the employer knew and consented to Thigpen's practice of watering his horses, Thigpen had not deviated from his employment and was in the course of his employment when the accident occurred.

In a case similar to the instant case, an employee of a bus company drove one of his employer's buses, which had been chartered by a private party, to a sea resort. There, the passengers boarded a sea-going vessel for a fishing expedition. The employee's duty was to await return of the passengers and be in readiness to drive the bus on its return trip. With the knowledge and permission of his employer, the employee had a settled and long-continued custom and practice of joining the passengers and participating with them in the fishing excursions. The court held that an injury on board the fishing vessel arose out of his employment. *Motto v. Cosmopolitan Tourist Co.*, 278 App. Div. 597, 101 N.Y.S.2d 873 (1951), *appeal denied* 302 N.Y. 950, 98 N.E.2d 117 (1951). The Court held that where the employee is required to remain in a particular place with no duties to perform, compensation may be awarded for an injury suffered in any reasonable recreational activity that the employee engaged in with the permission of his employer while waiting. The court held that the employee's indulgence therein was in the course of his employment and that the risk which brought about the employee's injury, arose out of his employment.

In *Davis v. Newsweek Magazine*, 305 N.Y. 20, 110 N.E.2d 406 (1953) the New York Court of Appeals in dicta correctly stated the rule that where an employee is directed as part of his duties to remain in a particular place or locality, the employee is not expected to remain immobile, and the risk inherent in any reasonable activity in that place, even though for his individual purposes, is an incident of the employment. *See also Motto v. Cosmopolitan Tourist Co., supra.*

We are of the opinion that the injuries sustained by the plaintiff while skiing on the mountain with the knowledge and permission of her employer, even though for her own individual enjoyment, were caused by an accident which arose out of and in the course of her employment under the Workmen's Compensation Act. The injury to the plaintiff occurred at a time while she was at work. The school authorities were aware that the sponsors made a practice of skiing with the students. In fact, that was part of the basis for selecting the sponsors. The employer assented to the plaintiff being in the place where she was injured and to the activities she was undertaking when injured. Although not required to ski as part of her duties in supervising the students, skiing was a reasonable activity for the plaintiff while waiting. The school even admitted that it was preferable to have the sponsors on the ski slopes with the students "so that they could see that the students were behaving themselves there, as well as in the lodge." The injury was caused by a risk to which the plaintiff was subjected during a reasonable activity she pursued while waiting.

For the reasons set forth above, the decisions of the Court of Appeals and the trial court are reversed. The trial court is instructed to proceed in a manner consistent with this opinion.

IT IS SO ORDERED.

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

EASLEY, C. J., dissents.

PAYNE, Justice, dissenting.

I dissent and agree with the opinion of Judge Sutin in the Court of Appeals.

633 P.2d 687

Clarence "Frank" TURLEY, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 13424.

Supreme Court of New Mexico.

Aug. 17, 1981.

Leslie Rakestraw, Rio Rancho, for petitioner.

Jeff Bingaman, Atty. Gen., Jill Z. Cooper, Asst. Atty. Gen., Santa Fe, for respondent.

OPINION

EASLEY, Chief Justice.

Turley was charged with using mechanical earth-moving equipment to excavate an archaeological site on another person's private property to remove objects of antiquity without a permit. The trial court dismissed the criminal information. The Court of Appeals reversed. We reverse the Court of Appeals and affirm the trial court's dismissal of the criminal information against Turley.

The issue is whether Turley, employed by the landowner to do the digging, violated Section 18–6–11, N.M.S.A. 1978 (Repl. Pamp. 1980), in excavating on the employer's land without a permit approved by the state archaeologist. We hold that Turley, as an employee of the landowner, was not required to obtain a permit.

Subsection (A) of the statute reads, in part:

> It is unlawful for any person to excavate with the use of mechanical earth moving equipment an archaeological site for the purpose of collecting or removing objects of antiquity when such archaeological site is located on private land in this state, unless such person has first obtained a permit issued pursuant to the provisions of this section for such excavation.

Subsection (B) permits such excavation upon approval of the state archaeologist and sets forth the procedure for obtaining the permit. Subsection (C) provides that archaeological specimens collected shall be the property of the person owning the land on which the site is located.

Subsection (D) is significant here, providing:

> Nothing in this section shall . . . require such owner to obtain a permit for personal excavation on his own land.

The State contends that the permit procedure is mandatory when the landowner has authorized another person to do the excavation. In essence, the State argues that the word "personal" in Section 18–6–11(D), means that the landowner

must personally operate any mechanical earth-moving equipment, or obtain a permit for a non-owner operator.

We disagree. We construe Section 18–6–11 according to its plain meaning. *Brown v. Bowling*, 56 N.M. 96, 240 P.2d 846 (1952). The State's interpretation would reject the application of the law of agency to these facts. It is an elementary principle of law that a person may do anything through an agent that he may lawfully do personally, unless public policy or some agreement requires personal performance. *Smith v. Walcott*, 85 N.M. 351, 512 P.2d 679 (1973); *Coldwater Cattle Co. v. Portales Valley Project, Inc.*, 78 N.M. 41, 428 P.2d 15 (1967); 3 AM.JUR.2d, *Agency*, § 20 (1962); *Restatement (Second) of Agency*, § 17 (1958). Furthermore, in order to determine that a right conferred by statute must be exercised personally and cannot be delegated to an agent, the statute must either expressly or by necessary implication prevent an agent from acting. *Smith v. Walcott, supra; Coldwater Cattle Co. v. Portales Valley Project, Inc., supra.*

The statute here does not state or imply that excavation by an agent is proscribed. We therefore conclude that in exempting the landowner from the permit requirement, the statute also allows the landowner to use an employee or agent to accomplish the task.

Applying this rule to the facts of this case, we inquire whether Turley was operating solely in the capacity of an agent of the landowner. Turley was employed under a written contract with the landowner which was stipulated at trial to be the complete understanding and agreement of the parties thereto. The contract provided that Turley was to perform certain excavation on behalf of and under the personal supervision of the landowner. The contract further provided that all artifacts recovered during the excavation were to be the sole property of the landowner. Under these facts, Turley was clearly not operating in any proprietary capacity, or as a licensee, or as a joint venturer or partner with the landowner, but merely as the agent of the landowner, and solely on his behalf and under his control. As an agent of the landowner, Turley was not required to obtain a permit.

As to an additional point of error raised by Turley, we find there is insufficient evidence in the record upon which the Court of Appeals could predicate a general principle of law that a legislator's testimony is not competent evidence as to the intent of the legislative body enacting a measure, and reverse as to that issue.

We reverse the Court of Appeals and affirm the dismissal of the criminal information by the trial court.

IT IS SO ORDERED.

SOSA, Senior Justice, and PAYNE and FEDERICI, JJ., concur.

RIORDAN, J., dissents.

RIORDAN, Justice (dissenting).

I cannot agree with the majority. I believe that the opinion of Chief Judge Wood of the Court of Appeals is a correct interpretation of the statutes in question, and I adopt that opinion as my dissent.

633 P.2d 689

PTA SALES, INC., d/b/a New Mexico Food Basket, Inc., No. 17 and New Mexico Food Basket, Inc., No. 18, Plaintiff-Appellee,

v.

RETAIL CLERKS LOCAL NO. 462, Defendant-Appellant.

No. 12899.

Supreme Court of New Mexico.

Aug. 25, 1981.

Kool, Kool, Bloomfield & Hollis, John L. Hollis, Albuquerque, for defendant-appellant.

Poole, Tinnin & Martin, Robert P. Tinnin, Jr., Robert H. Jacobvitz, Albuquerque, for plaintiff-appellee.

OPINION

EASLEY, Chief Justice.

Defendant Retail Clerks Local No. 462 (Union), appealed the trial court's issuance of a permanent injunction in favor of plaintiff PTA Sales, Inc. (Employer). We affirm the trial court.

The issues in this labor dispute are:

I. Whether there is substantial evidence to support the trial court's finding that Union agents blocked access to doorways and refused to allow customers out of their cars.

II. Whether the trial court had subject matter jurisdiction to issue an injunction.

III. Whether the injunctive relief granted by the trial court exceeded the scope of its jurisdiction.

IV. Whether Section 50–2–2(B), N.M.S.A.1978, applies only to acts against other employees.

V. Whether the trial court must comply with the provisions of Sections 50–3–1 and 50–3–2, N.M.S.A.1978, to grant injunctive relief under Section 50–2–2.

Employer operated two grocery stores in Roswell. Union is certified by the National Labor Relations Board (NLRB) as the collective bargaining representative of Employer's employees at the two stores. In furtherance of a labor dispute, Union commenced a strike and began picketing at the two stores. Employer brought an action for temporary, preliminary and permanent injunctive relief claiming that Union: (1) trespassed upon the Employer's property and refused to leave despite repeated requests; (2) intentionally blocked the access of customers to the stores and harassed and intimidated customers; (3) refused to allow customers out of their vehicles; and (4) falsely represented to customers that the stores were closed. The trial court granted an ex parte temporary restraining order. Union then sought to dissolve the temporary restraining order. After an evidentiary hearing in which both sides participated, the trial court denied Union's motion to dissolve the temporary restraining order and granted a preliminary injunction. The trial court subsequently issued a permanent injunction based on Subsections (B) and (D) of Section 50–2–2 which reads as follows:

> B. It shall be unlawful in connection with any labor dispute for any person individually or in concert with others to hinder or prevent by mass picketing, violence or threats of violence, force, coercion or intimidation of any kind, the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free or uninterrupted use of any public roads, streets, highways, railways, airports or other ways of travel or conveyance.
>
> . . . .
>
> D. Any person or persons may be restrained by injunction from doing any of the acts prohibited by this section without regard to the conditions and restrictions set forth in Sections 50–3–1 and 50–3–2 NMSA 1978.

I.

Significant among the court's findings of fact are:

> No. 11. The Defendant's agents blocked the doorways which permitted access of customers to Plaintiff's retail stores.
>
> No. 12. Customer's [sic] of Plaintiff's retail stores have been intimidated by agents of the Defendant by refusing to allow customers out of their vehicles, contrary to Section 50–2–2B N.M.S.A. (1978 Comp.).

We are bound by the rule that the evidence must be considered in an aspect most favorable to appellees and that the facts found by the trial court are binding on appeal if supported by substantial evidence. *Pentecost v. Hudson*, 57 N.M. 7, 252 P.2d 511 (1953). We hold that Findings of Fact Nos. 11 and 12 are supported by substantial evidence.

II.

Union contends that federal law preempts the state court's subject matter jurisdiction. Union relies primarily upon *San Diego Unions v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), and *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978).

In *Garmon*, the Court held that federal law preempts state court jurisdiction over labor practices which are arguably either protected or prohibited under Sections 7 or 8 of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 157 and 158 (1976).

In *Sears*, the Court held that where the union engaged in trespassory picketing and had a fair opportunity to invoke the juris-

diction of the NLRB and failed to do so, state court's subject matter jurisdiction was not preempted.

We do not believe the *Garmon* rule, as modified by *Sears*, is controlling in the instant case. In both of those cases, the Court recognized the continued validity of an exception to the general rule of federal preemption where the union's conduct "touched interests so deeply rooted in local feeling and responsibility." *Garmon, supra* 359 U.S. at 244, 79 S.Ct. at 779. These local interests are involved in cases where the union's conduct includes actual or potential violence, *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, 78 S.Ct. 206, 2 L.Ed.2d 151 (1957); threats of violence, *United Workers v. Laburnum Corp.*, 347 U.S. 656, 74 S.Ct. 833, 98 L.Ed. 1025 (1954); and obstruction of customer access without violence, *Kaplan's Fruit, Etc. v. Superior Court, Etc.*, 26 Cal.3d 60, 160 Cal.Rptr. 745, 603 P.2d 1341 (1979). This Court has previously observed that state jurisdiction is not preempted where the union's conduct is marked by violence, threats of violence or imminent threats to public order. *Gonzales v. Oil, Chemical and Atomic Workers Int. U.*, 77 N.M. 61, 419 P.2d 257 (1966).

The instant case is distinguishable from *Sears*. In *Sears*, the employer's action was grounded solely in trespass. In this case, Union's conduct included intimidating customers and obstructing customer access. Union's conduct was tantamount to a potential breach of the public order. This conduct, therefore, "touched interests so deeply rooted in local feeling and responsibility." *See Garmon, supra*. We hold that federal law did not preempt subject matter jurisdiction of the state court.

III.

[redacted] Union contends that, even assuming the state court had subject matter jurisdiction, the injunctive relief granted exceeded the scope of its jurisdiction by interfering with Union's right to engage in peaceful picketing.

The injunction provided that Union should be permitted to picket plaintiff's Store No. 17, such picketing should be confined to no more than four pickets, at any one time, and such picketing should be confined to the number of two pickets on the northerly side of the store and two pickets on the westerly side of the store and confined to the sidewalk area, and the two pickets permitted on the north side of the store to remain one on each side of the combination entry-exit doorway and should not approach the entrance-exit any closer than five feet, and should not in any manner picket these areas in a manner which will impede the flow of foot traffic to plaintiff's Store No. 17. Union relies heavily upon *Youngdahl v. Rainfair, Inc., supra*. In *Youngdahl*, the United States Supreme Court held that a state court lacked jurisdiction to issue an injunction prohibiting, *inter alia*, all "picketing or patrolling" of the employer's premises. The Court stated:

> Though the state court was within its discretionary power in enjoining future acts of violence, intimidation and threats of violence, by the strikers and the union, yet it is equally clear that such court entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioners. The picketing proper, as contrasted with the activities around the headquarters, was peaceful.... What violence there was was scattered in time and much of it was unconnected with the picketing.

355 U.S. at 139, 78 S.Ct. at 211–212.

The injunction in the present case does not go to the extreme measures adopted by the state court in *Youngdahl*. Picketing is allowed under the injunction. The limitation on the number of pickets and their location is directly related to the objective of preventing the obstruction of access to the employer's business. *See M. Restaurants v. San Francisco Local, Etc.*, 146 Cal. Rptr. 436 (Ct.App. 1978). We therefore hold that the injunctive relief granted by the trial court did not exceed the scope of its subject matter jurisdiction.

IV.

The Union contends that Section 50–2–2(B) does not apply to acts against customers and ought to be limited to acts against employees. The pertinent part of the statute reads:

> It shall be unlawful in connection with any labor dispute for any person individually or in concert with others . . . to obstruct or interfere with entrance to or egress from any place of employment. . . .

Union interprets the statute to apply only where striking workers obstruct the access of other employees to the place of employment. Thus, obstructing customer's access is not covered by Section 50–2–2(B).

This interpretation is too narrow and would be inconsistent with the intent of the Legislature. The legislative intent is set out in Section 50–2–1, N.M.S.A.1978. The legislative purpose is "for the welfare and protection of its citizens" as well as to "eliminate those practices which are so destructive to good employee-employer relationships." Limiting Section 50–2–2(B) to cover acts between employees would lead to absurd results. We therefore conclude that, consistent with the expressed intent of the Legislature, the state court is authorized under Section 50–2–2(B) to enjoin obstructions of access of customers as well as other employees.

V.

Union contends that a temporary restraining order and preliminary injunction cannot be issued under Section 50–2–2 without first complying with the requirements of Sections 50–3–1 and 50–3–2.

This contention is wholly without merit. Subsection (D) of Section 50–2–2 provides, "[a]ny person or persons may be restrained by injunction from doing any of the acts prohibited by this section without regard to the conditions and restrictions set forth in Sections 50–3–1 and 50–3–2 NMSA 1978." Thus the trial court is specifically authorized to grant an injunction under Section 50–2–2 without complying with Sections 50–3–1 and 50–3–2.

Alternatively, Union contends that the scope of the injunction exceeded that authorized under Section 50–2–2(D) and thus required compliance with Sections 50–3–1 and 50–3–2.

We have previously noted that the injunction is narrowly tailored to achieve the objectives of Section 50–2–2 by preventing obstruction of access and that the restrictions upon the number and location of pickets is directly related to this objective. A statute should be construed to accomplish what the Legislature intends. *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 568 P.2d 1236 (1977). We therefore hold that the injunctive relief granted by the trial court was within the scope of Section 50–2–2.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

SOSA, Senior Justice, and RIORDAN, J., concur.

633 P.2d 693

Orlando HERNANDEZ, Petitioner,

v.

STATE of New Mexico, Respondent.

STATE of New Mexico, Petitioner,

v.

Billy Ray HUGHES, Respondent.

Nos. 13593, 13684.

Supreme Court of New Mexico.

Aug. 31, 1981.

Jeff Bingaman, Atty. Gen., Carol Vigil, Clare E. Mancini, Asst. Attys. Gen., Santa Fe, for State of New Mexico.

Steven Quinn, Clovis, for respondent Hughes.

Martha A. Daly, Appellate Defender, Andrea L. Smith, Asst. Appellate Defender, Santa Fe, for petitioner Hernandez.

OPINION UPON CERTIORARI

FEDERICI, Justice.

The original Opinion Upon Certiorari by this Court filed August 10, 1981 is withdrawn and this Opinion substituted therefor.

Certiorari was granted by this Court in *Hernandez v. State*, (Ct.App. No. 4780), and *State v. Hughes*, (Ct.App. No. 5008), and the cases have been consolidated for purposes of this opinion. In *Hernandez v. State*, the Court of Appeals did not cite or discuss *State v. Linam*, 93 N.M. 307, 600 P.2d 253 (1979).

In order to avoid some confusion which may have arisen by the opinions in those two cases, we granted certiorari for review.

The issue involved is whether the rule relating to habitual criminals announced in *State v. Linam* is still in effect or whether the rule announced in *Linam* has been overruled or otherwise changed by Section 31–18–17, N.M.S.A. 1978 (Cum.Supp.1980), enacted after *Linam*.

We hold that *Linam* is still the law applicable to habitual offender proceedings and that Section 31–18–17 has not changed the result reached in that case. Judge Hendley's opinion in *State v. Hughes* is an exhaustive and excellent analysis of the issue involved.

Habitual offender proceedings are statutory. The only reason the defendant is entitled to a jury in habitual offender proceedings is because the statute provides for it. Section 31–18–20, N.M.S.A. 1978 (Cum. Supp.1980). *See State v. Linam, supra*, wherein we held that a habitual offender proceeding involved only sentencing and was not a trial, so jeopardy did not attach. Section 31–18–20(C) states:

> If the jury finds that the defendant is the same person and that he was in fact convicted of the previous crime or crimes charged, the court shall sentence him to the punishment as prescribed in Section 31–18–17, NMSA 1978.

This is the only question which must be submitted to the jury upon defendant's demand. The sequence of commission-conviction may be determined by the trial judge similarly to questions raised concerning the validity of prior convictions. *See State v. Martinez*, 92 N.M. 256, 586 P.2d 1085 (1978). *State v. Valenzuela*, 94 N.M. 285, 609 P.2d 1241 (Ct.App.1979), *affirmed*, 94 N.M. 340, 610 P.2d 744 (1980), insofar as it conflicts with this opinion, is hereby overruled.

We hereby affirm and adopt in full the opinion of the Court of Appeals in *State v. Hughes*. *Hernandez v. State* is hereby reversed and remanded to the trial court to determine whether the proper sequence of commission and conviction of the crimes occurred under the rule announced in *State v. Linam, supra*.

IT IS SO ORDERED.

EASLEY, C. J., SOSA, Senior Justice, and PAYNE and RIORDAN, JJ., concur.

633 P.2d 695

Rhonda VELKOVITZ, Plaintiff-Appellant,

v.

PENASCO INDEPENDENT SCHOOL DISTRICT and American Manufacturers Mutual Insurance Company, a corporation, Defendants-Appellees and Cross-Appellants.

No. 4386.

Court of Appeals of New Mexico.

May 8, 1980.

Terry M. Word, Smith, Ransom & Gilstrap, Albuquerque, for plaintiff-appellant.

Stephen M. Williams, Shaffer, Butt, Thornton & Baehr, Albuquerque, for defendants-appellees and cross-appellants.

OPINION

SUTIN, Judge.

This is a workmen's compensation case in which plaintiff was denied compensation benefits and she appeals. We affirm.

Plaintiff was an art teacher employed by defendant. Defendant and the Sipapu Ski Base had a cooperative program whereby Sipapu provided expert and certified ski instruction to defendant's students. Plaintiff was instructed by her supervisor to accompany the school ski club and racing team to Sipapu and supervise their activities as their sponsor/chaperon due to the fact that the ski area had experienced problems with shoplifting while students were present. She could ski for her own recreational purposes if she chose to do so.

On January 17, 1977, plaintiff was requested to escort the students to Sipapu. During a "free ski" period and while skiing alone, plaintiff fell and injured her knee. This accidental injury occurred during work hours, but the court found that it did not arise out of and in the scope of her employment, nor was it reasonably incident to her employment. We agree.

" * * * '[i]njury by accident arising out of and in the course of employment' shall include accidental injuries * * * as a result of their employment and while at work in any place where their employer's business requires their presence * * * *" Section 52–1–19, N.M.S.A. 1978.

Plaintiff suffered accidental injuries as a result of her employment at a place where defendant required her presence. But did she suffer her accidental injuries "while at work"?

"While at work" is synonymous with "in the course of employment." *Thigpen v. County of Valencia*, 89 N.M. 299, 551 P.2d 989 (Ct.App.1976).

"Placing this construction upon the wording of our statute, we find the rule to be as follows: '* * * an injury to an employee arises in the course of his * * * employment, at a place where he may reasonably be, and while he is reasonably fulfilling the duties of his employment or engaged in doing something incidental [thereto].'" *McKinney v. Dorlac*, 48 N.M. 149, 152, 146 P.2d 867 (1944).

At the time of her accidental injury, plaintiff was an art teacher on a special errand. She was not engaged in the duties of her regular employment. The logical point at which her special mission began was the moment she left her home and it ended when she returned home. It is during this interim period that we determine the scope of her employment from the directions of her employer. *Edens v. New Mexico Health & Social Services Dept.*, 89 N.M. 60, 547 P.2d 65 (1976). *Avila v. Pleasuretime Soda, Inc.*, 90 N.M. 707, 568 P.2d 233 (Ct.App.1977).

Plaintiff's accidental injury arose out of a personal recreational activity during a special mission for the school. This is not an "Employer Sponsored Social Affair." See, Annot. *Workmen's Compensation: Injury Sustained while Attending Employer-Sponsored Social Affair as Arising Out of and In the Course of Employment*, 47 A.L.R.3d 566 (1973); 99 C.J.S. Workmen's Compensation § 221C (1958); 82 Am.Jur.2d Workmen's Compensation §§ 283, 284 (1976), nor does this case fall within the personal comfort doctrine. *Whitehurst v. Rainbo Baking Company*, 70 N.M. 468, 374 P.2d 849 (1962). The instant case involves a cooperative Sipapu school program sponsored by Sipapu for the recreational activity of the students. Plaintiff was not acting as an art instructor at the time of her injury. Her recreational activity was not related to her regular employment. She was not ordered by defendant to accompany the students. A request was made and she went voluntarily. Neither skiing alone nor with the children was a recreational activity undertaken for the benefit of the children, the school teacher or for the school. Her duties did not include protection and care of the students while skiing. Her special mission was limited to

supervision of students going and coming on the special mission and while present at the Sipapu Lodge. Because of the flux of factual circumstances surrounding such claims for workmen's compensation cases, we limit our opinion to the facts of this case.

The only New Mexico case on departure from employment is *Thigpen v. County of Valencia, supra.* Thigpen, a deputy sheriff in Grants kept horses. His superior officers knew this and permitted it. The water tank for the horses was about 100 yards from Thigpen's trailer. During the on-call period, Thigpen had to have his equipment and patrol car with him ready to go. Thigpen was found dead in the driver's seat of his patrol car with a shotgun on the floor. The trial court dismissed the widow's claim at the close of her case. In reversing and remanding for a new trial, the court said:

> The uncontradicted proof is that Thigpen did not depart from his employment while watering his horses because the employer knew and consented to this practice. The contradicted proof is that in watering his horses on the day in question, Thigpen was "ready to go and take a call." The showing is that Thigpen was performing the duties of his employment. [Id. 89 N.M. at 302, 551 P.2d 989.]

We read *Thigpen* to mean that an employee does not depart from his employment when an act performed is repeatedly done solely for the benefit or purpose of the employee if the employer knows and consents to this practice.

However, the death of Thigpen was unexplained. There was no evidence that an accident occurred while Thigpen was watering his horses. No reasonable inference can be drawn from the death of Thigpen that an accident occurred. Thigpen was found dead as to the time, place and circumstances that defines "course of employment." Section 52–1–19. But this is not sufficient to constitute a compensable claim. Section 52–1–28. The result is inconsistent with the facts stated.

Nevertheless, *the rule* in *Thigpen* is inapplicable here. The general rule is that if the act performed is solely for the benefit or purpose of the employee or a third person, there may be no recovery of workmen's compensation benefits. *Deal v. Pilot Life Insurance Company*, 20 N.C.App. 30, 200 S.E.2d 420 (1973); *Fisher Body Division, G.M. Corp. v. Industrial Com'n*, 40 Ill.2d 514, 240 N.E.2d 694 (1968); *Stoddard v. Industrial Commission*, 23 Ariz.App. 235, 532 P.2d 177 (1975).

1(A) Larson's Workmen's Compensation Law § 22.00, 5–71 (1979) fixes the standards for recreational and social activities as follows:

> Recreational or social activities are within the course of employment when
>
> (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
>
> (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

We can find nothing in the facts of this case which come within the bounds of subsections (2) or (3). This area of the law is so sensitive that conclusions reached by the courts are not uniform. See, *City Council of Augusta v. Nevils*, 149 Ga.App. 688, 255 S.E.2d 140 (1979); *Crowe v. The Home Indem. Co.*, 145 Ga.App. 873, 245 S.E.2d 75 (1978); *Teems v. Aetna Casualty & Surety Company*, 131 Ga.App. 685, 206 S.E.2d 721 (1974); *Dorsch v. Industrial Commission*, 185 Colo. 219, 523 P.2d 458 (1974) (injured while skiing); *Diperri v. Boys Brotherhood Republic of N.Y., Inc.*, 31 N.Y.2d 215, 335 N.Y.S.2d 405, 286 N.E.2d 897 (1972); *Rausch v. Workmen's Compensation Appeals Bd.*, 274 Cal.App.2d 357, 79 Cal.Rptr. 148 (1969); *Kaplan v. Zodiac Watch Company*, 20 N.Y.2d 537, 285 N.Y.S.2d 585, 232

N.E.2d 625 (1967); *Davis v. Newsweek Magazine*, 305 N.Y. 20, 110 N.E.2d 406 (1953).

Workmen's compensation benefits were allowed in *Dorsch, supra*, a skiing accident case. Dorsch was employed as a fulltime bartender. His remuneration consisted of an hourly wage of $2.25, free meals and a ski pass. The ski pass was sold to the public for $100.00 a ski season. As an inducement, it was offered to Dorsch at the reduced rate of $5.00. Before going on the afternoon shift, while skiing, Dorsch was injured. The standards fixed by the court were those applicable *where the employer's principal business was recreation.* These standards are not applicable to the instant case which involved a school teacher not employed by the Sipapu Lodge.

Generally speaking, where an employee is free to use time for her own individual affairs and an injury arises during this time, the injury is not compensable, *Teems, supra* even in the recreational area. *Davis, supra.* Where, however, with the knowledge and acquiescence of an employer, as stated in *Thigpen, supra*, a resident employee of a summer camp distant from his home was injured during *off-duty hours* while regularly engaged in gymnastics in a recreational hall of an adjacent campus, the employee was engaged in a "reasonable activity" risk which constituted an "incident of his employment." Recovery of compensation benefits were not precluded on the theory that the gymnastics constituted a "personal" act. *Diperri, supra.*

We think it is quite clear that plaintiff, while engaged in the hazardous or risky act of skiing during working hours, was indulging in a personal recreational activity unrelated to her employment as a teacher or sponsor, except as it might better fit her physically to perform her duties as a teacher in refreshing her body and mind. Plaintiff was not injured by an accident that arose out of and in the course of her employment, "while at work."

The remaining question is whether the accident which occurred while skiing alone was reasonably incidental to her employment. Section 52–1–28(A)(2). A risk is "incidental to the employment" only where the risk belongs to or is connected with what an employee must do in fulfilling her contract. *Martin v. Kralis Poultry Co., Inc.*, 12 Ill.App.3d 453, 297 N.E.2d 610 (1973); *Queen City Furniture Company v. Hinds*, 274 Ala. 584, 150 So.2d 756 (1963). An employer is not liable where an employee voluntarily exposes herself to a danger that is not incidental to her employment. *Trunkline Gas Company v. Industrial Commission*, 40 Ill.2d 542, 240 N.E.2d 655 (1968).

"What is reasonably incident to the employment depends upon the practices permitted in the particular employment and on the customs of the employment environment generally." *Whitehurst, supra*, 70 N.M. 473, 374 P.2d 849. Skiing alone at Sipapu was not a practice permitted in plaintiff's employment as a teacher or as a sponsor of the school's students. It was not incidental to her employment.

Affirmed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HERNANDEZ, J., dissents.

HERNANDEZ, Judge (dissenting).

I respectfully dissent.

At the outset, it is necessary to note that the historical facts are undisputed. I also believe it is necessary to set forth a part of the testimony of Mr. Abe Aguilar, the Principal of the Penasco High School, where plaintiff was employed.

Q. Would you briefly describe for the Court what that ski program is and how it existed in 1976, '77?

A. It's been—it's been—it's a co-operative program between the Penasco Schools and the Sipapu Ski Resort. We send students there during the school season, when they are ready for them, once a day, once a week, for possibly two hours and we consider it as an extracurricular activity, similar to what—the experience they

would get, if they participated in other activities, such as basketball, baseball and that type of deal. With the exception, that in this case, since we don't have a faculty to do the instructing, we simply provide the transportation to the lodge. The actual charge or the actual instruction is done by the personnel at the lodge.

Q. How long has that program been going on for, the co-operative program, between—

A. Ten or twelve years, as I can recall.

Q. Were you aware, or was the school aware of, Mr. Aguilar, that school personnel would go skiing or could go skiing?

A. Yes.

Q. Did you—you did not make it mandatory?

A. No, sir.

* * * * * *

Q. Now, the—and, you were aware that the sponsors who were going up with the team and with the club, or the class, made a practice of skiing with the students?

A. Yes. In fact, that was part of the basis for selecting them. They were—if they were willing to ski or if they were interested in the activities; in other words, I didn't want to send anybody there that wasn't interested in the program to start with.

* * * * * *

Q. As a matter of fact, would it not,—not be preferable to have a teacher upon the slopes with the students, so that they could see that the students were behaving themselves there, as well as in the lodge?

A. Very definitely.

A case of particular applicability to a situation such as this is *McKinney v. Dorlec*, 48 N.M. 149, 146 P.2d 867 (1944) wherein our Supreme Court adopted the following language from *Young v. Department of Labor and Industries*, 200 Wash. 138, 93 P.2d 337, 339 (1939):

> [A]n injury to an employee arises in the course of his * * * employment, at a place where he may reasonably be, and while he is reasonably fulfilling the duties of his employment or engaged in doing something incidental [thereto].

Our Supreme Court in *Wilson v. Rowan Drilling Co.*, 55 N.M. 81, 227 P.2d 365 (1950) held:

> We are committed to the doctrine that the Workmen's Compensation Act must be liberally construed, and reasonable doubts resolved in favor of employees. [Citations omitted.] So construing the act, we conclude that when an employee is sent by his employer on a special mission away from his regular work; or by the terms of his contract of employment he is burdened with a special duty incidental to, but aside from the labor upon which his wages are measured; while on such mission, or in the performance of such duty, the employee is acting within the course of his employment * * * If an employee is accidentally injured while on such mission, or in the performance of such duty, the injury arises out of and in the course of his employment.

In the case of *Edens v. New Mexico Health and Social Services Dept.*, 89 N.M. 60, 547 P.2d 65 (1976) the deceased, Betty Jean Edens, and three other employees of the H.S.S.D. were ordered to attend a special two-day meeting in Santa Fe. They were requested to form a car pool and to return overnight to Albuquerque between the two sessions in order to save fuel and reduce travel costs. The four employees met at a designated place and proceeded as a group to Santa Fe in Eden's car. At the close of the first day's session, the four returned to the meeting place. After letting the other three off, Mrs. Edens drove out of the parking lot and immediately thereafter was involved in the accident which resulted in her death. The trial court found, among other things, that the accident did not arise out of, nor was it incidental to, her employment.

In reversing the trial court our Supreme Court stated the following:

We have previously held that, where the historical facts of the case are undisputed the question whether the accident arose out of and in the course of the employment is a question of law.

* * * * * *

Edens was sent on a special mission to the meeting in Santa Fe, away from her regular work at the Bernalillo County North Valley Office. The question remains, however, whether she was performing that special mission at the time of the fatal accident.

* * * * * *

In this regard, the following rules, as stated in 1 Larson on Workmen's Compensation Law, § 14.00 Meaning of "Course of Employment" (1972), are applicable:

"An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while he is fulfilling his duties or engaged in doing something incidental thereto."

* * * * * *

Each of the four employees who went that day to Santa Fe was the [sic] on a special mission for their employer HSSD, and each was within the scope of his employment from the moment he left home until the moment he returned home at the end of the day.

The holding in the case of *Robards v. New York Division Electric Products, Inc.*, 33 A.D.2d 1067, 307 N.Y.S.2d 599 (1970) is also applicable in a situation such as this:

Appellants contend that the accident did not arise out of and in the course of employment. Where an employee, as part of his duties is directed to remain in a particular place or locality until directed otherwise or for a specified length of time "the rule applied is simply that the employee is not expected to wait immobile, but may indulge in any reasonable activity at that place, and if he does so the risk inherent in such activity is an incident of his employment." Quoting *Matter of Davis v. Newsweek Mag.*, 305 N.Y. 20, 28, 110 N.E.2d 406, 409 (1953).

The facts of this case unquestionably bring it within the ambit of the foregoing authorities. The compelling factor that makes judgment for the plaintiff mandatory is that the plaintiff was not only expected to ski, she was authorized to do so. As, Mr. Aguilar testified, he purposely chose a teacher who was interested in skiing. He also thought that it was a good idea for the teacher to be out on the slopes where the students were so she could better supervise them. This accident arose out of and in the course of plaintiff's employment. I would reverse the judgment of the trial court.

633 P.2d 700

STATE of New Mexico, Plaintiff-Appellant,

v.

Clarence "Frank" TURLEY, Defendant-Appellee.

No. 4354.

Court of Appeals of New Mexico.

Nov. 25, 1980.

Jeff Bingaman, Atty. Gen., Jill Z. Cooper, Deputy Atty. Gen., Santa Fe, for plaintiff-appellant.

Leslie Rakestraw, Rio Rancho, for defendant-appellee.

OPINION

WOOD, Chief Judge.

Defendant was charged with unlawfully excavating, with the use of mechanical earth moving equipment, an archaeological site for the purpose of collecting or removing objects of antiquity; the site being located on private land. The criminal information specifically charged that the "objects" were of ancient, native American culture and that the site was an Indian ruin. The information also charged that the excavation was by use of mechanical earth moving equipment—a front-end loader. It is not disputed that the excavation was on private land, that the excavation was of an archaeological site, and that the purpose of the excavation was to remove objects of antiquity. The unlawfulness charged was that the excavating was done without a permit. It is stipulated that defendant did not obtain a permit; he did not apply for a

permit. The trial court dismissed the information; the State appealed. We discuss: (1) the statutory meaning; (2) ascertaining legislative intent; and (3) the claim that the statute is void for vagueness.

Statutory Meaning

(a) Statutory Scheme

The Cultural Properties Act, §§ 18–6–1 through 18–6–17, N.M.S.A.1978, contains a legislatively-declared purpose. Section 18–6–2 states, as a part of that declaration, "that the public has an interest in the preservation of all antiquities, historic and prehistoric ruins, sites, structures, objects and similar places and things for their scientific and historical information and value . . . ." Section 18–6–2 states the purpose of the Act is "to provide for the preservation, protection and enhancement of structures, sites and objects of historical significance within the state . . . ." This New Mexico statute complements federal legislation. See 16 U.S.C.A. §§ 461, 469, 470, 470aa. No claim is made that the New Mexico Act had an improper purpose or that the Legislature lacked the power to enact this legislation. See *City of Sante Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964); compare *National Advertising Co. v. State, Etc.*, 91 N.M. 191, 571 P.2d 1194 (1977); *Santa Fe Commun. Sch. v. New Mexico State Bd. of Ed.*, 85 N.M. 783, 518 P.2d 272 (1974).

The Cultural Properties Act regulates excavation of archaeological sites on both state and private lands. By § 18–6–9, the state reserves the exclusive right of field archaeology on sites owned or controlled by the state, and makes it a misdemeanor "for any person or his agent" to excavate any object of historical or archaeological value without a valid permit. By § 18–6–11, the excavation of archaeological sites on private land is regulated. A comparison of §§ 18–6–9 and 18–6–11 shows that excavation of sites on private land is less extensively regulated than similar excavations on public land.

(b) Private Land Excavation

This case involves excavation on private land. The pertinent provisions of § 18–6–11 state:

A. It is unlawful for any person to excavate with the use of mechanical earth moving equipment an archaeological site for the purpose of collecting or removing objects of antiquity when such archaeological site is located on private land in this state, unless such person has first obtained a permit issued pursuant to the provisions of this section for such excavation. As used in this section an "archaeological site" means a location where there exists material evidence of the past life and culture of human beings in this state and includes the sites of burial and habitats of human beings: Indian, Spanish, Mexican and other early inhabitants of this state.

* * * * * *

D. Nothing in this section shall be deemed to limit or prohibit the use of the land on which the archaeological site is located by the owner of such land, or to require such owner to obtain a permit for personal excavation on his own land, provided that no transfer of ownership is made with the intent of excavating archaeological sites as prohibited in this section.

Defendant is not the owner of the land being excavated. The trial court dismissed the information on the basis that defendant was not required to have a permit under § 18–6–11(A) because his excavation was with the consent of the landowner.

(c) The Landowner's Consent

In ruling that defendant had the consent of the landowner the trial court referred to an agreement between defendant and the landowner. The State asserts that this Court cannot consider this contract because it was never offered and admitted into evidence in the trial court. This claim disregards the stipulation between the parties, part of which was that "the defendant and the property owner entered into a written agreement attached hereto." Another part of the stipulation also referred to the "attached" contract. The contention that the

contract was not before the trial court is frivolous.

Pursuant to R.Crim.App.Proc. 209(a), the trial court's order designated that "all" proceedings be included in the appellate transcript. The contract was not included; this Court requested that the contract be forwarded to the Court of Appeals and this was done. Because the contract was not included in the transcript filed with this Court, the State contends we may not consider it. We need not consider the consequences to the State's appeal of the State's failure to have the contract included in the transcript; the contract is before us pursuant to this Court's request and we had authority to make such a request. See *State v. Garcia*, 92 N.M 730, 594 P.2d 1186 (Ct.App.1978).

(d) The Trial Court's Ruling

It is not necessary to set forth the provisions of the contract. A permissible inference from the provisions of the contract is that defendant was the agent of the landowner in performing the excavations which were the basis for the criminal charge. The trial court drew this inference. It ruled that defendant was not subject to prosecution for excavating with mechanical earth moving equipment without a permit, that "defendant, acting as an agent for the landowner is exempt from prosecution" under § 18–6–11(D).

(e) The Language of § 18–6–11(D)

Section 18–6–11(D) does not contain the word "agent". This absence is to be compared with § 18–6–9(B), which makes it a misdemeanor "for any person or his agent" to excavate on state land without a valid permit. The absence of a reference to "agent" in § 18–6–11(D) is also to be compared with § 18–6–11(A) which makes excavations without a permit unlawful "for any person." The exemption from the permit requirement in § 18–6–11(D) provides that the landowner is not required to obtain a permit "for personal excavation on his own land". One rule of construction is that a statute is to be read as a whole so that each provision is considered in relation to every other part of the statute. *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 568 P.2d 1236 (1977). Considering the relationship of the above provisions, § 18–6–11(D) does not exempt an agent of the owner from the permit required by § 18–6–11(A).

(f) Owner as Including the Owner's Agent

Disregarding the differences in statutory language discussed in paragraph (e), defendant asserts that the word "owner", at common law, included the owner's agent and contends that the word "owner" in § 18–6–11(D) also includes the owner's agent. This argument overlooks the express provisions of the statute; the owner is not required to obtain a permit for his *personal* excavations. The common meaning of "personal", which we apply, is "done in person without the intervention of another . . . relating to oneself". Webster's Third New International Dictionary (1966). This statutory requirement of "personal" excavation cannot be reconciled with the contention that "owner" includes "agent", and makes the asserted common-law rule inapplicable. *Southern Union Gas Company v. City of Artesia*, 81 N.M. 654, 472 P.2d 368 (1970).

(g) Absurd Result

Defendant asserts that if "owner" is not construed to include the owner's agent, the result is absurd because contrary to the language in § 18–6–11(D) that the use of the land by the owner is neither limited nor prohibited. This contention disregards § 18–6–10(A) which states: "It is the declared intent of the legislature that field archeology on privately owned lands should be discouraged except in accordance with the provisions and spirit of the Cultural Properties Act . . . ." This provision is consistent with the purpose stated in § 18–6–2 —to preserve and protect sites of historical significance. Permitting a landowner to conduct personal excavations on his own land, but requiring the owner's agent to obtain a permit, is not absurd; rather, this is consistent with § 18–6–2 and 18–6–10(A).

(h) Strict Construction

Section 18–6–11(E) provides penalties for violating § 18–6–11. Because the statute is penal, defendant asserts that any ambiguity should be strictly construed against the state. The meaning of "owner" in § 18–6–11(D) is not ambiguous; the strict construction rule is not applicable.

Ascertaining Legislative Intent

The discussion in paragraph (e), (f), (g) and (h) above answers the arguments on appeal as to the meaning of § 18–6–11(D). The contentions discussed in those paragraphs were not the basis for the trial court's decision; that basis is not discussed in the briefs.

The trial court remarked:

> [L]et the record show that the court is ruling as a matter of law that based upon the testimony of Senator Ike Smalley, sponsor of the bill which ended up as Statute 18, 6–11, stated that he was instrumental in adding Section D to the original bill excepting the landowner or its agents from obtaining a permit to use mechanical machinery; with that testimony this court has ruled that the defendant is an agent.

The order dismissing the information is consistent with the oral remarks of the trial court, above quoted. The order states that Senator Smalley was examined at the court's request "in an effort to determine the intent of the Legislature in enacting Section 18–6–11(D) . . . ." Having heard the testimony of Senator Smalley, the trial court ruled that defendant was exempt from prosecution because defendant's excavation was with the consent of the landowner.

We are not concerned with whether the trial court properly understood the "intent" testimony of Senator Smalley. The portion of the testimony which we consider is that "nothing materialized" from his pre-introduction discussions with an unidentified proponent of the legislation, that Senator Smalley thought the bill had been introduced in the Legislature by Senator Montoya, that the bill was considered in two committees of which he was a member, and amendments were made to the bill in one or both committees.

No committee report was in evidence; there is no testimony as to statements made by committee members at the time the measure was being considered by the committee. There is no testimony as to statements made during debate by the legislators concerning the measure. There is no testimony as to an explanation of the bill, to the Legislature, by a sponsor of the measure. Thus, we do not decide whether any of such evidence would be admissible to show legislative intent. See 2A Sutherland Statutory Construction (4th ed. 1973) §§ 48.06, 48.07, 48.08, 48.10, 48.13, 48.14, 48.15.

In this case the "intent" testimony of Senator Smalley was the testimony of a member of legislative committees which considered the measure and a member of the Legislature which enacted the measure. A difficulty with admitting this type of evidence is that it permits an evidentiary contest, between legislators, as to what was intended. See *Friends of Mammoth v. Board of Super. of Mono Cty.*, 8 Cal.3d 247, 104 Cal.Rptr. 761, 502 P.2d 1049 (1972) which states: "That two legislators report contradictory legislative intent fortifies judicial reticence to rely on statements made by individual members of the Legislature as an expression of the intent of the entire body . . . . Other extrinsic aids to determine legislative intent are generally more persuasive." *Sutherland*, supra, § 48.16 states:

> [I]n construing a statute the courts refuse to consider testimony as to the intent of the legislature embodied therein by members of the legislature which enacted it. The courts evidently wish to avoid having to pass upon the credibility of legislators and ex-legislators.

Haynes v. Caporal, 571 P.2d 430 (Okl. 1977) states:

> At trial, legislative intent . . . was sought to be established through the testimony of an individual senator and house member at the time of . . . [the bill's]

passage. This court is not bound, and need not consider such evidence. Testimony of individual legislators or others as to happenings in the Legislature is incompetent, since that body speaks solely through its concerted action as shown by its vote.

The propriety of admitting a legislator's testimony on the question of legislative intent has not been previously decided in New Mexico. See *Runco Acidizing & Frac. Co., Inc. v. Bureau of Revenue*, 87 N.M. 146, 530 P.2d 410 (Ct.App.1974). We hold that a legislator's testimony, either as committee member or legislative member, generally is not competent evidence as to the intent of the legislative body enacting a measure. *Southern Railway Company v. A. O. Smith Corp.*, 134 Ga.App. 219, 213 S.E.2d 903 (1975); *Financial Indemnity Co. v. Cargile*, 32 Ohio Misc. 103, 288 N.E.2d 861 (1972); *Levy v. State Bd. of Examiners, Etc.*, 553 S.W.2d 909 (Tenn.1977).

The trial court erred in basing its decision on the testimony of Senator Smalley.

Void for Vagueness

An alternative claim raised by defendant, in an effort to sustain the trial court's decision, is that he cannot be prosecuted for a violation of § 18–6–11(A) because that section is void for vagueness. This contention is directed to the sentence in § 18–6–11(A) which reads:

> As used in this section an "archaeological site" means a location where there exists material evidence of the past life and culture of human beings in this state and includes the sites of burial and habitats of human beings: Indian, Spanish, Mexican and other early inhabitants of this state.

Defendant states: "The terms 'archaeological site', 'material evidence' and 'past life and culture' are not defined and are too vague to be susceptible of identification." A penal statute "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application" violates due process. *Bokum Resources v. N.M. Water Quality Cont.*, 93 N.M. 546, 603 P.2d 285 (1979). The vagueness doctrine is based on notice. *State v. Najera*, 89 N.M. 522, 554 P.2d 983 (Ct.App.1976).

Defendant's contention was not raised in the trial court; we consider it here, for the first time, because the contention attacks the facial validity of the permit requirement of § 18–6–11(A) and, therefore, raises the issue of whether a crime has been committed. *State v. Vickery*, 85 N.M. 389, 512 P.2d 962 (Ct.App.1973).

Defendant relies on *United States v. Diaz*, 499 F.2d 113 (9th Cir.1974). The federal statute involved provided criminal penalties for appropriating any historic or prehistoric ruin or monument or any object of antiquity situated on federal land without the appropriate permission. Diaz was charged with appropriating objects of antiquity. The objects were face masks made in 1969 or 1970 and found in a cave on the San Carlos Indian Reservation. The masks were used in Indian religious ceremonies and deposited on remote places of the reservation for religious reasons. Noting that the statute did not define "ruin," "monument," or "object of antiquity," *Diaz* held: "Here there was no notice whatsoever given by the statute that the word 'antiquity' can have reference not only to the age of an object but also to the use for which the object was made and to which it was put . . . ."

Diaz does not aid defendant. "Archaeological site" is defined in § 18–6–11(A), and that definition does not cover "every cemetery, garbage dump, library, antique store, and housing development" as defendant contends.

The issue as to vagueness does not involve the lack of definition but whether the words, in that definition, "material evidence" and "past life and culture", fail to give notice as to the meaning of "archaeological site". In answering this question we consider the statute as a whole. *State v. Najera, supra.* In so considering the statute, we do not approach it from a lawyer's inability to understand the statutory wording, but from the ability of a person of

common intelligence to understand the words used. The following are taken from Webster's Third New International Dictionary (1966):

Material—"SYN PHYSICAL, CORPOREAL, PHENOMENAL, SENSIBLE, OBJECTIVE: MATERIAL describes whatever is formed of tangible matter and may be used in opposition to *spiritual, ideal, intangible*".

Evidence—"something that furnishes or tends to furnish proof".

Past—"gone by: AGO".

Life—"animate being".

Culture—"the total pattern of human behavior and its products".

With these common meanings, a person of common intelligence does not have to guess at the meaning of "archaeological site" defined in § 18–6–11(A). *State v. McHorse*, 85 N.M. 753, 517 P.2d 75 (Ct.App. 1973); *State v. Orzen*, 83 N.M. 458, 493 P.2d 768 (Ct.App.1972). The definition of "archaeological site" is not void for vagueness.

The order dismissing the criminal information is reversed. Upon remand, the cause is to be reinstated upon the trial docket.

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

ANDREWS, J., specially concurs.

ANDREWS, Judge (specially concurring).

Except for the discussion on "Ascertaining Legislative Intent," I concur in the majority opinion.

New Mexico courts have consistently held that the enrolled and engrossed bill is "conclusive and unimpeachable." *Dillon v. King*, 87 N.M. 79, 529 P.2d 745 (1974); *Clary v. Denman Drilling Co.*, 58 N.M. 723, 276 P.2d 499 (1954); *Thompson v. Saunders*, 52 N.M. 1, 189 P.2d 87 (1947); *State ex rel. Clancy v. Hall, State Treasurer*, 23 N.M. 422, 168 P. 715 (1917); *Smith et al. v. Lucero, Sec'y of State*, 23 N.M. 411, 168 P. 709 (1917); *Kelley v. Marron, State Treasurer*, 21 N.M. 239, 153 P. 262 (1915); *Earnest, Trav. Auditor v. Sargent, Auditor*, 20 N.M. 427, 150 P. 1018 (1915). Only in *Dillon v. King, supra*, did the court articulate an exception to the rule when it stated that the conclusive legal presumption would not attach when the "Legislature had ceased to be a legislative body by operation of the Constitution and was, therefore, without jurisdiction or authority to transact business or perform any lawmaking function." 87 N.M. at 85, 529 P.2d 745. No issue of this nature is present in the instant case.

The majority is aware of this rule, but considers it inapplicable because all cases previously decided deal with either the content of what the Legislature enacted or the mechanics of the enactment. In my view, such fact is immaterial. The reason the issue is one of first impression is that the rule is clear. The policy behind the presumption is the crucial issue, and is applicable regardless of the nature of the attack. There is nothing to be gained from a discussion of the issue.

633 P.2d 706

Fred W. POORBAUGH,
Plaintiff-Appellee,

v.

Leo M. MULLEN, Defendant-Appellant.

No. 4508.

Court of Appeals of New Mexico.

Jan. 20, 1981.

Wollen & Segal, a Professional Corp., Roland T. Taylor, Albuquerque, for plaintiff-appellee.

Michael G. Rosenberg, Albuquerque, Pickard & Singleton, Lynn Pickard, Santa Fe, for defendant-appellant.

OPINION

LOPEZ, Judge.

Plaintiff, Fred Poorbaugh, sued Leo Mullen for defamation and emotional distress

resulting over a real estate transaction in which Mullen was the purchaser and Poorbaugh the broker or vendor. Defendant counterclaimed for fraud, breach of fiduciary duty, wrongful forfeiture, and related claims arising out of the same real estate transaction. The trial court ordered Summary judgment in favor of plaintiff's complaint and dismissed defendant's counterclaims. We reverse.

The issues on appeal are whether the Summary judgment was proper and whether the counterclaims should have been dismissed. We hold that both actions were in error. Summary judgment was improper because 1) there are genuine issues of material fact in dispute and 2) defendant is not collaterally estopped from litigating any of the issues by the final judgment in a prior lawsuit between Poorbaugh and the New Mexico Real Estate Commission. In addition the counterclaim for wrongful forfeiture states a proper cause of action.

The sale of land, from which this lawsuit arises, was for 160 acres of land in Rio Arriba County. The record indicates that, in August 1975, Poorbaugh bought the land from Melecio Lopez and Lopez's former wife for $80,000 and immediately sold it to Mullen for $125,000. According to Mullen, Poorbaugh was not the seller, but was Mullen's real estate agent, the Lopezes being the actual sellers. He maintains that Poorbaugh represented that the $125,000 was the price the Lopezes wanted and that he, Mullen, agreed to having the papers in Poorbaugh's rather than Lopez' name because he understood the Lopezes wanted it that way. It is undisputed that Poorbaugh paid the Lopezes a $33,500 down payment after he had received this amount from Mullen. Poorbaugh's version of the events is that Mullen always knew that Poorbaugh was acting on his own behalf, and that on learning of the amount of profit Poorbaugh made on the sale, he became angry and began to harass Poorbaugh with charges of fraud in letters threatening criminal prosecution. Poorbaugh asserts these charges were made to various other parties as well, including the Albuquerque National Bank. Mullen admits that he contacted the bank, which then refused to act as escrow agent on the Poorbaugh-Mullen contract. He also complained of Poorbaugh's conduct to the New Mexico Real Estate Commission, which, after a hearing where it found that Poorbaugh had failed to reveal to Mullen that he owned the Lopez property and had breached his duty as a broker in other ways, revoked Poorbaugh's license. The appeal of this decision resulted in an eventual reversal by the Bernalillo County District Court in Cause No. 12–76–00519, *Poorbaugh v. New Mexico Real Estate Commission.*

Because Mullen failed to pay Poorbaugh personally the first installment due on their contract, Poorbaugh declared a forfeiture and recorded the deed back to himself, thereby causing Mullen to lose his $33,500 down payment. On the advice of an attorney, Mullen had tendered the installment to the First National Bank in La Jara, Colorado, which was handling the collection on the Lopez-Poorbaugh contract. The Albuquerque National Bank, designated escrow agent on the Poorbaugh-Mullen contract, had refused to handle the escrow.

Genuine issues of disputed facts. Summary judgment is proper only if there is no genuine issue as to any material fact or the moving party is entitled to 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). If the evidence is sufficient to create a reasonable doubt as to the existence of a genuine issue, summary judgment cannot be granted. *Pharmaseal Laboratories, Inc. v. Goffe*, 90 N.M. 753, 568 P.2d 589 (1977). All reasonable inferences are to be made in favor of the party opposing summary judgment. *C & H Construction & Paving Co. v. Citizens Bank*, 93 N.M. 150, 597 P.2d 1190 (Ct.App.1979); *Smith v. Klebanoff*, 84 N.M. 50, 499 P.2d 368 (Ct. App.), *cert. denied*, 84 N.M. 37, 499 P.2d 355 (1972). With these principles in mind, we examine the pleadings and depositions before us. Both parties verified their pleadings, which are thus treated as affidavits. *See, Rekart v. Safeway Stores, Inc.*, 81 N.M. 491, 468 P.2d 892 (Ct.App.1970).

Disputes involving genuine issues of material facts exist with respect to both the claims and counterclaims. Poorbaugh is suing for defamation and intentional infliction of emotional distress. One of Mullen's defenses is that what he said was true. This dispute raises factual issues as to whether Poorbaugh did defraud Mullen. Fraud is a misrepresentation of a fact, known by the maker to be untrue, made with the intent to deceive and to induce the other party to act upon it, and upon which the other party relies to his detriment. *Unser v. Unser*, 86 N.M. 648, 526 P.2d 790 (1974). There is a factual issue of whether any misrepresentations were made by Poorbaugh to Mullen. If Poorbaugh was acting as a real estate broker, he may be liable as a fiduciary. *Iriart v. Johnson*, 75 N.M. 745, 411 P.2d 226 (1965), and the elements necessary to prove fraud are somewhat modified. *See, Unser; Barber's Super Markets, Inc. v. Stryker*, 84 N.M. 181, 500 P.2d 1304 (Ct. App.), *cert. denied*, 84 N.M. 180, 500 P.2d 1303 (1972). The question of whether Poorbaugh was acting as broker or as seller is contested by the parties, and this is a material factual issue. Poorbaugh claims that Mullen acted maliciously in accusing him of fraud before other people. The existence of malice is a question of fact. *See, El Paso Natural Gas Co. v. Kysar Insurance Agency, Inc.*, 93 N.M. 732, 605 P.2d 240 (Ct.App. 1979). Mullen claims that Poorbaugh intended to deceive him. Intent is also a question of fact. *See, Maxey v. Quintana*, 84 N.M. 38, 499 P.2d 356 (Ct.App.1972), *cert. denied*, 84 N.M. 37, 499 P.2d 355 (1972). The dispute over these genuine and material issues of fact precludes summary judgment, unless, as a matter of law, these issues have already been litigated and decided in favor of Poorbaugh.

Collateral estoppel. Poorbaugh asserts that Mullen is estopped from litigating the issue of whether Poorbaugh acted as a real estate agent in the transaction by the court's finding in the earlier case between Poorbaugh and the New Mexico Real Estate Commission that Poorbaugh was not acting as a broker, but sold the land for himself. Collateral estoppel bars the relitigation of issues and facts which were actually litigated, *C & H Construction & Paving Co.*, and were necessary to support the judgment in a prior litigation with a different cause of action. *Atencio v. Vigil*, 86 N.M. 181, 521 P.2d 646 (1974). It is necessary in New Mexico that the parties in the second suit be those of the first suit, *State v. Rogers*, 90 N.M. 604, 566 P.2d 1142 (1977); *Atencio; El Paso Natural Gas Co.*, or in privity with them. *C & H Construction & Paving Co.* Since Mullen was not a party, nor in privity with the New Mexico Real Estate Commission which was a party in the first suit, collateral estoppel does not apply.

Poorbaugh urges that Mullen, in that he testified before the New Mexico Real Estate Commission and failed to allege an agreement concerning a real estate commission, should be estopped in the present case from claiming that Poorbaugh acted as a broker. In effect, Poorbaugh is forwarding the adoption of the rule that, in certain circumstances, a non-party who participates in litigation is estopped from relitigating the same issues in a future suit.

> If a non-party who thus participates in litigation has an interest sufficiently close to the matter in litigation, and has adequate opportunity to litigate in support of or in defense against the cause of action on which the suit is based, the policies underlying the doctrine of judicial finality require that the participating non-party should be bound by the resulting judgment to the same extent as though he were a party to the action.

1B Moore's Federal Practice ¶ 0.411[6] at 1552 (2d ed. 1980); *see*, Restatement of Judgments § 84 (1942). We need not decide whether to adopt this rule in New Mexico at present. Even if it were the law here, Poorbaugh could not benefit from it. *Moore's* continues:

> Generally speaking, the rule as to participating non-parties requires that the non-party have control, or at least joint control of the prosecution or defense of the suit. And he must be able to control the

> decision to appeal or not to appeal. Instigating litigation ... is not sufficient. Nor is a non-party's participation sufficient if he merely assists ... by procuring witnesses or evidence, unless, by such assistance, the non-party acquires the requisite degree of control.

Moore's supra at 1564–66. Moreover, the sufficiency of a non-party's control and participation is a question of fact. *Gerrard v. Larsen*, 517 F.2d 1127 (8th Cir. 1975); *Ransburg v. Automatic Finishing Systems, Inc.*, 412 F.Supp. 1357 (E.D.Pa.1976); *Watts v. Swiss Bank Corp.*, 27 N.Y.2d 270, 265 N.E.2d 739, 317 N.Y.S.2d 315 (1970). The burden of affirmatively proving sufficient control rests upon the party seeking to invoke the conclusive force of the judgment. *Ransburg; Moore's supra* at 1567. The facts adduced by Poorbaugh, that Mullen filed the complaint which instigated the proceedings of the Real Estate Commission that he testified before it and that Mullen and his attorney were present at the *de novo* hearing in the district court, would be insufficient to show Mullen had the requisite control in those proceedings to permit collateral estoppel to be used against him.

Wrongful forfeiture. Forfeiture should be avoided when possible. It is well established that forfeitures are not favored. *Hale v. Whitlock*, 92 N.M. 657, 593 P.2d 754 (1979); *Eiferle v. Toppino*, 90 N.M. 469, 565 P.2d 340 (1977); *Stamm v. Buchanan*, 55 N.M. 127, 227 P.2d 633 (1951). We can find no reason why Mullen's wrongful forfeiture counterclaim was dismissed. Clearly it was not part of the first suit between Poorbaugh and the Real Estate Commission. In the circumstances, the resolution of whether or not forfeiture was wrongful should be made only after a full trial.

Summary judgment should not have been granted on plaintiff's complaint, nor should defendant's counterclaim have been dismissed. The judgment is reversed and the cause is remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

WOOD, J., concurs.

SUTIN, J., specially concurs.

SUTIN, Judge (specially concurring).

I specially concur.

This case involves two litigious parties. After more than four years of having had hearings, procedures, pleadings, motions, depositions and affidavits thrown into the storm and stress of the wind's eye, they ended up with a summary judgment that misled and confused the parties and this Court. The parties and lawyers harassed the district judge and then presented him with a form of judgment to sign which was misleading to plaintiff and this court. "Summary judgment is a lethal weapon, and courts must be mindful of its aims and targets and beware of overkill in its use." *Brunswick Corporation v. Vineberg*, 370 F.2d 605, 612 (5th Cir. 1966). Condemnation of use of the summary judgment has long been prevalent in New Mexico with little effect. Waste of time, effort and expense in district court and appellate courts has been a cancer for which no remedy is presently available. Perhaps, summary judgment will be abolished.

On September 8, 1976, plaintiff sued defendant for damages for defamation, libel, duress and coercion. Defendant counterclaimed for false and fraudulent representations of various matters, alternatively, in six claims. On January 18, 1980, the trial court entered the following Summary Judgment:

> The attorneys for the parties having appeared before the Court on December 17, 1979, pursuant to the motion of each party for Summary Judgment, the Court having heard the arguments of counsel and being otherwise fully advised to the circumstances,
>
> IT IS HEREBY ORDERED that Summary Judgment, be and hereby is, *entered for the Plaintiff against the Defendant, and that each and all of the Defendant's counterclaims against the Plaintiff be, and they hereby are, dismissed.*
>
> IT IS FURTHER ORDERED that the lis pendens filed in this cause by the

Defendant upon Plaintiff's property, be immediately released. [Emphasis added.]

The procedural events leading up to entry of summary judgment were as follows:

(1) On November 7, 1979, defendant filed a motion for summary judgment in which it sought an order granting defendant summary judgment against plaintiff *as to defendant's counterclaims.*

(2) On November 17, 1979, plaintiff filed a motion for summary judgment in which it sought dismissal of *defendant's counterclaims* against plaintiff for the reason that no question of fact existed and plaintiff was entitled to have *defendant's counterclaims* dismissed as a matter of law.

(3) Plaintiff gave notice that his motion for summary judgment would be heard on December 17, 1979.

(4) On December 17, 1979, defendant filed a motion that the court reconsider its "oral ruling of December 17, 1979, granting plaintiff's motion for summary judgment."

(5) Defendant's motion to reconsider was set for hearing on January 18, 1980. Plaintiff gave notice that "Defendant's pending motion for the Plaintiff's presentment of Summary Judgment for signature will be heard on January 18, 1980 . . . ."

On January 18, 1980, plaintiff's summary judgment, presented to the trial court, was signed and filed.

The summary judgment was intended to dispose only of *defendant's counterclaims.* These counterclaims were buried in the trial court. Plaintiff did not file a motion that summary judgment be "entered for the plaintiff against the defendant"; that plaintiff recover against defendant on three counts of plaintiff's complaint. Plaintiff's recovery against defendant on plaintiff's complaint was not an issue to be decided on January 18, 1980. Plaintiff's complaint remained alive and erect in the district court, is at issue and ready for trial.

Defendant's second point on appeal reads in pertinent part:

SUMMARY JUDGMENT WAS ERRONEOUSLY ENTERED *ON MR. POORBOUGH'S COMPLAINT BECAUSE MR. POORBOUGH NEVER MOVED FOR SUCH A SUMMARY JUDGMENT* . . . . [Emphasis added.]

The majority opinion states:

. . . The trial court ordered Summary Judgment in favor of plaintiff's complaint and dismissed defendant's counterclaims . . . .

* * * * * *

Disputes involving genuine issues of material facts exist with respect to both the *claims* and counterclaims. [Emphasis added.]

The only issue on this appeal is whether any genuine issue of material fact exists with reference to defendant's counterclaims.

The summary judgment can be read to mean that it decided both plaintiff's claims and defendant's counterclaims. If so, defendant took no appeal from that portion of the summary judgment that was "entered for the plaintiff against the defendant." Furthermore, this portion of the summary judgment is not an appealable order.

Plaintiff sued defendant for damages. The summary judgment established liability but not damages. Rule 56(c) of the Rules of Civil Procedure provides in part that:

. . . A summary judgment, *interlocutory in character,* may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. [Emphasis added.]

The rule is uniform that Rule 56 is not intended to affect appeal jurisdiction. It does not make an interlocutory order appealable. A summary judgment in favor of plaintiff on the issue of liability alone is an interlocutory order and non-appealable. *Aetna Life Insurance Company v. Nix,* 85 N.M. 415, 512 P.2d 1251 (1973); *Schultz v. Adams,* 161 Mont. 463, 507 P.2d 530 (1973); *Wheatland Irrigation District v. McGuire,* 537 P.2d 1128 (Wyo.1975); *Liberty Mutual Ins. Co. v. Wetzel,* 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976); *Tye v. Hertz Drivurself Stations,* 173 F.2d 317 (3d Cir. 1949); *Russell v. Barnes Foundation,* 136 F.2d 654 (3d Cir. 1943).

The interlocutory order entered does not fall within the orbit of § 39–3–4, N.M.S.A. 1978 which relates to appealable interlocutory orders.

A "partial" summary judgment is not a "judgment" within the meaning of Rule 54(a) of the Rules of Civil Procedure. The "partial" summary judgment rendered plaintiff rests in the trial court and does not become final until the issue of damages is decided by a trier of the fact. It is not subject to a determination in this appeal.

The defendant's and plaintiff's motions for summary judgment with reference to defendant's counterclaims were without foundation in fact and law. The district court should set this case for trial as soon as possible without recognition of any motions for continuances, delays or otherwise.

633 P.2d 712

STATE of New Mexico, Plaintiff-Appellee,

v.

Orlando HERNANDEZ, Defendant-Appellant.

No. 4780.

Court of Appeals of New Mexico.

March 5, 1981.

Jeff Bingaman, Atty. Gen., Clare E. Mancini, Asst. Atty. Gen., Santa Fe, for appellee.

John B. Bigelow, Chief Public Defender, Andrea L. Smith, Asst. Appellate Defender, Santa Fe, and Joseph Gant, Carlsbad, for appellant.

OPINION

HERNANDEZ, Chief Judge.

Defendant was convicted on three counts of fraudulent use of a credit card. A supplemental information was then filed, charging him under the Habitual Offender Act with having been convicted of a prior robbery in California. The jury found against defendant on the issue of identity and he appeals. We affirm.

The first issue on appeal relates to admission of an eighteen page document containing information given to California police about the robbery. Defendant objected to admission on the grounds that the material was irrelevant and immaterial. The objection was overruled, and defendant now argues that his conviction should be reversed because the exhibit was irrelevant and prejudicial.

Habitual criminality is a status rather than an offense, so allegations of prior convictions do not constitute a charge of a distinct crime but only relate to the punishment. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167 (1977). Unless the defendant raises the validity of the prior conviction as a defense, there are two issues to be determined in an habitual offender proceeding: (1) whether there was a prior felony conviction and (2) whether the defendant is the same person who was convicted of the prior felony. *See State v. Martinez*, 92 N.M. 256, 586 P.2d 1085 (1978). The exhibit which was admitted into evidence related to those two points, and so was relevant. Because the habitual offender proceeding was not being conducted to determine defendant's guilt or innocence of the felony charge, the evidence which went beyond his identity and prior conviction was harmless error. *State v. Wright*, 84 N.M. 3, 498 P.2d 695 (Ct.App.1972). Knowing the details of the prior conviction did not prejudice defendant before the jury when the only issues considered were those of identity and prior conviction.

The second issue on appeal relates to the sufficiency of the evidence regarding defendant's prior conviction. Section 31–18–17(B), N.M.S.A. 1978 (1980 Cum.Supp.), provides as follows:

> Any person convicted of a noncapital felony in this state who has incurred one prior felony conviction which was part of a separate transaction or occurrence is a habitual offender and his basic sentence shall be increased by one year, and the sentence imposed by this subsection shall not be suspended or deferred.

The State's exhibits showed that defendant was convicted of robbery in California in 1975. Defendant was convicted in New Mexico on February 1, 1980, of fraudulent use of a credit card. The evidence thus shows different crimes in different states with different dates of conviction. This is sufficient evidence for the jury to find beyond a reasonable doubt that the California conviction was prior to the New Mexico conviction, and that it was part of a separate transaction or occurrence. *State v. Lankford*, 92 N.M. 1, 582 P.2d 378 (1978).

IT IS SO ORDERED.

ANDREWS, J., concurs.

HENDLEY, Judge (dissenting).

I dissent.

The instructions given in this case are the law of the case and those instructions were very explicit. The instructions set forth the specific dates of the commission of the crimes. Furthermore, the verdicts also contained the specific dates. Under *State v. Dominguez*, 91 N.M. 296, 573 P.2d 230 (Ct. App.1977), an instruction requiring more

than the law would be the law of the case and that would be to test to satisfy the sufficiency of the proof. *State v. Martin*, 90 N.M. 524, 565 P.2d 1041 (Ct.App.1977); *State v. Rogers*, 83 N.M. 676, 496 P.2d 169 (Ct.App.1972).

The defendant is correct when he said that the dates of the New Mexico conviction were never established. The prosecutor who prosecuted the New Mexico conviction took the stand and identified Exhibits 2, 4, 5 and 6. This was all that was identified. No place in the transcript do we find anything referring to the dates of the commission of the New Mexico offense. Hence, in this regard, the defendant's position is correct and, under the instruction given regardless of what might have been the proper law, the State failed to establish the date of the offense in New Mexico. Although the supplemental criminal information did spell out all the dates, it was not evidence. The case should be reversed.

633 P.2d 714

STATE of New Mexico, Plaintiff-Appellant,

v.

Billy Ray HUGHES, Defendant-Appellee.

No. 5008.

Court of Appeals of New Mexico.

May 5, 1981.

Jeff Bingaman, Atty. Gen., Carol Vigil, Asst. Atty. Gen., Sante Fe, for plaintiff-appellant.

Steve Quinn, Quinn & Quinn, Clovis, for defendant-appellee.

OPINION

HENDLEY, Judge.

Pursuant to § 39–3–3(B)(1), N.M.S.A. 1978, the State appeals the dismissal of the second count in a three count supplemental information under the Habitual Offender Statute, § 31–18–17, N.M.S.A. 1978 (Supp. 1980). We affirm.

The second count involves a conviction on January 28, 1980, for an offense committed on July 27, 1978. The third count is for a conviction on September 29, 1980, for an offense committed on December 14, 1979. Thus, the commission of the offense in Count III was not subsequent to the conviction in Count II. For enhancement, *State v. Linam*, 93 N.M. 307, 600 P.2d

253 (1979), requires that each felony be committed after the conviction for the preceding felony.

The State contends that the language in the amended Habitual Offender Statute requires only that the prior felony convictions be part of separate transactions or occurrences. We are not persuaded. *State v. Linam, supra,* reasons that "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." Fully aware of this decision, the Legislature did not in its 1979 amendment use language to show clearly a different intent. The State relies on the omission in the 1979 amendment of language in the prior statute, § 31–18–5, N.M.S.A. 1978, "after having been convicted . . . commits any felony". However, the 1979 amendment not only omits the language mentioned by the State, but consists of a complete redrafting in new phraseology.

Intent is to be determined primarily from language used. *State v. Russell,* 94 N.M. 544, 612 P.2d 1355 (Ct.App.1980). We do not see in the omission relied on by the State a clear showing that the Legislature intended a purpose different from that expressed in *Linam, supra.* On the contrary, subsection A of the amended act defines "prior felony conviction" to mean "a conviction for a prior felony committed" and "any prior felony for which the person was convicted." The use of the phrase "felony committed" along with the phrase "felony for which the person was convicted" does not suggest that the Legislature was concerned with the distinction our Supreme Court made in *Linam, supra,* regarding the date of commission of the act and the conviction of the felony. Construing the statute as the State suggests, the reform objective of the Habitual Offender Act as enunciated in *Linam, supra,* "to provide a deterrent from future crimes" would hardly be realized. Furthermore, any ambiguity in a criminal provision must be construed in favor of the accused. *State v. Sweat,* 84 N.M. 416, 504 P.2d 24 (Ct.App.1972). Thus, in light of the absence of any legislative language clearly to the contrary, we are bound to follow 2iState v. Linam, supra.

As a basis for its position, the State refers us to the Committee Commentary to N.M.U.J.I. Crim. 39.01, N.M.S.A. 1978 (Supp.1980), which suggests that it is possible that *State v. Linam, supra,* may no longer be applicable to the new Habitual Offender Act. We note, however, that the Committee Commentaries are not adopted by the Supreme Court. *State v. Zamora,* 91 N.M. 470, 575 P.2d 1355 (Ct.App.1978). Furthermore, in *State v. Wise,* 95 N.M. 265, 620 P.2d 1290 (1980), a decision written a year and a half after the effective date of the amended Habitual Offender Act, the Supreme Court held that N.M.U.J.I. Crim. 39.01 and 39.06, N.M.S.A. 1978 (Supp.1980), were promulgated to be effective July 1, 1979. This date is the effective date of the amended Habitual Offender Act. Because both instructions, 39.01 and 39.06 require dates of offense, as well as dates of conviction, as critical acts to be found by the trier of fact, we are not free to disregard the holding of *State v. Wise, supra,* and to adopt the suggestion of the State in this case.

Finally, the State relies on *State v. Hernandez,* 96 N.M. ——, 633 P.2d 712 (Ct.App.1981), for the proposition that the new Habitual Offender Statute "requires only that the prior conviction was a part of a separate transaction or occurance [sic]." We are not persuaded. First, we note that the Supreme Court has granted a petition for certiorari in that case. Secondly, that case discusses neither *State v. Linam, supra,* nor *State v. Wise, supra.* More significantly, this Court is not free to disregard the precedents of the Supreme Court. *Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973). Likewise, we do not have the authority to disregard the mandatory instructions promulgated by the Supreme Court. *State v. Scott,* 90 N.M. 256, 561 P.2d 1349 (Ct.App.1977).

Accordingly, we affirm the trial court's dismissal of Count II.

IT IS SO ORDERED.

LOPEZ and ANDREWS, JJ., concur.

633 P.2d 716

In the Matter of the ESTATE OF Alejandro N. GUERRA, Jr., Deceased,

Leo GUERRA, Petitioner-Appellee,

v.

NEW MEXICO HUMAN SERVICES DEPARTMENT, Respondent-Appellant.

No. 4908.

Court of Appeals of New Mexico.

May 21, 1981.

Richard Shapiro, Asst. Atty. Gen., Santa Fe, for respondent-appellant.

William L. Lutz, Martin, Martin, Lutz & Cresswell, P. A., Las Cruces, for petitioner-appellee.

OPINION

WALTERS, Judge.

In 1977, the personal representative in an informal probate action commenced a wrongful death action on behalf of the Estate of Alejandro Guerra, Jr., the father of Leo Guerra. A settlement of the wrongful death action was entered into and subsequently approved by the court. The proceeds, after allowance for costs, were divided into eight equal shares, which shares were to be distributed to Mrs. Guerra and the seven Guerra children, including Leo. Three of the children's shares were distributed to Mrs. Guerra in trust, with specific instructions for handling. The shares of the remaining Guerra children were ordered paid to the Department of Health & Social Services (now the Department of Human Services, hereafter "HSD") in trust, since HSD had been awarded custody of those children in a previous proceeding. The order directed that those funds were to be "deposited by HSD in interest-bearing accounts until the minors reach the age of majority."

When Leo turned 18 in 1980, he requested the funds in the possession of HSD and was informed that the funds had been spent for Leo's care and expenses while he had been under foster care. Leo then moved for an Order to Show Cause why HSD should not be ordered to deliver the trust fund to him. HSD moved to dismiss for lack of jurisdiction. After a hearing, the court denied HSD's motion and by order of September 12, 1980, directed HSD to comply with the terms of the 1977 order. It is this 1980 order which HSD appeals.

HSD argues in this court, as it did below, that the district court did not have jurisdiction over the Department in 1977 by which the 1977 order could be enforced against the Department; and that Leo is not entitled to reimbursement of funds expended by HSD for Leo's foster care. We do not agree and affirm the trial court.

Defendants have cast their principal argument in terms of lack of notice of the 1977 proceedings under the New Mexico Rules of Civil Procedure and the Probate Court, overlooking completely the fiduciary status it occupied as guardian of Leo Guerra and the duties attaching to that guardianship.

It was said in *In re Clendenning*, 145 Ohio St. 82, 60 N.E.2d 676 (1945), that a guardian is an officer of the court, and that, in guardianships, the ward is the ward of the court. *Clendenning* further declared that control of the ward's person and property remains in the court, with the "discharge of the duties in respect thereof being delegated to a guardian as the agent of the court and subject to the orders of the court." 60 N.E.2d at 681.

This language, approved and followed in *Seattle-First National Bank v. Brommers*, 89 Wash.2d 190, 570 P.2d 1035 (1977), and *Browne v. Superior Court*, 16 Cal.2d 593, 107 P.2d 1 (1940), lends itself to the single interpretation that the Department became a trustee insofar as the property of Leo Guerra was to be administered by it. As a trustee under court appointment (and there is no dispute regarding HSD's guardianship at the time of the 1977 order), HSD was bound as an officer of the court and as a trustee of Leo's property to obey the orders of any court of competent jurisdiction affecting the property it held in trust for Leo.

Section 45–5–208, N.M.S.A. 1978 provides in part:

By accepting a testamentary or court appointment as guardian, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any person. Notice of any proceeding shall be delivered to the guardian, or mailed to him at his address as then known to the petitioner. . . .

HSD received notice sufficient to subject it to the jurisdiction of the court. Following the April 1977 hearing, Leo's share was delivered to a representative of HSD, who transmitted the order and the funds to Santa Fe. They were accompanied by a cover letter pointing out the need to deposit the funds in interest-bearing accounts. Acceptance of those monies by the Santa Fe office of HSD, pursuant to the Court's order of April 27, 1977, and HSD's failure to contest either the Court's jurisdiction or the terms of the trust, estop HSD from now asserting the trial court's lack of jurisdiction to enforce its 1977 order. *See Reinhart v. Rauscher Pierce Sec. Corp.*, 83 N.M. 194, 490 P.2d 240 (Ct.App. 1971).

Additionally, to concur with HSD that it is not bound by any court order because it was not made a party to the original proceedings would be to prevent every trustee and guardian from receiving assets on behalf of their wards or beneficiaries, from whatever source, unless a legal proceeding were instituted in which the guardian or trustee were made a party. That is not the law, and it never has been. The guardianship statutes establish the guardian's duty to receive and account for funds deliverable or delivered for the ward's benefit, Section 45–5–209 B and D, N.M.S.A. 1978, regardless of the manner in which those funds come into the guardian's possession.

HSD's agreement to act as Leo's guardian imposed upon a continuing obligation to accept and protect assets belonging to its ward according to any terms attaching to those assets, until its guardianship had been terminated. *See Garcia v. Sanchez*, 64 N.M. 114, 325 P.2d 289 (1958). Its fiduciary obligations to Leo Guerra in accordance with the terms of the court order issued from a court of competent jurisdiction, were binding; as an "officer of the court," HSD was under an even deeper obligation, once it accepted the proceeds of the 1977 proceeding for the benefit of Leo Guerra, to recognize and obey the terms of the order by which those proceeds became available. "A trust relationship imposes stringent and high standards of conduct upon the trustee." *Pino v. Budwine*, 90 N.M. 750, 568 P.2d 586 (1977).

The Department directs our attention to its rules and regulations providing that it may use whatever assets are available for the care, custody and education of its wards before it disburses public funds for those purposes. We do not quarrel with the propriety of the agency's rules; we do not, however, credit to them the overriding force which the Department attributes to them. There are provisions both in the Department's regulations and in the New Mexico statutes which permit HSD to petition the court for use of a ward's personal assets for his care. There was nothing to prevent the Department from following proper procedures to ask Judge Galvan's permission to use the fund created for Leo's benefit from the proceeds of the wrongful death action. Section 45–5–209, N.M.S.A. 1978, limits the general powers of a guardian "as modified by order of the court." It was a breach of duty for HSD to disburse Leo's funds without judicial permission.

We are not persuaded, either, by HSD's argument that the 1977 order was unclear. As we noted at the outset, the order directing that Leo's share be paid to the Department of Health and Social Services ended with the judge's handwritten addition to that paragraph, to-wit: ". . . said amounts to be deposited by HSSD in interest-bearing accounts until the minors reach the age of majority." In the immediately preceding paragraph, the order directed the mother of the children whose shares were paid to her to open three separate savings accounts in the names of those children, and to deposit their shares in their respective savings account. An explicit proviso was included in that paragraph: ". . . that the said [mother] shall be allowed and authorized to

withdraw funds from said savings accounts from time to time, as may be necessary for the support and maintenance of the three minor children; at such time as any of said minor children reach majority any balance remaining in his or her savings account, if any, shall be distributed and transferred to said child."

Existence of the express language in the proceeding paragraph authorizing withdrawals, and the absence of it from the paragraph relating to the shares delivered to HSD, make it abundantly clear that the funds deposited to Leo's account were not to be treated in the same manner as the funds paid to the mother of the three other beneficiaries. Moreover, if HSD felt the language of ambiguous, as it argues here, no reason was advanced why it did not seek clarification.

Finally, HSD contends that §§ 38–3–1 and 38–1–17, N.M.S.A. 1978, required the action to have been brought in Santa Fe County against the head of HSD, rather than in the District Court of Dona Ana County and against a regional field office manager. We conclude that those statutes do not apply in the present case; this action is not a "suit against a state officer," but an exercise by the court of its continuing jurisdiction. We have already held that HSD acknowledged the court's supervision and, therefore, its jurisdiction when it accepted the trust res. The order to show cause was of the same nature as the proceeding in *State v. Quesenberry*, 74 N.M. 30, 390 P.2d 273 (1964), where the Supreme Court held that issuance of a peremptory writ of mandamus by the district court was ancillary to the court's earlier judgment and was not "a new or independent action" and, therefore, the venue statute did not control.

The judgment of the trial court is affirmed. HSD is directed to deliver to petitioner the amount of the fund entrusted to its care for the benefit of Leo Guerra. *See Candelaria v. Miera*, 18 N.M. 107, 134 P. 829 (1913). HSD shall pay all costs.

IT IS SO ORDERED.

HERNANDEZ, C. J., and ANDREWS, J., concur.

633 P.2d 719

Edgar CAMP, Plaintiff-Appellee,

v.

BERNALILLO COUNTY MEDICAL CENTER and The University of New Mexico School of Medicine, Defendants-Appellants.

No. 4766.

Court of Appeals of New Mexico.

June 9, 1981.

James A. Thompson, Chris Lucero, Jr., Albuquerque, for defendants-appellants.

William H. Carpenter, Albuquerque, for plaintiff-appellee.

OPINION

WALTERS, Judge.

Following or during an arteriogram performed by a third-year radiology resident, plaintiff suffered a stroke which resulted in some permanent physical disabilities. Defendants appeal from a judgment entered after a non-jury trial which awarded damages of $120,000 to plaintiff, for "medical malpractice committed by agents and employees" of defendants. They raise four issues; however, their first two points require reversal, in our opinion, so we do not reach the additional arguments presented.

Plaintiff's complaint alleged eight different theories of negligence: (1) Defendants failed to obtain prior medical reports and follow precautions that would have been evident from reading prior medical records, including the records of Mr. Camp's admission at St. Joseph Hospital by Dr. Parsons in 1974 for repair of an abdominal aneurysm; (2) Defendants misdiagnosed bilateral femoral aneurysms; (3) Defendants performed a test that was potentially dangerous without adequate diagnosis and indication; (4) Defendants improperly administered a dangerous diagnostic test; (5) Even when the physician encountered resistance in trying to pass the catheter, the physician continued in his efforts to pass the catheter and further traumatized the artery; (6) There was failure on the part of the hospital personnel, including the doctors, to recognize and treat a cerebrovascular accident when it occurred; (7) Defendants proceeded with the diagnostic test in the absence of informed consent; (8) Dr. J. Davenport, the physician who performed the aortogram did not possess/use the knowledge and skill ordinarily known/used by a reasonably well qualified radiologist.

During the trial and over defendants' objections, plaintiff was allowed to amend his pleadings to include allegations of "improper supervision or lack of supervision in not having a staff physician reasonably well

qualified to *participate in the decision*" to have an arteriogram performed.

Prior to trial, counsel was asked by the trial judge whether Dr. Dobernick would be called because, as the judge later explained if Dobernick were to be a witness the judge felt he would have to recuse himself—the doctor was the judge's next-door neighbor. Defense counsel responded that he had not intended to call that witness. At trial, however, and during the plaintiff's examination of his last witness, a medical doctor, some evidence was adduced regarding the resident's lack of expertise, particularly if not supervised, in performing an arteriogram. An objection was made on the ground that there was no evidence that the resident had not been supervised. The court responded:

> Well, I don't know that there's any evidence to that. I assume you're going to tie that up later. And if not, I'll strike the answer. . . . [I]f there are no facts to establish the question, I'll, of course, ignore it.

It was after the medical doctor completed his testimony, and after defendants had moved for dismissal for lack of evidence to support the allegations of the complaint, that plaintiff's motion to amend the complaint was granted. Defendants' objections that this introduced a new theory of negligence for which they had not had the opportunity to prepare, and that it was supported only by the opinion of plaintiff's final witness "based solely on the absence of written notes in the [hospital] record," did not persuade the trial court that the amendment should not be allowed.

Defendants thereupon advised the trial court that it would be necessary to call Dr. Dobernick as a defense witness on the issue of consultation and supervision. The request was refused.

Subsequently, a doctor who performed an examination of plaintiff four or five days before trial and was added as a witness, was permitted to testify beyond the boundaries the court imposed on her testimony when defendants objected to her being allowed to testify at all.

The trial court's findings clearly reveal that plaintiff's case was ultimately decided on the issue of lack of supervision and control—which was the negligence claim allowed by amendment after plaintiff had presented his evidence—and that the arteriogram would not have been ordered or performed if proper supervision and consultation had been obtained before the arteriogram was attempted. This state of facts presents the two issues determinative of this appeal, i. e., (1) Was it error to permit the trial amendment without also permitting defendants to call the judge's neighbor as a necessary defense witness in refutation of the basis for the new claim of negligence? and (2) was defendant denied a fair trial when a last-minute medical witness was permitted to testify beyond a pre-trial limitation imposed by the court?

1. *The trial amendment; the exclusion of essential testimony.*

Amendments to pleadings are favored and should be liberally permitted in the furtherance of justice. Rule 15(b), N.M. R.Civ.P., N.M.S.A.1978; *Martinez v. Research Park, Inc.*, 75 N.M. 672, 410 P.2d 200 (1965). However, when amendments to conform to the proof are asked, and there is no express or implied consent (as here), the test is whether prejudice would result to the opposing party if the amendment were allowed, i. e.,

> whether [the defendant] had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory.

3 Moore's Federal Practice 15–172, –173, ¶ 15.13[2]; *see also Wynne v. Pino*, 78 N.M. 520, 433 P.2d 499 (1967).

When the court refused to allow defendants to call Dr. Dobernick to meet the substance of the permitted amendment, it offered to accept a tender of proof. Plaintiff suggests that because defendants did not make a tender, any erroneous exclusion of evidence was cured or waived. N.M.R.Evid. 103, N.M.S.A.1978, requires a tender of evidence if a ruling excludes it, unless the substance of the evidence is clear to the

judge by offer or is apparent from the context of the questioning. The necessity for Dr. Dobernick's testimony was apparent from the moment defendants asked that he be allowed to testify on the supervision/consultation issue. Dobernick was the supervising physician from the Department of Surgery at the time the arteriogram was ordered. His testimony was crucial because plaintiff's expert testified that lack of supervision or consultation in approving the arteriogram procedure would be negligence. The expert agreed, however, that merely because such a consultation was not written into the hospital records, the absence of a record was not conclusive that a consultation had not occurred: "That [documentation] isn't [made] one hundred percent of the time."

Nonetheless, the trial court permitted the trial amendment to allege negligence inherent in a lack of consultation or supervision, based on the expert's assumption that failure to record a consultation indicated there had been none. The amendment added a new theory of negligence between the beginning and completion of plaintiff's case. Plaintiff was granted the advantage of amendment, over strenuous defense objections; yet when defendants requested an adjustment to their pre-trial evaluation of defense witnesses to be called, in order that they might meet the new and unanticipated malpractice charge, the trial court refused to accord to them the same degree of liberality as was shown to plaintiff.

■ The prejudice to defendants in denying them the chance to adequately defend was sufficient to require refusal of plaintiff's motion to amend. This is not a situation where a request for and allowance of a continuance would have helped; *see* 6 Wright and Miller, Federal Practice and Procedure: Civil 480–481, § 1495 (1971 ed.). Defense counsel had consulted with the medical director of the defendant hospital during the lunch hour, after plaintiff's doctor had testified regarding lack of supervision, and had been assured that Dr. Dobernick would give evidence that he had been consulted regarding the proposed arteriogram. If the witness who had rendered the diagnostic consultation and supervision were not to be allowed to testify, a continuance would serve no purpose. Consequently, defendants were not required to seek one to preserve the error. *Compare Batista v. Walter & Bernstein*, 378 So.2d 1321 (Ct. App.Fla.1980); *V. C. Edwards Contr. Co., Inc. v. Port of Tacoma*, 83 Wash.2d 7, 514 P.2d 1381 (1973).

■ The court's ruling on the amendment to the pleadings, together with its exclusion of essential defense evidence made necessary after the amendment was permitted, was an abuse of discretion. *See Hambaugh v. Peoples*, 75 N.M. 144, 401 P.2d 777 (1965). If defendants were to be bound by their preparatory assessment of necessary witnesses to defend against the pleaded act of negligence, so should plaintiff have been bound to the pre-trial acts of negligence alleged in his complaint against which the defense had had the opportunity to anticipate witnesses. Defendants were prejudiced, after the amendment was allowed, in presenting their defense upon the merits; N.M.R.Civ.P. 15(b), *supra*, condones amendments of the sort granted when such prejudice does *not* attach. The trial court should have granted the motion to amend *and* the request to call Dr. Dobernick, or it should have denied both.

2. *Dr. Hollinger's testimony.*

Trial was set for Monday, May 5th. On the preceding Thursday defense counsel was advised by plaintiff's counsel that a neurologist, Dr. Sonia Hollinger, had examined plaintiff on Wednesday (the day before) and would examine plaintiff's medical records on Friday (the next day) to prepare "an updated evaluation of his [plaintiff's] condition"; and that she "possibly" would be called by plaintiff as an expert witness. Defendants immediately sought a protective order and urged a continuance, contending extreme prejudice if Dr. Hollinger were to be added as a trial witness on such short notice—specifically, that defendants would be denied adequate opportunity to examine her before the trial. Counsel for

plaintiff told the court that he intended to rely on Dr. Hollinger to establish plaintiff's present medical condition, and he listed the conditions Dr. Hollinger had said she found on her Wednesday examination: residual hemiparesis, equilibrium problems and some memory loss. The court refused the continuance but ruled that if the doctor's testimony was different during trial from his understanding that she would "be used just to state his present condition and was not going to testify as to the alleged act of malpractice . . . then I'll grant your motion for continuance."

We agree with defendants' claim that plaintiff was allowed to far exceed the compass of Mr. Camp's present physical condition in his questioning of the witness, and she in her replies. During and in response to defendants' request for a ruling to limit testimony from Dr. Hollinger, the court again imposed this restraint on the questions and answers that would be permitted:

> Well, as I indicated before, if you're talking about any of the acts that led up to what they are claiming is the malpractice, . . . she cannot testify as to how those acts were performed or whether they were performed properly. I think we agreed to that.
>
> If it's just testimony about the condition afterwards and how that's changed to date, I see no problem.

Subsequently, when asked to describe an arteriogram, the witness said, in part:

> . . . The idea that they have in mind was to go down this way into the descending, so you could see both femorals here, the left and the right. It seems when they go around here, here in the upper part of the descending aorta, are the arteries who goes to the brain, to the right and to the left side of the brain.
>
> He started with a common carotid that subdivides in the top into internal and external carotid.
>
> And they went this way. They were trying to go down this way into the descending artery, but they could not. They struck the thing here, moving it back, who went up this way to the brain.

Defendants objected and asked that the testimony regarding the cause of the stroke be stricken; the court ruled it would not be stricken but, tacitly modifying its earlier ruling, said that "to the extent it's an opinion and not borne out by the records, I'll ignore it as far as establishing any kind of negligence." Several more questions were asked, and eventually the following series of questions, objections, and answers ensued:

> Q. Now, does that indicate to you—what does that indicate to you from the history of BCMC's own doctor?
>
> A. It seems to me, you know, that something [w]ent wrong.
>
> (Objection—overruled).
>
> Q. Well, let me ask it this way. Under primary and secondary diagnosis, it says, "Stroke, left internal capsulary thrombosis with dense right hemiparesis associated with an aortogram."
>
> A. Yes.
>
> Q. What does that mean in plain language?
>
> A. In plain language it means they did an arthrogram. And during the arthrogram, a stroke was made. And the only way that this can be done is—
>
> (Lengthy objection, argument by both counsel; objection overruled).

And, finally,

> Q. Now, then, Doctor, do you have an opinion as a matter of medical probability what caused—whether the stroke and right paralysis that Mr. Camp sustained was directly and proximately caused by the procedure of the arteriogram?
>
> (Objection—overruled).
>
> A. Yes, I think it's secondary to the arteriogram.

On all issues made by the pleadings in this case, defendants were entitled to depose every witness fully and exhaustively. *Griego v. Grieco*, 90 N.M. 174, 177, 561 P.2d 36 (Ct.App.1977), *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977). "Such a right is basically fundamental to our system of jurisprudence and no court has power to restrict or limit it." *Griego, supra, citing*

Northwestern University v. Crisp, 211 Ga. 636, 88 S.E.2d 26, 31 (1955). There is no question that Dr. Hollinger testified beyond the original limits proscribed by the court. She gave her opinion on ultimate issues of fact before the court. Plaintiff's counsel insisted that he had represented she would testify about causation and the relationship of the arteriogram to the stroke, but the record does not bear him out on that contention; and the rulings of the court at trial were not in accordance with its ruling when the matter of Dr. Hollinger's testimony was first brought to the court's attention. Defendants should have been afforded the opportunity to discover the full extent of this witness's testimony in order to adequately prepare to meet it; having reversed its earlier ruling during the presentation of this evidence, the court should have granted the continuance defendants were promised, so that defendants' rights to a fair opportunity to defend and offer additional evidence, if available, would have been protected. *See George M. Morris Const. Co. v. Four Seasons*, 90 N.M. 654, 567 P.2d 965 (1977).

It is true that the granting or denying of a motion for a continuance rests in the discretion of the trial court and is not to be interfered with except for abuse. *Tenorio v. Nolen*, 80 N.M. 529, 458 P.2d 604 (Ct.App.1969). But Dr. Hollinger's unexpected testimony required, in fairness and justice, that the discretion of the court be exercised favorably toward the continuance. We do not say that defendants will successfully defend when this case is retried, but we do hold that they are entitled to prepare for and conduct a defense free of eleventh-hour surprises.

This case is reversed and remanded for a new trial.

IT IS SO ORDERED.

ANDREWS, J., concurs.

SUTIN, J., dissents.

SUTIN, Judge (dissenting).

I dissent.

A. *Allowance of amendment to complaint during trial not error.*

Defendant claims the trial court erred in allowing plaintiff to bring in an entirely new, irrelevant, factual basis for support of his allegations of negligence, namely, *lack of supervision* of Dr. Davenport, a third year resident, who performed an aortogram. An aortogram or arteriogram, is a surgical or radiological procedure that has many risks which may result in a stroke, brain damage and paralysis.

During plaintiff's examination of Dr. Ole Peloso, who specialized in general and vascular surgery, a doctor who did not know Dr. Davenport, he testified that a third year resident was not as capable as someone who had gone through the training period. The following exchange occurred:

Q. *Would that be particularly true if he were not supervised in the procedure?*

A. Yes, I think so.

MR. THOMPSON: Object to that, Your Honor. *There is no evidence he wasn't supervised.*

THE COURT: Well, I don't know that there's any evidence to that. I assume you're going to tie that up later. *And if not, I'll strike the answer.*

MR. THOMPSON: I don't know how he would tie it up. This seems to be his last witness. It's again an attempt of Counsel to do a lot of testifying to get a lot of things in this court reporter record which doesn't appear anywhere else.

THE COURT: Well, if there are no facts to establish the question, *I'll of course, ignore it.* [Emphasis added.]

At the close of plaintiff's case, the trial court denied defendants' motion to dismiss pursuant to Rule 41(B) of the Rules of Civil Procedure. Plaintiff moved "to amend to include the allegations, specifically that there was negligence, *improper supervision or lack of supervision* of the resident and medical students in not having a staff physician reasonably well qualified participate in this decision to send him for an arterio-

gram." Over defendants' objection, the trial court granted the motion to amend.

Plaintiff requested the court to find:

* * * * * *

13. A third-year radiology resident does not possess the skill and knowledge to perform an arteriogram, *and there is no evidence that the resident was supervised during the procedure.* [Emphasis added.]

The trial court did not adopt this requested finding. The trial court found that:

* * * * * *

7. At no time prior to the performance of the arteriogram did the resident *consult with the supervising* ar [sic] attending *physician.* [Emphasis added.]

There is a significant difference between "supervision" and "consultation." "To supervise" means "to coordinate, direct, and inspect continuously and at first hand the accomplishment of." "To consult" means "to ask advice of." In effect, the trial court struck the answer of Dr. Peloso to the questions asked above as the trial court said it would do. The amendment allowed to the complaint had no effect upon the trial court's decision.

Unquestionably, the trial court had a duty to allow plaintiff to amend his complaint at the close of plaintiff's case. Rule 15 of the Rules of Civil Procedure. The proper question to have been raised was whether the trial court erred in admitting in evidence the issue of lack of supervision. Even so, the answer was given and defendants did not move to strike the answer. The trial court volunteered to assist defendants in this matter. Otherwise, defendants could not have raised any question of error on this subject matter.

Defendants now seek to escape by claiming prejudice due to the absence of Dr. Dobernick, the supervising physician, during the treatment of plaintiff. In the opening statement, plaintiff stated that Dr. Dobernick never saw the patient. At this point, the court inquired whether Dr. Dobernick would be a witness. Both parties stated that he would not be a witness. During cross-examination of Dr. Peloso, defendants stated: "Dr. Dobernick will testify." The court said:

Wait a minute. I asked at the beginning of the case whether Dr. Dobernick was going to testify. And I was told by both of you that Dr. Dobernick would not testify, and that's the only reason I decided to hear this case.

After much argument, the court announced that the matter would be argued in chambers after the witness was excused. At the close of the argument, the court stated:

I'll let you make an offer of proof as to what his testimony would be . . . .

During defendants' case in chief, the court said:

Well, I indicated yesterday if you wanted to make an offer of proof for the record as to what Dr. Dobernick would testify to, that I would allow that.

MR. THOMPSON: *I intend to, Your Honor.* I'm just trying to ask this witness to identify Dr. Dobernick.

Again the court said:

The issue in question is whether a resident consulted with Dr. Dobernick prior to performing this procedure.

Dr. Pitcher, defendants' witness, was asked to search the records to find evidence of Dr. Dobernick signing the records and answered, "I don't see Dr. Dobernick's signature here."

Finally, and presumably after Mr. Thompson spoke with Dr. Dobernick, the trial concluded. Mr. Thompson was asked by the court:

Do you have any other evidence?

MR. THOMPSON: No, your honor. *I would not make an offer of proof.* [All emphasis added.]

It is no longer necessary to cite authority for the established rule that an offer of proof is essential to preserve the error for appeal. No offer of proof was made because defendants knew that Dr. Dobernick would not support defendants' position. In reply, defendants state that "[t]here was no

time for consultation with Dr. Dobernick during this trial such as would have permitted a meaningful tender of proof of what his testimony would have been." Nothing appears of record that defendants made any attempt to contact Dr. Dobernick, an employee of defendants. In reply to the cases cited by plaintiff, defendants cite *Epstein v. Waas*, 28 N.M. 608, 216 P.2d 506 (1923); *Houston v. Young*, 94 N.M. 308, 610 P.3d 195 (1980), neither of which are applicable to this issue.

Defendants state:

> If this Court permits this amendment to stand, it will result in turmoil in the trial court level in the future, as attorneys will offer like amendments during trail and deprive other parties an opportunity to prepare a defense.

Quite the contrary, Rule 15 was adopted to preserve the rights set forth. "Quotation of the rule, a statement of its purpose and effect, and the citation of authority are unnecessary to support . . . [plaintiff's] motion and the order granting the motion." *Citizens Bank v. C & H Const. & Paving Co., Inc.*, 89 N.M. 360, 364–5, 552 P.2d 796 (Ct.App.1976).

Defendants suffered no prejudice in the ruling of the court.

B. *The trial court properly managed the use of witnesses.*

Defendants state:

> Mismanagement of the witnesses by the lower court begins with allowing Dr. Sonia Hollinger to testify over BCMC's objection.

On September 20, 1979, in answer to defendants' request for names of expert witnesses, plaintiff did not list Dr. Hollinger. On May 1, 1980, at a hearing held three days before trial, plaintiff handed defendants a letter which stated:

> Therefore, *yesterday* I referred Mr. Camp to Dr. Sonia Hollinger, the neurologist, for an updated evaluation of his condition. *Mr. Camp will be examined by Dr. Hollinger who will review the medical records tomorrow.* This is to advise you that I will possibly call Dr. Hollinger as a witness. [Emphasis added.]

In effect what plaintiff related to defendants was that on Thursday, May 1, 1980, plaintiff had been referred to Dr. Hollinger; that on Friday, May 2, 1980, Dr. Hollinger will examine plaintiff and the medical records. Trial was set for Monday, May 5, 1980. The time available for an interview or deposition was Saturday, May 6, or Sunday, May 7, 1980. The court authorized the taking of the deposition on Saturday, May 6, but defendants said that it was impossible for reasons stated. Plaintiff suggested that Dr. Hollinger would be available to interview, but defendants said they would not act on five minutes notice.

After extensive argument, plaintiff announced what Dr. Hollinger's testimony would be. The trial court then granted plaintiff the right to use the expert testimony. Defendants now claim it suffered extreme prejudice because it lost *the right* to pre-trial discovery.

The trial court did not deny defendants *the right* to pre-trial discovery. Defendants decided not to take the deposition. The reason appears to be "THREE DAYS BEFORE TRIAL," as emphasized by defendants. Rule 30(B)(3) provides that:

> The court may for cause shown enlarge or shorten the time for taking the deposition.

It should be noted that there is no requirement of notice. The requirement was omitted to take care of the situation in which notice to take a deposition is so short that the five-day notice of motion required by Rule 6(d) cannot be given. 4A Moore's Federal Practice, p. 30–84 (1981). Plaintiff discovered before trial that two of the doctors listed as witnesses had left the hospital and he had no doctor that practiced in neurology. Therefore, it was requested that plaintiff be examined by Dr. Hollinger, a neurologist. This was good cause shown. But it amply points to danger that exists when plaintiff waited almost the full limitation period in which to file this case. This practice can be as burdensome to a plaintiff as it is to a defendant. It should be avoided

under normal circumstances. It should be available under extraordinary circumstances. However, the statutory period represents the public policy of this State and cannot be condemned.

It appears that defendants made no effort to interview Dr. Hollinger or to take her deposition.

In *Ramm Industries Co. v. Chapman Performance Products, Inc.*, 18 F.R.Serv.2d 1531 (Ill.1974), plaintiff sought a postponement of depositions. The court held that four days notice was reasonable under the circumstances. The court said:

> It is clear to this court that the taking of the deposition . . . is necessary and proper to the speedy resolution of the instant litigation. Delay does not appear to be justified.

In the instant case, the court exercised judicial discretion in allowing the deposition to be taken, rather than to delay the trial months hence. It is important to note that this case was tried before the court. To show an abuse of discretion, defendants would have to show that Dr. Hollinger's testimony affected the decision of the court. The parties agreed that Dr. Hollinger would not testify as to any negligence of defendants. During her examination, defendants made objections that the testimony went beyond the agreement. The court stated that it would ignore all such testimony. Even though we agree that plaintiff mistakenly went beyond the agreement, we assume that the trial court ignored the answers. We may also assume, unless shown to the contrary, that questions and answers were the same as those of other doctors who testified.

No reasonable approach to this perplexing problem can impute to the trial court that it acted beyond the bounds of reason. No prejudice to defendants was shown, nor can it be shown. That which might be considered error when the trier of the fact is a jury does not necessarily constitute error when the trier of the fact is a judge. The personality of the judge is the pivotal factor. "Efforts to eliminate the personality of the judge are doomed to failure. The correct course is to recognize the necessary existence of this personal element and to act accordingly." Frank, Law and the Modern Mind, p. 138 (1936).

Defendants close this point with the observation that it was unfair to allow Dr. Hollinger to testify, yet deny Dr. Dobernick the right to testify for defendants. The precise answer is that defendants did not offer proof of Dr. Dobernick's knowledge of the patient's condition or whether actual supervision was exercised by Dr. Dobernick. We may assume, unless shown to the contrary, that Dr. Dobernick did not supervise the aortogram made by the third year student. For this failure, the liability of defendants was established per se.

The trial court properly managed the use of witnesses Drs. Hollinger and Dobernick.

The majority opinion did not decide the other issues raised. I refrain from doing so.

633 P.2d 727

In the Matter of the ESTATE OF Candido MARTINEZ, Deceased.

Magdalena L. MARTINEZ, et al., Plaintiffs-Appellees,

v.

Vincente H. ANDERSON, et al., Defendants-Appellants.

No. 4959.

Court of Appeals of New Mexico.

July 16, 1981.

Writ of Certiorari Denied Sept. 8, 1981.

Edward J. Apodaca, Jr., Edward J. Apodaca & Associates, Albuquerque, for defendants-appellants.

Narciso Garcia, Jr., Albuquerque, for plaintiffs-appellees.

OPINION

WOOD, Judge.

This case involves the doctrine of advancements. We (1) refer to certain procedural matters and discuss (2) whether the advancement provision of the Probate Code applies; (3) whether the doctrine of advancements applies to intestate proceedings; (4) the presumption of an advancement; (5) evidence to rebut the presumption; and (6) evidence of advancement apart from any presumption.

Inasmuch as all persons involved in this litigation were at one time named Martinez, we refer to them by their first names.

Theresita, the first wife of Candido, died in 1922 or 1923. There were three children of that marriage—Arturo, Merenciana and Jose G., also known as Jose Diego (hereinafter referred to as Jose).

Candido married Magdalena in 1927. There were six children of this marriage. Three of these six children testified—Gonzalo, Eutimio and Jose Rafael (hereinafter to as Rafael).

Candido executed and delivered a deed to approximately 15 acres of land to each of the children of the first marriage. The deed to Merenciana was in 1937, to Arturo in 1941, to Jose in 1948. Magdalena, the second wife, joined in the deeds to Merenciana and Arturo.

Candido died, intestate, in 1965.

Administration proceedings were begun in 1966. A dispute arose between the children of the first and second wives; the second set of children claimed that the land deeded by Candido to the children of the first wife were advancements. The result was that the attorney who instituted the

administration proceedings withdrew and the delays began.

Jose brought a quiet title suit in 1966 that apparently raised the advancement issue as to him. This case was tried in 1974.

Magdalena and her six children filed a quiet title suit in 1970. This suit named the children of the first wife as defendants. This suit involved the question of advancements to Arturo and Merenciana.

In addition, Arturo asserted, in the administration proceedings, that he was entitled to a child's share of Candido's estate and that the land deeded to him was not an advancement.

In 1978 the trial court ordered a consolidation of the two quiet title suits and the administration proceedings, at least to the extent of the common question concerning the advancements. Also in 1978, an order was entered in the consolidated case, which gave judgment in Jose's quiet title suit which had been tried in 1974. That judgment was that Jose's land was not an advancement and that Jose was entitled to a share of Candido's estate as provided by the applicable law of descent and distribution. This judgment in favor of Jose is not involved in this appeal.

The question of whether Merenciana's deed was an advancement has not yet been tried.

This appeal involves the question of whether Arturo's deed was an advancement. This issue was tried in May, 1980. The trial court's decision was filed in August, 1980 and judgment adverse to Arturo was entered in October, 1980.

The trial court found: "The conveyance to Arturo . . . was intended by the deceased to be the grantee's share of (an advancement against) the estate of the deceased." The trial court concluded: "The conveyance to Arturo . . . was an advancement and said child is not entitled to any other portion of the estate of Candido . . . ."

Arturo appeals; for convenience, we refer to the opposition to Arturo, in both the administration proceedings and the quiet title suit, as Magdalena.

Procedural Matters

(a) The delays in this case are unconscionable; justice delayed is justice denied. The differences among the children of Candido were apparent soon after administration proceedings were begun in 1966; that those differences have been only partially resolved, judicially, in 1981 is appalling. The appellate record suggests some reasons in explanation of the delay—difficulties in obtaining the land description and in obtaining abstracts, dilatoriness on the part of at least some of the children, changes in attorneys and changes in judges. These suggested reasons are, however, insufficient to justify a fourteen-year delay in resolving the question of whether Arturo's deed was an advancement. By these comments we do not assess blame against the current trial judge or the current attorneys. The delay does suggest the need for a form of docket control in civil cases which prevents attorneys from proceeding at their leisure. We refer to this again at the close of this opinion.

(b) Arturo complains of various procedures; we dispose of them summarily. (1) The propriety of the trial court's dismissal and subsequent reinstatement of both the administration proceedings and quiet title suit cannot be answered because of the ambiguity of the record. (2) The consolidation of the administration proceedings and the quiet title suit appears to be a consolidation limited to resolving the advancement question and not a consolidation for all purposes; there are numerous parties in the quiet title suit, and issues in that suit differ from the matters to be resolved in the administration proceedings. (3) The trial court made no finding as to estoppel, laches and the statute of limitations; those are not issues in this case. (4) That the trial court's judgment as to Arturo was in the quiet title suit, and that there is no judgment as to Arturo in the administration proceedings, presents no difficulty. The question of an advancement to Arturo, in both suits, was to be resolved at one trial. Appropriate judgments, in both cases, should be entered on remand. (5) That the trial court's rul-

ing, see finding and conclusion quoted above, excluded Arturo from an intestate share, rather than giving Arturo the option of putting the advancement into hotchpot, was consistent with the position of the parties at trial and makes no difference in this case because of the result we reach.

The Advancement Provision of the Probate Code

Section 45–2–110, N.M.S.A.1978, provides:

> If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir is treated as an advancement against such heir's share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement.

Arturo contends § 45–2–110 applies, and prevents Arturo's 15 acres of land from being an advancement because there is no contemporaneous writing by Candido, and no written acknowledgement by Arturo, that the 15 acres of land was an advancement. We disagree.

Section 45–2–110 was enacted as a part of Laws 1975, ch. 257. Section 10–101(B) of that law provides:

> B. The Probate Code applies to the affairs of decedents dying on or after the effective date of the Probate Code, and to matters of missing persons, protected persons, minors and incapacitated persons commenced on or after the effective date of the Probate Code.

The effective date of the Probate Code was July 1, 1976, Laws 1975, ch. 257, § 10–101(A). Candido died in 1965. This litigation involves no matters pertaining to missing, protected or incapacitated persons, and no matters pertaining to a minor. See *Matter of Estate of Seymour*, 93 N.M. 328, 600 P.2d 274 (1979).

Section 45–2–110, supra, is not involved. The doctrine of advancements applicable in this case is that which existed prior to the enactment of § 45–2–110.

Whether the Doctrine of Advancements Applies to Intestate Proceedings

Historically, "the doctrine of advancements applies only in cases of intestacy .... In cases of testacy, however, the term is frequently found in construing the provisions of wills which have made use of the term in attempting to equalize the distribution of estates among legatees and devisees." *Harper v. Harris*, 294 F. 44 (8th Cir. 1923). See *Nobles v. Davenport*, 183 N.C. 207, 111 S.E. 180, 26 A.L.R. 1086 (1922).

Arturo's claim that the doctrine of advancements, in New Mexico, does not apply to intestacy proceedings is based on the following sentence from *In re Williams' Will*, 71 N.M. 39, 376 P.2d 3 (1962): "Advancements should be confined to cases where the testator by will specifically directs that certain gifts already made by him be counted as advancements in equalizing the distribution of his estate."

The reliance on *In re Williams' Will* is misplaced. The quoted sentence refers only to the use of the law of advancements in testacy proceedings. The context of the sentence went to a distinction between ademption and advancement in testacy matters; this distinction was made in pointing out that the doctrine of advancements was not involved, that the issue in that case was whether there had been an ademption. *In re Williams' Will* cited *Sylvanus v. Pruett*, 36 N.M. 112, 9 P.2d 142 (1932), which quoted *Harper v. Harris* with approval as to the use of the doctrine of advancements in testacy matters.

■ No New Mexico decision rejects the use of the doctrine of advancements in intestacy proceedings; we hold the doctrine is applicable to intestacy proceedings. *Harper v. Harris*, supra.

Presumption of an Advancement

Nobles v. Davenport, supra, provides a definition of an advancement sufficient for this case:

> [A]n "advancement" is an irrevocable gift in praesenti of money or property, real or

personal, to a child by a parent, to enable the donee to anticipate his inheritance to the extent of the gift; or, as somewhat differently defined, a perfect and irrevocable gift, not required by law, made by a parent during his lifetime to his child, with the intention on the part of the donor that such gift shall represent a part or the whole of the donor's estate that the donee would be entitled to on the death of the donor intestate.

See *Harper v. Harris.*

Clement v. Blythe, 220 Ark. 551, 248 S.W.2d 883, 31 A.L.R.2d 1033 (1952), states: "There is a presumption that a parent's substantial gift to one of his children is intended as an advancement." This presumption is based on the view "that the natural affection of a parent is as strong for one child as for another, and that, in the distribution of his property, the parent will treat his children equally and fairly." *Annot.*, 31 A.L.R.2d 1036 at 1040 (1953).

Candido's deed of 15 acres of land to Arturo raised a presumption that the land was an advancement.

Evidence to Rebut the Presumption

The Annotations at 26 A.L.R. 1106 (1923) and 31 A.L.R.2d 1036 (1953) state the holdings of various states as to the quantum of evidence required to rebut the presumption. The amount necessary has been stated as "clear and unmistakable" evidence, a preponderance of the evidence, and slight evidence. *Clement v. Blythe*, supra, states that the "presumption is not an especially strong one. There may evidently be many reasons for a parent to think that one of his children should receive more than an exact share of the estate." *Clement v. Blythe* holds that the presumption may be " 'readily overcome' ".

We need not decide the "strength" of the presumption or choose the quantum of evidence required to rebut it. New Mexico has decided the matter in other cases.

This litigation, being so old, is not governed by the Rules of Evidence. The Supreme Court Order of April 26, 1973, which adopted the Rules of Evidence, states: "[T]he Rules of Evidence . . . shall be effective July 1, 1973, for cases filed on or after said date. Cases filed prior to July 1, 1973, shall be governed by rules applicable prior to the effective date of these rules."

Both the administration proceedings and the quiet title suit were filed prior to July 1, 1973; Evidence Rule 301, on presumptions, does not apply; New Mexico law on presumptions, prior to the adoption of Evidence Rule 301, is applicable.

Trujillo v. Chavez, 93 N.M. 626, 603 P.2d 736 (Ct.App.1979), states:

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).

The presumption operated against Arturo; he introduced evidence that would have supported a finding contrary to the presumption. That evidence was the trial testimony of Arturo and Merenciana that Candido's deeds to them were their inheritance from their mother, Theresita. Arturo testified that Candido made that statement when Candido and Magdalena signed Arturo's deed; Magdalena's deposition testimony (at trial, her testimony was different) was " 'it was the mother's part he gave to the three.' " With this evidence the presumption vanished "as though it had never existed". *Hartford Fire Insurance Company v. Horne*, 65 N.M. 440, 338 P.2d 1067 (1959).

The ruling that Arturo's deed was an advancement cannot be sustained on the basis of a presumption of advancement.

Evidence of Advancement Apart From Any Presumption

In the determination of the question whether a transfer of property from parent to child is a gift, a sale, or an ad-

vancement, the intention of the grantor is the controlling element. [Citations omitted.] And only such intention as exists at the time of the transaction is to be considered.

Nobles v. Davenport, supra; see also *Annot.*, 26 A.L.R. 1089 (1923).

The testimony of Arturo and Merenciana, and the deposition testimony of Magdalena, is to the effect there was no advancement. The question, however, is whether there is evidence supporting the finding that the land deeded to Arturo was an advancement. Four items of evidence are directed to this question—the trial testimony of Magdalena, Rafael, Eutimio and Gonzalo.

We have previously pointed out that in her deposition, taken in 1971, Magdalena testified that the acreage deeded to Arturo, Jose and Merenciana was for their mother's part. At trial (1980), Magdalena testified the acreage "was the inheritance he [Candido] left to them"; she also testified that she did not know Candido's intent in executing the deeds; that she remembered going with Candido to Philip Hubbell's office where the deed to Arturo was executed, and remembered signing the deed, but could not remember any discussion with Candido concerning that deed. The trial court admitted Magdalena's deposition without requiring individual questions concerning the deposition. The trial court's reason, in part, was: "I feel her memory has been impaired to some extent since this deposition".

Magdalena's lack of knowledge as to Candido's intent and inability to remember any discussion with Candido concerning Arturo's deed deprive her testimonial conclusion, that the deeds were an inheritance from Candido, of any probative effect. Candido's intent was the controlling element; as to that, Magdalena had no knowledge.

The testimony of Rafael, Eutimio and Gonzalo involves the issue of subsequent declarations of Candido as to his intent when he executed the deed to Arturo. Eutimio, born in 1934, testified that when he was 19 years old (thus in 1953), Candido "told me about the land, that he gave it to my three half brothers [Merenciana is a female]. It was inheritance, you know, the land." Rafael, born in 1944, testified that when he was 15 years old (thus in 1959), Candido "brought up my two half brothers and my half sister, that they had gotten their inheritance already." Gonzalo testified that Candido stated in three conversations with Gonzalo that the deeds to the 15 acres of land to Arturo, Jose and Merenciana were their share of the inheritance. The first of these conversations was when Gonzalo was 18 years old (he was born in 1940), thus in 1958. The second conversation was in 1963 and the third conversation was in 1964.

The testimony of Eutimio, Rafael and Gonzalo is that in conversations with Candido, 12, 17, 18, 22 and 23 years after the 1941 deed to Arturo, Candido stated that he had given Arturo, Merenciana and Jose their inheritance.

Arturo objected to the admission of this testimony because it was hearsay. The trial court permitted the testimony, but reserved a ruling on the admissibility. The trial court never expressly admitted the testimony; we consider whether it could properly be considered because there is no evidence, apart from this hearsay, to support the finding of advancement.

In contending this hearsay was admissible, Magdalena relied on Evidence Rules 803(3), 804(b)(4) and 804(b)(6). We have previously pointed out that the Rules of Evidence are inapplicable because the administration proceedings and the quiet title suit were filed before the Rules of Evidence were adopted.

The substance of Magdalena's argument for admissibility was that the testimony was admissible under "state of mind", "statement against interest", and "necessity" exceptions to the rule excluding hearsay. The Annotations at 26 A.L.R. 1106 at 1167 and 31 A.L.R.2d 1036 at 1051, point out a conflict of authority as to whether subsequent declarations are admissible "to prove or to rebut the presumption of an advancement." In this case, Candido's subsequent declarations do not involve a presumption—

under the evidence, the presumption ceased to exist. The question is whether the subsequent declarations are competent to show an advancement, regardless of any hearsay exception.

The fact that the declarations were "subsequent" does not answer the question of admissibility. Subsequent declarations were held admissible on the issue of delivery of a deed in *Schultz v. Young*, 37 N.M. 427, 24 P.2d 276 (1933). Subsequent declarations were held admissible on the issue of ademption. *In re Williams' Will*, supra. Both of these decisions point out that admissibility depends on the circumstances involving the subsequent declaration.

A circumstance to be considered is the nature of subsequent declaration testimony. Such declarations "are generally regarded as unsatisfactory evidence on account of the ease with which they may be fabricated, the impossibility of contradiction, and the consequences which the slightest mistake or failure of memory may produce." *Ellis v. Newell*, 120 Iowa 71, 94 N.W. 463 (1903). See *Comer v. Comer*, 119 Ill. 170, 8 N.E. 796 (1886); *Rowe v. Rowe*, 144 Va. 816, 130 S.E. 771 (1925). Concern with mistake of memory is particularly appropriate in this case—Eutimio testified to a conversation 27 years earlier; Rafael testified to a conversation 21 years earlier, Gonzalo testified to conversations 16 to 22 years earlier. Compare *McCoy v. Alsup*, 94 N.M. 255, 609 P.2d 337 (Ct.App.1980), where the conversation was two years earlier.

Another circumstance to be considered is the remoteness of the conversations. The closest conversation, offered to prove Candido's intent, occurred 12 years later. Subsequent declarations "several years after the transaction" were held to be too remote in *Thistlewaite v. Thistlewaite*, 132 Ind. 355, 31 N.E. 946 (1892). A declaration one year after the transaction was held to be too remote in *Lowe v. Wiseman*, 46 Ind.App. 405, 91 N.E. 364 (1910). *In re Williams' Will*, supra, in holding that fifty days was not too remote, states:

> [E]vidence which is otherwise competent may relate to facts too remote in point of time or matters too far removed from the scene of the transaction to be admissible.

Another circumstance to be considered is that the testimony of Eutimio, Rafael and Gonzalo was self-serving because its effect would be to increase their share of Candido's estate. *Brown v. General Insurance Company of America*, 70 N.M. 46, 369 P.2d 968 (1962), states that with certain exceptions, "[s]elf-serving declarations regardless of relevancy or materiality are incompetent."

We do not hold that the hearsay testimony was inadmissible because of any one of the above circumstances. We do hold that the hearsay was inadmissible because of the combination of the circumstances. As an example: Eutimio gave self-serving testimony in 1980 to a conversation with Candido in 1953 to prove Candido's intent in 1941. The time and self-serving circumstances emphasize the possibility of mistaken memory to such an extent that the testimony was inadmissible.

Evidence Rule 803(3) excludes statements "of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." The Advisory Committee's Note explains this limitation:

> The exclusion of "statements of memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind.

Although the Rules of Evidence are not applicable in this case, this explanation is applicable to the hearsay testimony under consideration.

The hearsay testimony of Eutimio, Rafael and Gonzalo was not competent and could not be properly considered by the trial court. There being no other evidence to support the finding of an advancement, that finding is erroneous and the judgment based thereon must be reversed.

The judgment of the trial court is reversed. The cause is remanded with instructions to enter judgments in both the administration proceedings and the quiet title suit that the 1941 deed to Arturo was not an advancement. The trial court is also instructed to give these cases precedence on its civil docket with the purpose of deciding the advancement issue as to Merenciana, and closing these cases in a reasonable time after this decision becomes final. Any requests for delay by litigants or counsel are to be closely scrutinized; the trial court should impose a time schedule for bringing this litigation to an end.

Arturo is to recover his appellate costs.

IT IS SO ORDERED.

LOPEZ and WALTERS, JJ., concur.

633 P.2d 1225

STATE of New Mexico, Petitioner,

v.

Willie James STEVENS, Respondent.

No. 13524.

Supreme Court of New Mexico.

Sept. 15, 1981.

Jeff Bingaman, Atty. Gen., Charles F. Noble, Asst. Atty. Gen., Santa Fe, for petitioner.

John B. Bigelow, Chief Public Defender, Melanie S. Kenton, Asst. Appellate Defender, Santa Fe, for respondent.

OPINION

PAYNE, Justice.

The defendant, Willie James Stevens, was convicted of second-degree murder under the third of a series of successively more serious indictments. On appeal he alleged, among other things, that the enhanced successive reindictments which resulted in his conviction violated his right to due process. The Court of Appeals overturned the conviction, holding that the reindictments created a presumption of vindictiveness on the part of the prosecutor. We granted certiorari and reverse the Court of Appeals on that issue.

The defendant was originally indicted for aggravated assault with a firearm enhancement and voluntary manslaughter or, in the alternative, involuntary manslaughter with firearm enhancement. He moved to suppress certain evidence upon which this indictment was based. While the first indictment was pending and before a ruling on the motion to suppress, a second indictment was filed which charged the defendant with second-degree murder with firearm enhancement. Four days after the second indictment was filed, the district attorney filed a *nolle prosequi* in the first cause. Notwithstanding the *nolle prosequi*, the trial court acted on the motion to suppress and ruled in the defendant's favor. The defendant's subsequent motion to quash the second indictment was granted because that indictment was filed while the first was still pending. Later, the prosecutor procured a third indictment containing an open charge of murder. The court granted the defendant's motion to quash the third indictment on the grounds that it was based on evidence suppressed as to the first indictment. On appeal, the Court of Appeals reinstated the third indictment. *State v. Stevens*, 93 N.M. 434, 601 P.2d 67 (Ct.App.1979). A second motion to quash the third indictment was denied.

Prior to trial on the third indictment the defendant moved again for dismissal upon a new ground contending that the successive reindictments on more serious charges denied him due process. The trial court denied the motion because it found no vindictiveness on the State's part in increasing the charges in the successive indictments.

On appeal his conviction was reversed by the Court of Appeals which held that a presumption of vindictiveness arose when the prosecutor sought an enhanced indict-

ment after the defendant exercised a procedural right which resulted in a need for reindictment. We disagree with the Court of Appeals that a presumption of vindictiveness arose in this case and affirm the trial court.

The United States Supreme Court recognized a presumption of vindictiveness in *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). There the Court held that the record must reflect the reasons for a heavier sentence imposed by the same judge after a second conviction resulting from a successful appeal of the original conviction. The holding was based on two concurrent due process considerations. First, "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." Second, "due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge" which could deter exercise of procedural rights. *Pearce, supra*, 395 U.S. at 725, 89 S.Ct. at 2080. The requirement of objective, on-the-record facts justifying the stiffer sentence is a "prophylactic rule" intended to police vindictive judicial behavior. However, this rule does not apply where a stiffer sentence is imposed pursuant to a trial de novo before a different judge, *Colten v. Kentucky*, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972), or where the resentencing is performed by a different jury following a second conviction after a successful appeal, *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973). In the latter cases, the Court explained that a different judge or a different jury will have "no personal stake in the prior conviction and no motivation to engage in self-vindication." *Stynchcombe, supra*, 412 U.S. at 27, 93 S.Ct. at 1983.

In *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), the concern about vindictiveness was extended to prosecutorial action. In that case, the defendant, originally indicted on a misdemeanor charge, was reindicted on a more serious felony charge after he had exercised a statutory right to a de novo trial. On these facts, the Court concluded that the prosecutor had a "considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo," since "such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free." *Id.*, at 27, 94 S.Ct. at 2102. Applying the rationale of *Pearce*, the Court held that the prosecutor's conduct violated due process, not because there was evidence of bad faith or because "actual retaliatory motivation must inevitably exist" in this circumstance, but because of the improper deterrent effect of a defendant's apprehension of retaliation. "A person convicted of an offense is entitled to pursue his statutory right of a trial de novo without apprehension that the state will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration." *Blackledge, supra*, 417 U.S. at 28, 94 S.Ct. at 2102–2103.

Most recently, in *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), the Court refined its approach. The prosecutor, openly admitting that he acted vindictively, obtained a second indictment adding a more serious charge after the defendant refused to plead guilty to the original indictment. The Court ruled that the defendant's due process rights were not impaired. Since an increase in charges as a part of the "give-and-take" of plea bargaining contained "no element of punishment or retaliation as long as the accused is free to accept or reject the prosecution's offer." *Id.* at 363, 98 S.Ct. at 668.

A review of the approaches used in the federal courts demonstrates that reconciliation of these three cases has not been easy. A good example of this difficulty is *United States v. Andrews*, 633 F.2d 449 (6th Cir. 1980), in which four judges dissented separately from the *en banc* decision.

Andrews involved a superseding indictment charging conspiracy which the prosecutor obtained within two days after the defendants successfully appealed a denial of bail. The court framed the question as a reconciliation of "two conflicting rules of law: 1) prosecutors have and need broad discretion to file charges where there is probable cause that someone has broken the law; 2) vindictive conduct by persons with the awesome power of prosecutors (and judges) is unacceptable and requires control." *Id.* at 453. The majority adopted a standard that if "there existed a realistic likelihood of vindictiveness for the prosecutor's augmentation of the charges," the burden of disproving it is on the government. To avoid the difficulty and unpleasantness of having judges pass on subjective good faith assertions by prosecutors, "only objective, on-the-record explanations can suffice to rebut a finding of realistic likelihood of vindictiveness." *Id.* at 456 (footnote omitted). The court reached this result, applying it to pretrial prosecutorial discretion, by limiting *Bordenkircher* to the specific context of plea bargaining.

Other circuits have applied different analyses. For example, in the Fifth Circuit, if a prosecutor adds charges related to separate criminal acts, he may overcome a presumption of vindictiveness merely by presenting non-vindictive reasons for his action. *Hardwick v. Doolittle*, 558 F.2d 292 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d 801 (1978). However, if the added charges arise out of the activity involved in the original indictment, a balancing test is applied which may result in barring the added charge. *Jackson v. Walker*, 585 F.2d 139 (5th Cir. 1978); *Miracle v. Estelle*, 592 F.2d 1269 (5th Cir. 1979). That same circuit has recently ruled that there is no violation of due process where a defendant receives a greater sentence for choosing a trial over making a plea bargain. There, the sentencing judge indicated in pretrial plea bargaining sessions that he would sentence the defendant to twenty years confinement if he accepted a plea bargain. After trial, the same judge sentenced the defendant to thirty-three years in prison. *Frank v. Blackburn*, 646 F.2d 873 (5th Cir. 1980).

In the Ninth Circuit, the prosecutor bears a heavy burden to overcome the presumption of vindictiveness whenever charges are added after the defendant exercises a procedural right. *United States v. Groves*, 571 F.2d 450 (9th Cir. 1978); *United States v. Griffin*, 617 F.2d 1342 (9th Cir. 1980).

The Fourth Circuit recently held that, even though the prosecutor did not act with actual vindictiveness in seeking a felony indictment, a felony conviction must be set aside where the indictment could have been brought before the defendant elected a jury trial on a misdemeanor charge, but was not actually brought until after. The court feared that permitting the felony prosecution might chill the exercise of the right to a jury trial. *United States v. Goodwin*, 637 F.2d 250 (4th Cir. 1981).

The Tenth Circuit has held that application of the New Mexico Habitual Offender Act to a defendant who had successfully appealed his original conviction but who had been re-convicted was improper since the prosecutor had not applied the Act after the original conviction. *James v. Rodriguez*, 553 F.2d 59 (10th Cir. 1977), *cert. denied*, 434 U.S. 889, 98 S.Ct. 262, 54 L.Ed.2d 174 (1977). Several other variations of the vindictiveness notion have been applied. In the absence of further guidance by the United States Supreme Court, we deem it necessary to make an independent analysis of the question.

In reconciling the conflicting rules of law outlined by the *Andrews* court, we note that the U. S. Supreme Court has never applied the vindictiveness notion to a prosecutor's actions in the pretrial and trial stages of a criminal case. *Bordenkircher* was the only case presenting pretrial activity, and there, despite clearly vindictive conduct, the Court declined to apply the doctrine. As Justice Blackmun stated in dissent, the Court appeared to be "departing from, or at least restricting" the *Pearce* and *Perry* doctrines. *Bordenkircher, supra*, 434 U.S. at 365, 98 S.Ct. at 669.

The prosecution in the present case urges a distinction based on a double-jeopardy notion; i. e., it claims that the presumption of vindictiveness was intended only to protect double jeopardy values involving post-conviction vindictiveness. As a result, the doctrine would not apply to pretrial proceedings. Adoption of this analysis would limit *Pearce* and *Perry* to the double jeopardy context. While this approach has the obvious advantage of relative simplicity and ease of application, we cannot foreclose the possibility that a prosecutor's pretrial retaliatory conduct might violate due process.

At the same time, we see serious problems in applying a *Pearce/Perry* presumption of vindictiveness at the pretrial stage. As Judge Merritt stated in dissent in the *Andrews* case:

> During the pretrial and trial process, the prosecutor must decide what position to take on an endless variety of procedural, evidentiary, substantive and tactical questions. He may oppose motions to suppress evidence or for the appointment of counsel or refuse to agree to discovery, severance, bail, or plea bargaining; he may try to get into evidence prior criminal conduct or various co-conspirator and other kinds of hearsay; he may be harsh in his characterization of the defendant's conduct to the jury; he may recommend probation or refuse to prosecute altogether; or he may make a deal with a co-defendant in exchange for incriminating testimony and on and on.
>
> Once a defendant has successfully asserted a particular legal right in the course of the criminal process over the prosecutor's objection, is the prosecutor arguably guilty of unconstitutional vindictive conduct, which "chills" the exercise of the legal right asserted, each time the prosecutor thereafter takes a position contrary to the interests of the defendant? If not, why not, and what is the standard of measurement? What difference does it make that the prosecutor's conduct took place *after* rather than *before* the defendant asserted the right? The "exercise" of a legal right can be more effectively "chilled" before it is asserted than after. What difference should it make that the defendant was unsuccessful rather than successful in asserting the legal right? On the facts of this case, would it make any difference that the defendant lost his motion for bail rather than won it? If we are talking about the "exercise" of a legal right, should it make a difference that its exercise happened to be unsuccessful in the particular case?

633 F.2d at 459.

We are sensitive both to a defendant's due process rights and to the need for full prosecutorial discretion in seeking indictments. We would not hesitate to impose a presumption of vindictiveness if we felt that such a presumption were necessary to protect defendants, in a pretrial setting, from deprivations of due process. We do not feel that such a presumption is necessary, however.

At the pretrial stage the prosecutor has not gone through the effort of a trial and therefore has less at stake and less motive to act vindictively. As pointed out by Judge Merritt, many actions taken by a prosecutor prior to conviction might appear vindictive yet are required by our system of criminal justice. We do not find at the pretrial stage the type of motivation sufficient to presume vindictiveness. Imposition of a pretrial presumption of vindictiveness would interfere with proper prosecutorial discretion. Prosecutors would be required to justify actions properly taken as adversaries but which may appear vindictive, adding additional burdens to the criminal justice system. Prosecutors might feel compelled to press the severest charges possible at the outset, to the detriment of defendants.

If a prosecutor acts vindictively before trial, the defendant still retains the protection of a jury trial. Situations may arise where egregious conduct on the part of a prosecutor could extinguish the protections afforded by a jury trial. Even though a defendant does not have the benefit of a presumption at the pretrial stage, he may

present evidence of vindictiveness and request relief from the court. However, such conduct is not present in this case.

We note that the indictments in the present case were obtained through a grand jury, which traditionally has afforded some protection against improper prosecutorial activity. The present case presents no indication that the grand jury procedure inadequately protected the defendant. The trial court considered the question of vindictiveness and determined that there was no improper conduct. We do not deem it necessary to impose a pretrial presumption of vindictiveness. Therefore, we reverse the Court of Appeals and remand to them for consideration of the other points raised on appeal.

We express no opinion on the evidentiary issues raised.

Reversed.

BE IT SO ORDERED.

EASLEY, C. J., and FEDERICI and RIORDAN, JJ., concur.

SOSA, Senior Justice, dissenting.

633 P.2d 1229

SEABOARD FIRE & MARINE INSURANCE COMPANY, a corporation, and Joseph F. Higgins, Plaintiffs-Appellants,

v.

Victoria A. KURTH, Defendant-Appellee,

No. 4112.

Court of Appeals of New Mexico.

Aug. 5, 1980.

Farlow & Bradley, P. A., Albuquerque, for plaintiffs-appellants.

Thomas A. Simons, IV, Santa Fe, for defendant-appellee.

OPINION

ANDREWS, Judge.

In this action we are asked to consider whether a claimant under the Workmen's Compensation Act [§§ 52–1–1 to 52–1–69, N.M.S.A. 1978], may assign all of his rights of action to a third party, in this case the workmen's compensation insurer.

On January 25, 1978, plaintiffs Seaboard Fire & Marine Insurance Company and Joseph F. Higgins filed suit against defendant, Victoria Kurth, alleging damages arising out of an automobile accident which occurred January 28, 1975. Paragraph 3 of the original complaint alleged specific acts of negligence on the part of the defendant and, also alleged that Higgins suffered injury. However, no claim for relief was sought for Higgins personally in that original complaint. Thus, the only injury asserted was the claim of Seaboard which alleged payment of benefits to Higgins under the Workmen's Compensation Act, and an assignment from Higgins to the extent of those payments.

Seaboard and Higgins filed a first amended complaint on July 6, 1978, containing a first cause of action setting out Seaboard's claim for the amounts paid under the workmen's compensation policy issued to Underwriters Adjusting Company. The second cause of action claimed damages to Higgins as a result of the accident—these damages were not claimed in the first complaint. Between the time of the first complaint and the amendment the defendant filed a motion to dismiss Higgins as a party on the ground that no claim for relief was asserted on his behalf. The trial court found that the second cause of action was barred by the statute of limitation, and entered an order September 7, 1978, dismissing Higgins' claim. On March 28, 1979, Seaboard's claim was also dismissed. Seaboard had contended in paragraph 6 of the original complaint that "by statute the plaintiff Seaboard Fire & Marine Insurance Company has an assignment from Joseph Higgins." The trial court ruled that as Higgins was no longer a party, and as the claimant is an essential party, Seaboard did not have the right to action.

Seaboard alleges that a written subrogation receipt rather than the claim of statutory assignment transferred all of the claimant's rights to actions to them. As such was the case, Higgins was not an indispensable party, and the trial court erred in dismissing the action. The questions before us then, are whether, in a multi-party litigation, the time limit for appeal on a final order pertaining to one party runs from the time of that order, or from the time the entire action is completed; and, whether a claimant under the Workmen's Compensation Act can contractually create an assignment of his claim

against a third-party tortfeasor such that he is not an indispensable party to the action brought against the tortfeasor.

As to the first issue Rule 54(b)(2), N.M.S.A. 1978, clearly establishes the law. Under the "final judgment" rule a judgment dismissing all claims of one plaintiff is final at that time, and such party cannot wait until the remaining claims are concluded before appealing. *See Stotlar v. Hester*, 92 N.M. 26, 582 P.2d 403 (Ct.App.1978); *Gengler v. Phelps*, 89 N.M. 793, 558 P.2d 62 (Ct.App.1976). As stated in *Stotlar v. Hester, supra*, "[i]n multiple party suits, Rule of Civ. Proc. 54(b)(2) authorizes a judgment adjudicating 'all issues' as to one or more, but fewer than all parties.... The summary judgment adjudicated all of plaintiff's claims [against defendant]; there was no provision in the summary judgment that it was not final. The summary judgment was an appealable final judgment. * * *" 92 N.M. 26 at 27, 582 P.2d 403.

In the case before us, the order entered September 7, 1978, dismissed with prejudice all claims asserted by plaintiff Higgins, and there was no provision in the order to the effect that this dismissal was not final. The time for Higgins to appeal this ruling began to run on September 8, 1978, and expired on October 9, 1978. The timely filing of a Notice of Appeal is a fundamental requirement for appellate review. *Daughtrey v. Carpenter*, 82 N.M. 173, 477 P.2d 807 (1970); *Associates Discount Corp. v. DeVilliers*, 74 N.M. 528, 395 P.2d 453 (1964). Since no timely appeal was taken from the September 7, 1978 order, that ruling is not subject to review, and the dismissal of Higgins as a party is therefore affirmed.[1]

The next issue is whether if Higgins is no longer a party to the action, Seaboard, through an assignment of the claim, can maintain the cause on behalf of the missing plaintiff. It is clear that in a workmen's compensation action the statute creates no right of subrogation or assignment in the insurer, merely the right to reimbursement. *Reed v. Styron*, 69 N.M. 262, 365 P.2d 912 (1961). Section 52–1–6, N.M.S.A. 1978, allows an insurer to recover benefits it has paid where the claimant has been successful in a tort action against a third party. This is, however, an entirely different proposition than creating a right of action in that insurer. *Herrera v. Springer Corp.*, 85 N.M. 6, 508 P.2d 1303 (Ct.App.), *rev'd on other grn'ds*, 85 N.M. 201, 510 P.2d 1072 (1973).

The difference between this action and *Herrera v. Springer, supra*, should be noted. In that case, the court also dealt with a claimant's suit against a third party tortfeasor. The defendant sought to set aside a default judgment arguing that the insurer was an indispensable party because claimant had informed the trial court of an agreement to reimburse the insurer for payments made under the Workmen's Compensation Act. The court was not dealing with an attempted voluntary assignment of the cause of action, but rather with a theory of involuntary subrogation which, if accepted, would have worked against the claimant. This distinction is critical.

Here, we are urged to accept the theory that although the statute does not invest the insurer with such a right, the claimant may assign all of his interest in the action to the insurer by contract. Further, that once such an assignment has occurred, it is the insurer alone which would have the right to release the defendant. The net effect of such an assignment would be to render the claimant dispensable. Section 52–1–56 does not invest the insurer with a "right to collect", but rather gives that right to the claimant and the right to reimbursement to the insurer. *Herrera v. Springer, supra.* However, it is clear that if claimant is able to transfer to the insurer

1. Appellant argues that since the March 28, 1979 order mentions the previous dismissal of Higgins, such order incorporates the earlier order and is therefore appealable. We find this argument unpersuasive. The earlier order, as shown above, was a final order from which no appeal was taken. Mention of such fact in a latter order does not re-establish jurisdiction. *See Central-Southwest Dairy Coop. v. American Bank of Commerce*, 78 N.M. 464, 432 P.2d 820 (1967).

the totality of his rights—in effect the right to collect and the right to release—then, it owns the right sought to be enforced and is in a position to release the third party from the liability upon which the action is grounded. In this situation the insurer is an indispensable party. *Sellman v. Haddock*, 62 N.M. 391, 310 P.2d 1045 (1951); *Crego Block Co. v. D. H. Overmyer Co.*, 80 N.M. 541, 458 P.2d 793 (1969); *Herrera v. Springer, supra.*

As it is obvious that § 52–1–56 does not give the insurer the necessary rights to create this status, we are asked to find that the claimant who possesses them under this section may transfer them to an insurer. In *Motto v. State Farm Mut. Auto. Ins. Co.*, 81 N.M. 35, 462 P.2d 620 (1969), the court recognized that in a personal injury case an injured person may assign his cause of action. Whether this same right is established under the Workmen's Compensation Act is the question here.

Section 52–1–56(C) states in relevant part:

> *[t]he right of any workman* * * * to receive payment or damages for injuries occasioned to him by the negligence or wrong of any person other than the employer, * * * *shall not be affected by the Workman's Compensation Act,* * * * (Emphasis added.)

If the clear language of the statute is accepted at face value we must assume that "the right of any workman to receive payment . . . [is not] affected by the . . . Act." It might be argued that this speaks only to the right to actually receive the damages, but does not preserve the peripheral rights a plaintiff possesses. We cannot accept this argument. Section 52–1–6 specifically states:

> [n]othing in the Workmen's Compensation Act, however, shall affect, or be construed to affect, *in any way*, the existence of, *or the mode of trial* of, any claim or cause of action which the workman has against any person other than his employer. * * * (Emphasis added.)
>
> [T]he proposition that personal injury claims are assignable has been considered. We have held that the provisions of the Workmen's Compensation Act (§ 59–10–25, N.M.S.A. 1953) providing for assignments of personal injury causes of action are valid.

Motto v. State Farm Mutual Automobile Insurance Company, 81 N.M. 35 at 36, 462 P.2d 620.

An analysis of other jurisdictions reveals that there are five subrogation schemes. The first two are at the extremes—an absolute bar of subrogation,[2] and absolute subrogation.[3] In the third, subrogation and direct action co-exist—allowing either the payor or employee to sue.[4] Twenty-two states have a scheme similar to that in effect in New York. There, the employee has six months after the awarding of compensation to initiate an action against the third party. Failure to do so results in subrogation.[5] The fifth method of dealing with this problem exists in Maryland and Maine, where it is the subrogee who has the first chance to bring the action.

In the states which allow absolutely no subrogation, Georgia, West Virginia, and Ohio, the underlying theory is that subrogation should only be allowed by express statutory provision. This is clearly not the case in New Mexico. *See Motto v. State Farm Automobile Ins. Co., supra.*

States which allow election, such as Idaho, base the absolute subrogation on the need of the insurer to attempt to offset the amounts paid. However, this scheme provides that the excess over the compensation

2. Three states presently have such a format; Georgia, West Virginia, and Ohio. Other states, such as Oklahoma and Minnesota bar subrogation in specific situations such as death cases.

3. Idaho, Colorado, Texas.

4. *See generally*, Cal. Labor Code §§ 3852–60 (Supp.1972); Mass.Gen.Laws Ann. ch. 152, § 15 (Supp.1971).

5. The New York provisions are by far the most widely followed on this and many other compensation issues. It expresses the basic liberal intent of the compensatory insurance schemes.

claim be paid to the employee. Idaho Code Ann. § 72–204 (1958). The theory in this situation is clear; the claimant will receive the amount due under the compensation statute, the insurer can recover that amount from a third party, and the claimant will receive any excess. The only apparent shortcoming is that the claimant may be denied the excess if the insurer does not feel compelled to litigate the third party claim. The liberal intent of the statute can, however, be seen in a scheme which creates the ability to transfer the cause of action to the insurer.

Section 52–1–56 seeks only to prevent double recovery by a claimant. *Brown v. Arapahoe Drilling Co.*, 70 N.M. 99, 370 P.2d 816 (1962); *Transport Indem. Co. v. Garcia*, 89 N.M. 342, 552 P.2d 473 (Ct.App.) *cert. denied.* 90 N.M. 9, 558 P.2d 621 (1976). In our view, nothing in that section alters the claimant's right to assign a personal injury action. Rather, when read in light of § 52–1–6, it is clear that the Legislature—expressing the liberal intent of this scheme,[6] sought to insure all workmen against specific injuries and to allow every other avenue previously extant to redress wrongs not contemplated by the Act. One such avenue is assignment of the entire claim to an insurer.

The right of subrogation can arise either by operation of law or by convention or contract between the parties. *State Farm Mutual Automobile Ins. Co. v. Foundation Reserve Ins. Co.*, 78 N.M. 359, 431 P.2d 737 (1967); and, although it is clear that the right of subrogation does not arise by operation of law under § 52–1–56(C), *Herrera v. Springer Corp., supra*, New Mexico courts have never excluded the possibility of this right arising by convention or contract between the parties.

The "subrogation receipt" given by Higgins to Seaboard states:

> the undersigned hereby subrogates said insurance company, to *all the rights*, claims and interest which the undersigned may have against any person or corporation liable for the loss mentioned above. * * * (Emphasis added.)

In our opinion, this receipt operated to assign Higgins' claim to Seaboard.[7] We see no reason to distinguish the assignment here from that in a personal injury action. *See Motto v. State Farm Mutual Automobile Ins. Co., supra.* Unlike *Herrera v. Springer, supra*, this action presents a case where the claimant has voluntarily assigned his rights in hope of being justly compensated beyond his insurance claim. The ability to assign this personal injury claim is unaffected by the Workmen's Compensation Act.

Since an assignment is a contract in which the claimant transfers all rights to the insurer, such an action would not be done merely to acquire benefits to which the claimant is entitled under the statute—this would be a contract without consideration. As the pre-existing legal duty to compensate would be insufficient consideration, it is probable that the consideration involved would be the excess over the compensation paid plus the litigation costs to the insurer. Such a result clearly reflects the liberal intent of the statute.

The trial court erred in entering summary judgment against plaintiff. The cause is reversed and remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

LOPEZ, J., concurs.

SUTIN, J., specially concurs.

6. For discussion of the liberal intent of our Workmen's Compensation Act, *see Transport Indemnity Co. v. Garcia*, 89 N.M. 342, 552 P.2d 473 (Ct.App.1976).

7. Appellees, relying on *Hockett v. Winks*, 82 N.M. 597, 485 P.2d 353 (1971), and *Musgrove v. H.S.S.D.*, 84 N.M. 89, 499 P.2d 1011 (Ct.App. 1972), argue that this theory of the case is not that presented at trial where Seaboard claimed a statutory assignment, and therefore is not subject to review here. This is an appeal from the trial court's decision as a matter of law that the pleadings do not state a claim against the defendant. The proper standard for appellate review in this situation is whether "in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *McCasland v. Prather*, 92 N.M. 192, 585 P.2d 336 (Ct.App. 1978). Neither *Hockett* nor *Musgrove* apply.

SUTIN, Judge (specially concurring).

A. *The dismissal of Higgins' claim is not an issue in this appeal.*

Plaintiffs' first point is directed to the issue that the trial court erred in dismissing Higgins' claim for damages against defendant. Reliance is had on Rule 15(c) of the Rules of Civil Procedure. This rule allows an amended pleading of a claim to relate back to the date of the original pleading. Plaintiff claims, therefore, that the Higgins' claim, pleaded as a second cause of action in an amended claim by Seaboard and Higgins, related back to the original pleading and therefore defeated the statute of limitations.

The accident occurred January 31, 1975. The original claim was filed January 19, 1978, some 12 days before the limitation period for negligence cases had run. Seaboard and Higgins were party plaintiffs. The complaint stated a claim for both Seaboard and Higgins, except that no damages for personal injury of Higgins had been alleged.

The amended claim in two counts was filed July 6, 1978. The record does not disclose the reason an amended claim was filed. Instead of filing an amended complaint, plaintiff should have requested permission of the court to insert an allegation in the original complaint showing damages suffered by Higgins for personal injuries. One of defendant's affirmative defenses, with reference to Higgins' cause of action stated that "The Complaint is barred by the Statute of Limitations." A motion to dismiss was filed July 7, and on September 7, 1978, an Order of Dismissal with prejudice was entered. This Order was erroneous under Rule 15(c).

Unfortunately, plaintiff did not appeal from this Order. The dismissal of Higgins' cause of action is not an issue in this appeal.

B. *Summary judgment for defendant was erroneous.*

Summary judgment was granted defendant as a matter of law, not fact.

The court found that Seaboard paid workmen's compensation benefits to Higgins and joined Higgins in a suit to recover those benefits; that Higgins was dismissed as a party plaintiff; that the written assignment Higgins gave Seaboard, in the absence of Higgins as a party plaintiff, was of no force and effect, and Seaboard had no right or cause of action against defendant. Based upon these findings, the court ordered that summary judgment be entered in favor of defendant.

The Order was, in effect, one that sustained a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, or judgment on the pleadings. Rule 12(b)(6), (c), Rules of Civil Procedure. A motion to dismiss for failure to state a claim is granted infrequently. It should not be done unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. On appeal, our inquiry is essentially limited to the contents of the complaint and exhibits attached thereto to determine whether, in the light most favorable to the plaintiffs, and with every doubt resolved in their behalf, the complaint states a valid claim for relief. *McCasland v. Prather*, 92 N.M. 192, 585 P.2d 336 (Ct.App.1978).

Plaintiffs' first cause of action alleges that Seaboard "insured the employees of Underwriters Adjusting Company, Albuquerque, New Mexico for workmen's compensation insurance providing their employees benefits of the Workmen's Compensation Statutes of the State of New Mexico." Exhibit "A" attached to the complaint is entitled Final Compensation Settlement Receipt, signed by Higgins. It states on January 31, 1975, the date of the accident, Higgins was employed by The Continental Insurance Company and that he was a resident of El Paso, Texas. It was witnessed by Irene Duran of El Paso, Texas.

Exhibit "B" attached to the complaint is a "Subrogation Receipt" executed by Higgins and witnessed by Irene Duran.

Both instruments appear to be forms used in Texas in workmen's compensation cases.

We have no knowledge whether the compensation settlement was effected under the Texas compensation law or that of New Mexico. If it is proven to be a Texas settlement under Texas law, the Texas compensation statute is applicable. *Argonaut Insurance Co. v. Panhandle & Sante Fe R. Co.*, 367 F.2d 564 (1966).

Article 8307, § 6a of the Texas Workmen's Compensation Law reads in pertinent part:

> * * * If compensation be claimed under this law by the injured employee * * * then the association shall be subrogated to the rights of the injured employee, and may enforce in the name of the injured employee * * * the liability of said other person * * *.

In Texas, the right of subrogation will not mature until payment or assumption thereof has occurred. *Reliance Ins. Co. v. Kronzer, Abraham, Etc.*, 582 S.W.2d 170 (Tex.Civ.App.1979).

It was erroneous to enter summary judgment before a determination was made of the state under whose statute compensation benefits were actually paid Higgins.

If the compensation was paid, the settlement executed, and the Subrogation Receipt given, under the New Mexico Compensation Act, Seaboard is entitled to proceed in subrogation. Higgins was not dismissed out as a party plaintiff in the first cause of action. Seaboard and Higgins proceeded together to establish Seaboard's claim. It alleged that "By statute * * * Seaboard * * * has an assignment from Joseph Higgins for all benefits paid to him * * *."

Section 52–1–56(C), N.M.S.A. 1978 provides in pertinent part, that:

> * * * the receipt of compensation from the employer shall operate as an assignment to the employer, his or its insurer * * * of any cause of action, to the extent of payment by the employer to the workman * * * which the workman * * may have against any other party for the injuries * * *.

This statute makes an assignment for an employee who receives compensation. It also allows a workman a cause of action against a third party for injuries and allows an insurer to have such cause of action for compensation benefits paid the workman by way of partial assignment. Courts of equity will protect the assignee under such partial assignments whenever they can do so without working a hardship, such as double liability, upon the third party who is allegedly liable to the workman. The insurer is the "real party in interest" and is entitled to sue on such assignment in its own name, even if the assignment was of only part of the claim.

The above statute is a "reimbursement" statute when the workman sues a third party and recovers. The employer who has paid compensation to the workman has a right to share in the proceeds. It is not a "reimbursement" statute when the insurer has sued on the cause of action and recovered judgment. When this judgment is obtained, the workman's cause of action against a third party is not extinguished due to a pro tanto assignment. *Kandelin v. Lee Moor Contracting Co.*, 37 N.M. 479, 24 P.2d 731 (1933).

Unfortunately, *Kandelin* has been misinterpreted. The above statute is not solely a "reimbursement" statute nor one cause of action as stated in *Herrera v. Springer Corporation*, 85 N.M. 6, 508 P.2d 1303 (Ct.App. 1973), reversed on other grounds, 85 N.M. 201, 510 P.2d 1072 (1973), and followed in *Transport Indemnity Company v. Garcia*, 89 N.M. 342, 552 P.2d 473 (Ct.App.1976).

This mistake originated in *Royal Indem. Co. v. Southern Cal. Petroleum Corp.*, 67 N.M. 137, 144, 353 P.2d 358 (1960) in which the court said:

> We have held this to be a reimbursement statute and *that there is but a single cause of action in the employee*, even though a part of the recovery is to be paid to the employer or his insurer. Kandelin * * * [supra]. [Emphasis added.]

This statement was carried forward in *Varney v. Taylor*, 71 N.M. 444, 379 P.2d 84

(1963) and *Security Insurance Co. of Hartford v. Chapman*, 88 N.M. 292, 540 P.2d 222 (1975).

Kandelin said:

> Questions of whether a cause of action in tort is assignable * * * *rules against splitting causes of action*, yield to the provisions of our Workmen's Compensation Act. * * * "An insurance company receiving an assignment * * * was the 'real party in interest' within Comp. Laws 1907, § 2902, so as to entitle it to sue on such assignment in its own name, even if the assignment was of only a part of the claim."
>
> * * * * * *
>
> It seems to us also that the assignment pro tanto of the employee's cause of action against a third person responsible for his injuries has not been extinguished *merely because the employer has sued on the cause of action and recovered judgment* * * *. [Emphasis added.] [37 N.M. 488–89, 24 P.2d 731.]

We should return to *Kandelin*. The pro tanto assignment by the workman to the insurer granted the insurer the right to institute proceedings for the recovery of such damages or to compromise with the third party tort-feasor. If not, the legislature should "spell out" with particularity the substantive rights of all parties, this being a legislative rather than a judicial function. Just prior to *Kandelin, Aetna L. Ins. Co. v. Moses*, 287 U.S. 530, 53 S.Ct. 231, 77 L.Ed. 477 (1933), 88 A.L.R. 647, 651 (1934) said:

> In the case where the employee survives and accepts compensation as the only person entitled, it is clear that the statutory assignment vests in the employer the full right to recover damages from the third person. Double recovery by the employee * * * is thus avoided. Yet the employer is permitted to share in the recovery only to the extent of his own liability * * * and any excess goes to the injured employee.

The insurer succeeded to that right by subrogation. As long as the third party tort-feasor is not burdened with double recovery, the assignment provision should be liberally construed to make it effective. "Subrogation * * * is an equitable remedy. * * * In its normal sense . . . it gives the payor a right to collect what is has paid from the party who caused the damage." *White v. Sutherland*, 92 N.M. 187, 190, 585 P.2d 331 (Ct.App.1978). "Subrogation is a remedy which courts of equity employ to prevent unjust enrichment. It is said to be based on principles of 'natural justice' and is not applied if it would work injustice. [citation omitted] Neither is it employed to relieve a party of the consequences of wrongdoing in which it participated." *Associated Indem. Co. v. Hartford Acc. & Indem. Co.*, 524 S.W.2d 373, 376 (Tex.Civ.App. 1975). The Workmen's Compensation Act was not passed for the benefit of a third party tort-feasor. Except by judicial construction, the Act does not deny a workman or an insurer an independent claim, nor cause either to lose this right. In equity and good conscience, the insurer, by way of subrogation, should be assigned rights and remedies that the workman had. *State Farm Mut. Auto. Ins. Co. v. Foundation R. Ins. Co.*, 78 N.M. 359, 431 P.2d 737 (1967).

In addition, there is another factor that strongly supports Seaboard's position. Higgins executed a "Subrogation Receipt" in which he subrogated the insurer and authorized the insurer to sue any person liable for the loss in Higgins' name or otherwise. In common parlance, "or otherwise" means "in any other way." *State v. Miller-Wohl Co.*, 3 Terry 73, 28 A.2d 148 (Super.Ct.1942). Although this is, in effect, what the statute allows, it establishes that the presence of Higgins as a party to the suit is not essential. Such a grant of subrogation is not prohibited by the Workmen's Compensation Act.

Defendant is subject only to the claim of Seaboard. To deny this claim would arouse "The Sense of Injustice."

633 P.2d 1237

Nel DE LAO, Plaintiff-Appellant,

v.

Cecil GARCIA and Leo R. Romero, Sr., Defendants-Appellees.

No. 4986.

Court of Appeals of New Mexico.

Aug. 11, 1981.

[redacted]

N. Tito Quintana, Albuquerque, for plaintiff-appellant.

William D. Diaco, Albuquerque, for Garcia.

Leo R. Romero, pro se.

OPINION

SUTIN, Judge.

On May 21, 1980, a jury verdict in favor of defendants was entered. On July 28, 1980, plaintiff moved to set aside the verdict because "No judgment on said verdict has as yet been entered although more than sixty days have elapsed from the date the verdict was returned and entered." The motion was denied. Judgment in favor of defendants was entered on November 3, 1980 and plaintiff appeals.

Plaintiff's motion was based upon Rule 36(e) of the Court Rules of the Second Judicial District. It reads:

> Subject to New Mexico Rules of Civil Procedure 52(b), all orders, judgments and decrees shall be filed within ten (10) days of decision. The prevailing party shall be responsible for such filing, and if the approval of opposing counsel cannot be obtained by the 10th day, prevailing counsel shall, no later than the 10th day, request a setting for a hearing before the trial judge. At the hearing, counsel shall submit their proposed order of judgment to the Court.

This rule does have the force and effect of law, *Spingola v. Spingola*, 91 N.M. 737, 580 P.2d 958 (1978), but this rule applies only to "decisions" of the trial court in cases tried before the court. It has no application to verdicts rendered by a jury.

Plaintiff relies upon the statute and law of Montana. The statute provides that an action may be dismissed by the court after verdict if "the party entitled to judgment neglects to demand and have the same entered for more than six months." *Carnegie Nat. Bank v. City of Wolf Point*, 110 F.2d 569 (9th Cir. 1940). This statute is not comparable with Rule 36(e).

"Entry of judgment" is governed by Rule 58 of the Rules of Civil Procedure. It reads:

Judgment shall be entered when the court so directs. In all cases where the court has directed entry of judgment counsel for the prevailing party shall prepare the form of judgment in accordance with the direction of the court and the judge shall promptly settle, approve and sign the form of judgment which shall thereupon be filed in the clerk's office and the filing of such judgment, signed by the judge, constitutes the entry of such judgment, and no judgment shall be effective for any purpose until the entry of the same, as hereinbefore provided.

No time limitation is expressed in the rule, including the time between the entry of a jury verdict and the entry of judgment. Absent statute or rule of court, judgment may be entered on a verdict or decision at anytime thereafter, and a party is entitled to have a judgment so entered unless the lapse of time is unreasonably great, some independent right has intervened, or the court has lost jurisdiction. *Industrial Loan & Thrift Corporation v. Benson*, 221 Minn. 70, 21 N.W.2d 99 (1945); *Cahn v. Schmitz*, 56 Ariz. 469, 108 P.2d 1006 (1941); *State ex rel. Eilers Music House v. French*, 100 Wash. 552, 171 P. 527 (1918). "Mere delay does not work a loss of jurisdiction to render or enter a judgment." *Wallace Grain & Supply Co. v. Cary*, 374 Ill. 57, 28 N.E.2d 107, 108 (1940).

The entry of judgment is a ministerial act, and the validity of the judgment is not affected by delay or omission in entering judgment. *Fleming v. Clark Township of Chariton County*, 357 S.W.2d 940 (Mo.1962); *Williams v. Wyrick*, 151 Tex. 40, 245 S.W.2d 961 (1952).

Affirmed. Plaintiff shall bear the costs of this appeal.

IT IS SO ORDERED.

HERNANDEZ, C. J., and WALTERS, J., concur.

633 P.2d 1238

STATE of New Mexico, Plaintiff-Appellee,

v.

Richard J. CRESPIN, Defendant-Appellant.

No. 4985.

Court of Appeals of New Mexico.

Sept. 8, 1981.

John B. Bigelow, Chief Public Defender, Michael Dickman, Asst. Appellate Defender, Santa Fe, Richard A. Winterbottom, Trial Counsel, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Clare E. Mancini, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

Because of violations of probation, defendant's suspended sentence was revoked. Defendant was sentenced to six months in the penitentiary. Defendant sought reconsideration of the sentence, arguing for a change in the terms of probation. The trial court denied the motion to reconsider, ruling that it lacked "jurisdiction to modify conditions of probation or extend the period of probation * * *." The trial court used "jurisdiction" in the sense of power or authority to grant the relief sought by defendant. *Heckathorn v. Heckathorn*, 77 N.M. 369, 423 P.2d 410 (1967). Defendant appeals. We discuss: (1) the length of probation; (2) conditions of probation; and (3) defendant's contention on appeal.

Length of Probation

Convicted on his guilty plea to commercial burglary, defendant was sentenced to eighteen months in the penitentiary. See § 31–18–15(A)(4), N.M.S.A.1978 (1980 Cum. Supp.)

The sentence was suspended and defendant was placed on probation. A special condition of probation was that defendant enter the "Plagge Alcohol Treatment Center in Las Vegas, New Mexico for the three (3) months treatment program".

The judgment also provided for a total probation period of twenty-one months. The "Order of Probation", however, provided for a probation period from January 25, 1980 to September 25, 1982. The length of the probation period, in both the judgment and the order of probation, was erroneous. The maximum period of probation was eighteen months, Laws 1981, ch. 285, § 2(D) not being applicable to this case. See *State v. Gonzales*, 96 N.M. 556, 632 P.2d 1194 (Ct.App.1981). Thus, the maximum length of a probation beginning January 25, 1980 was to July 25, 1981.

The judgment provided that defendant was to be given credit for presentence confinement of sixty-one days. Section 31–20–12 N.M.S.A.1978. Applying this credit, see *State v. Murray*, 81 N.M. 445, 468 P.2d 416 (Ct.App.1970), the maximum length of imprisonment and, thus, the maximum length of probation was reduced to sixteen months. A probation beginning January 25, 1980 would expire May 25, 1981.

Defendant violated the terms of probation by: "Leaving the PLAGGE program;

failing to report to his probation officer; absconding from probation supervision." Seeking to have the court order defendant to a rehabilitation program in Albuquerque, called "New Dawn," defendant contended: "Defendant does not have to be given credit for the time between February 23, 1980, and the date of his arrest on the instant probation revocation." The record indicates that defendant left the Plagge program, without authorization, on February 23, 1980. How the other two violations of probation may or may not affect credit to be applied on defendant's probation time was not mentioned in the trial court and is not discussed on appeal. Thus, the only violation that we consider involves the Plagge program.

Although defendant left the Plagge program, without authorization on February 23, 1980, a warrant for his arrest was not issued until June 21, 1980. Defendant was arrested on August 28, 1980. An issue in the trial court was whether defendant's probation time was to be credited with the time from February 23, 1980 to August 28, 1980. Section 31–21–15(C), N.M.S.A.1978. See *State v. Murray, supra.*

The trial court was concerned with the amount of remaining probation time. Defendant's position was that the time remaining did not matter because credit did not have to be given. The question of the amount of credit was avoided by the six-month penitentiary sentence, there being no contention that six months was not within the time yet to be completed. However, defendant's position, that credit did not have to be given, is incorrect. *State v. Reinhart,* 79 N.M. 36, 439 P.2d 554 (1968); *State v. Sublett,* 78 N.M. 655, 436 P.2d 515 (Ct.App.1968).

■ Although the length of time remaining on probation was avoided in the trial court, it is involved in the appeal by the claim that the trial court erred in ruling it could not extend the period of probation. The showing in the trial court was that New Dawn would accept defendant for ninety days to a year "[i]f you [the court] want him to stay a year, he'll stay a year." Absent a determination of the remaining probation time, we do not know whether any extension of probation would have been involved. The trial court's ruling implies that an extension of probation time would be involved. Assuming, but not deciding, that an extension would be involved, the trial court correctly ruled that it could not extend the length of the probation term; the trial court's authority as to length of probation was the authority conferred by our statutes. *State v. Gonzales,* supra.

Conditions of Probation

■ A special condition of defendant's original probation was attendance at the Plagge program for three months. Defendant left this program after approximately one month. To avoid the penitentiary sentence, defendant sought to be ordered to the New Dawn program. The trial court was not concerned with a change in where defendant was to receive his treatment and there is no suggestion that the trial court could not substitute New Dawn, for Plagge, as the place for treatment. See § 31–20–6(F), N.M.S.A.1978. The trial court was concerned with the length of the treatment. With two months remaining on the time for the Plagge program, the trial court ruled that it lacked authority to order a New Dawn treatment program of three months to one year. The trial court ruled correctly. The New Dawn treatment program would have been an increased penalty; the trial court lacked authority to increase the penalty. *State v. Castillo,* 94 N.M. 352, 610 P.2d 756 (Ct.App.1980), and cases therein cited.

Implicit in defendant's trial court argument is the view that the trial court could impose new probation conditions once it was determined that defendant had violated the terms of his original probation. This view is incorrect. Section 31–20–5, N.M.S.A.1978, authorizes the trial court to place a defendant on probation when sentence is suspended. If there are probation conditions, they are to be attached to the order suspending sentence. Section 31–20–6, supra. When a violation of probation is established, "the court may continue or re-

voke the probation and may require the probationer to serve the balance of the sentence imposed or any lesser sentence." Section 31–21–15(B), N.M.S.A.1978. Under this authority, the trial court may relieve a defendant of the conditions of probation, or continue the existing conditions; however, these statutes do not authorize the trial court to change any probation condition so that the penalty is increased.

Contention on Appeal

Defendant's brief states:

> This case is perverse. Advised by counsel, a probation violator wants to be given another chance: to rehabilitate himself and avoid incarceration. He is willing to extend his probation, and to live under its rule for a longer time. He is willing to add to its conditions. * * * Yet the judge believes that it cannot be done.

After imposition of a valid sentence, a court may not increase the penalty. Defendant points out that the prohibition against an increased penalty is based on the concept of double jeopardy. *State v. Allen*, 82 N.M. 373, 482 P.2d 237 (1971).

Defendant contends that he may waive the protections afforded by the double jeopardy concept. We assume this is correct.

The appellate brief, correctly, does not suggest that any waiver has yet occurred. Defendant's trial counsel did not proceed on the basis of a waiver. If the trial court had acceded to defendant's request, and ordered defendant to the New Dawn program, defendant would have been in a position to avoid any consequence for a violation of the New Dawn probation condition by asserting the trial court's lack of authority. This was what happened in *State v. Castillo*, supra. The trial court did not err in failing to give effect to a waiver that had not occurred.

Even if defendant had waived his double jeopardy protection and had agreed to an increase in the length of his probation and to an increased penalty through changed conditions of probation, the result herein would not change. The fixing of penalties is a legislative function; the trial court's authority is to impose a penalty which has been authorized by the Legislature; a penalty which has not been authorized is void. *State v. Holland*, 91 N.M. 386, 574 P.2d 605 (Ct.App.1978); see *McCutcheon v. Cox*, 71 N.M. 274, 377 P.2d 683 (1962); *State v. Hovey*, 87 N.M. 398, 534 P.2d 777 (Ct.App.1975). The statutes cited in this opinion have not authorized a trial court to extend the length of probation or change the conditions of probation so as to increase the penalty even if a defendant is agreeable to such changes.

The order sentencing defendant to the penitentiary for six months and the order denying defendant's motion to reconsider that sentence are affirmed.

IT IS SO ORDERED.

HERNANDEZ, C. J., and HENDLEY, J., concur.

633 P.2d 1241

Raymond MEDRANO, Plaintiff-Appellee,

v.

RAY WILLIS CONSTRUCTION COMPANY and Employers Casualty Company, Defendants-Appellants.

No. 5097.

Court of Appeals of New Mexico.

Sept. 8, 1981.

William G. W. Shoobridge, Neal & Neal, Hobbs, Lynn Pickard, Pickard & Singleton, Santa Fe, for defendants-appellants.

Clifford L. Payne, Lovington, for plaintiff-appellee.

OPINION

SUTIN, Judge.

In February, 1980, plaintiff suffered an injury by accident arising out of and in the course of his employment. Beginning March 21, 1980 and ending May 22, 1980, defendants paid plaintiff maximum compensation benefits of $201.04 weekly for 10 weeks for a total of $2,001.40, and also paid $4,569.01 for surgical, hospital and medical expenses.

For some unaccountable reason not disclosed in the record, payment of compensation benefits ended. On May 29, 1980, plaintiff filed his "Complaint To Recover Damages [sic] For Workmen's Compensation." No reference was made to prior payments made by defendants. By way of Answer, defendants admitted that plaintiff suffered an accidental injury arising out of and in the course of his employment and was earning an average weekly wage in excess of $275.00. Defendants denied that plaintiff suffered injuries to his chest and stomach as a result of said accident and denied that plaintiff suffered permanent disability. By way of affirmative defenses, defendants claimed: (1) They "tendered to the Plaintiff all of the compensation to which he is entitled under the Workmen's Compensation Act * * * *" and (2) "That the compensation that was paid was paid by mistake of fact * * * and, by reason thereof, the Defendants have no responsibility under the * * * Act * * * for the payment of any medical expenses."

Based upon these pleadings, plaintiff sought to recover compensation benefits for permanent disability from the date of the accident. Thus the case went to trial.

Trial consisted of the testimony of plaintiff and the depositions of two doctors. De-

fendants established by their record, payment of compensation benefits between the date of the accident to May 22, 1980, as shown above. The trial court found, *inter alia*:

> 7. As a direct result of plaintiff's accidental injury, plaintiff was totally disabled from March 18, 1980, for a period of nine months and is therefore entitled to compensation at the rate of * * * ($201.04) per week for that period of forty weeks.
>
> 8. Additionally, defendants owe two-thirds of the medical expenses incurred.

Judgment was entered in accordance with these findings and defendants appeal. We affirm.

By the court's findings, conclusions and judgment, the trial court allowed plaintiff double recovery for compensation benefits from the date of injury or disability from March 18, 1980 to May 22, 1980. During this period of time, defendants paid plaintiff $2,001.40 for compensation and $4,569.01 for all medical and hospital expenses.

The trial court found that defendants paid weekly compensation benefits to plaintiff for ten weeks at $201.04; that plaintiff was totally disabled from March 18, 1980 for a period of nine months and is therefore entitled to compensation at the rate of $201.04 per week for that period of 40 weeks.

The court concluded that judgment should enter for compensation at the rate of $201.04 per week *from the time of injury for nine months*; that judgment should be entered for ⅔ of the medical expenses [net $4,569.01].

The judgment entered, which had been prepared by plaintiff, gave judgment to plaintiff "for compensation at the rate of Two Hundred, One Dollars and Four Cents ($201.04) per week *from the time of the injury for nine (9) months*," and granted judgment for ⅔ of the medical expenses expended.

Under this judgment, plaintiff can recover an amount of $6,570.01 for the period March 21, 1980—May 22, 1980 which amount defendants had previously paid plaintiff.

The trial court was led into this error by plaintiff's requested findings, conclusions and judgment tendered to the court and adopted. No objection was made by defendants, nor was this matter raised in this appeal. Nevertheless, we believe this error was an oversight. It was not the intention of plaintiff to recover $6,570.41 twice, nor defendants' intention to pay it twice. To avoid subsequent litigation, the judgment will be ordered amended on remand.

Unfortunately, no evidence was presented nor findings made on the purpose, reason or effect of defendants' payment of compensation benefits to plaintiff at the time of disability. It could play a key role in the solution of legal problems involved in the voluntary payment of workmen's compensation benefits.

Before closing their argument, defendants discussed the cases of *Perea v. Gorby*, 94, N.M. 325, 610 P.2d 212 (N.M.App.1980) and *Romero v. S.S. Kresge Co.*, 95 N.M. 484, 623 P.2d 998 (N.M.App.1981). *Perea* held that admissions by defendants that they voluntarily paid plaintiff workmen's compensation benefits for eight consecutive months for temporary total disability as a result of a back injury sustained in the course of employment constitute an admission that disability was a natural and direct result of the accident and operated to relieve plaintiff of the burden of establishing any casual connection as a medical probability by expert medical testimony. *Romero* held that *Perea* was not binding because two members of the panel concurred in the result, and said:

> * * * The rule of law from *Michael v. Bauman, supra*, [76 N.M. 225, 413 P.2d 888 (1966)] and *Armijo v. Co-Con Construction Co., supra*, [92 N.M. 295, 587 P.2d 442 (N.M.App.1978)] is clear—voluntary payment of compensation benefits is merely *competent evidence as to any issue in a workman's compensation suit*, and does not create any presumptions or

shifts in the original burden. [Emphasis added.] [623 P.2d 1000.]

"Competent evidence" is defined in *Chiordi v. Jernigan*, 46 N.M. 396, 402, 129 P.2d 640 (1942). Omitting citations, it said:

> Competent evidence means that which the very nature of the things to be proved requires as the fit and appropriate proof in the particular case. *It is evidence which in legal proceedings is admissible for the purpose of proving a relevant fact.* [Emphasis added.]

"Competent evidence as to any issue" is not limited to "any *one* issue." It means "Competent evidence as to *every* issue." Carried to its logical conclusion, proof of payment by defendants to plaintiff of compensation benefits is proof of every relevant fact in a claim for workmen's compensation. Thus, when defendant proved, during plaintiff's case in chief, that it paid plaintiff $6,570.41 in workman's compensation benefits, it was competent evidence that proved every relevant fact necessary under § 52–1–28—that portion of the Act which allows a workman to recover compensation benefits. This includes proof of that portion of the section which allows compensation "when the disability is a natural and direct result of the accident."

The difference between *Perea* and *Romero* is the difference between an admission of a relevant fact and proof of a relevant fact. In *Perea*, the court said:

> By paying plaintiff workmen's compensation benefits, defendants admit the disability was a natural and direct result of the accident. [Id., 94 N.M. at 329, 610 P.2d 212.]

Romero says, in effect:

> By defendant paying plaintiff workmen's compensation benefits, this is competent evidence that the disability was a natural and direct result of the accident.

An unsuccessful attempt was made in *Romero* to reconcile the diversity of New Mexico cases on this subject matter [623 P.2d 1001, Sutin, J., dissenting].

The sole issue in this appeal is whether plaintiff established as a medical probability by expert testimony that his disability was a natural and direct result of the accident. This issue is based upon § 52–1–28(B) which reads:

> *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.]

To "deny" is a condition precedent to the duty of a workman to establish medical probability. Under what circumstances the denial should be made has not been determined. A duty placed upon a workman to prove a fact at trial should not be imposed unless the workman has written notice of the denial by defendants. The burden is on defendant to establish the denial. It can be done by way of an affirmative defense or some other pleading. The record does not disclose any denial by defendants. As a result, no duty was imposed upon plaintiff to establish a causal connection as a medical probability by expert medical testimony.

Nevertheless, we read the short depositions of the two doctors. After a previous question asked on medical probability, one of the doctors was asked this question to which he made this answer:

> Q. What I am asking, Doctor, just as a medical probability, it was medically probable that this [disability] was a natural and direct result [of the accident]?
>
> A. * * * yes.

There is substantial evidence that plaintiff established that causal connection as a medical probability.

The judgment is affirmed but this case is remanded to the district court to amend the judgment to read:

(1) That judgment is entered in favor of plaintiff, Raymond Medrano, for compensation at the rate of Two Hundred One Dol-

lars and Four Cents ($201.04) per week from May 22, 1980 to December 19, 1980.

(2) Delete from the Judgment:

That judgment enter in favor of Plaintiff, Raymond Medrano for two-thirds (⅔) of the medical expenses expended and * * * *

Plaintiff is awarded $1,250.00 attorney fee for services rendered in this appeal. Costs to be paid by defendants.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HERNANDEZ, C. J., dissents.

HERNANDEZ, Chief Judge, dissenting.

I respectfully dissent.

In my opinion the defendants' sole point of error has merit; that the plaintiff failed to establish that as medical probability his disability was a natural and direct result of the accident. In my opinion the testimony of the doctors established a mere possibility that plaintiff's injury resulted from the accident. Dr. Laws testified in pertinent part as follows:

Q. All right. Now, Doctor, as a medical probability from the history that you received of the injury and from your physical examination of the patient, could you say that, as I state, as a medical probability, that the disability you found from your examination was a natural and direct result of the accident or injury that he related to you?

A. Well, this is a very difficult area, as you know, especially when someone has had prior injury and disruption of the natural barriers to the outside, so to speak, with an incision that involves the same area of recent injury or question of injury that relates to the symptoms. The issue, I think, cannot, in hundred percent, be said that it is absolutely related to the accident, although the circumstances and the onset of the tenderness and findings are compatible with at least recent exacerbation of potentially chronic problems; but I don't think medically, other than the issue of acute symptoms, I don't think I can, for a hundred percent, say that it was related absolutely to the recent injury, nor can I say, was it a chronic finding without having had prior exposure.

Q. What I am asking, Doctor, just as a medical probability, it was medically probable that this was a natural and direct result?

A. I think that the sudden onset of increased acute abdominal pressures can potentially, in an area that was, in the past, had been involved in an operative intervention with potentially weak areas, potentially could have herniated acutely, yes.

Dr. Zadeh testified in pertinent part as follows:

Q. Now taking the history that Mr. Medrano gave you of complaining that he was hit in the abdomen area with a heavy pipe, taking that as a history of what he had told you his problem is, is it reasonably probable that the injuries that you treated and claimed and the disability that you are testifying to is a result of the accident as he described it to you?

A. I cannot say this is true, because as I said before, hernia comes—number one, there has to be some defect in some part of the abdomen. Number two, anything which can cause increased intra-abdominal pressure, even defecation, might cause hernia, too.

Q. But definitely a heavy pipe falling on your abdomen could cause it?

A. Possibly.

Q. Is it medically probable?

A. Possible.

Q. Okay. In other words, if I understand you correctly, any type of pressure—

A. That's true.

Q. —could cause it, but certainly the pressure of a heavy object would—

A. Possible.

Q. —would possibly cause it?

A. Yes, sir.

Q. Defecation—

A. May do it, too.

Q. —possibly?

A. That is true.

Q. Any pressure it is possible?

A. Yes, sir.

Q. So it is possible that the history he gave you could have caused this?

A. Possible.

633 P.2d 1246

STATE of New Mexico, Plaintiff-Appellee,

v.

John DOE, Defendant-Appellant.

No. 5140.

Court of Appeals of New Mexico.

Sept. 8, 1981.

Randall S. Bell, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Carol Vigil, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

This appeal involves the sealing of records under § 32–1–45, N.M.S.A. 1978. The pertinent parts of this Children's Code provision reads:

Sealing of records.

A. On motion by or on behalf of an individual who has been the subject of a petition filed under the Children's Code, or on the court's own motion, the court shall vacate its findings, orders and judgments on the petition, and order the legal and social files and records of the court, probation services and of any other agency in the case sealed, and if requested in the motion the court shall also order law enforcement files and records sealed. An order sealing records and files shall be entered if the court finds that:

(1) two years have elapsed since the final release of the individual from legal custody and supervision or two years have elapsed since the entry of any other judgment not involving legal custody or supervision; and

(2) the individual has not, within the two years immediately prior to filing the motion, been convicted of a felony or of a misdemeanor involving moral turpitude,

or found delinquent or in need of supervision by a court, and no proceeding is pending seeking such a conviction or finding.

* * * * * *

E. Any finding of delinquency or need of supervision, or conviction of a crime, subsequent to the sealing order may at the court's discretion be used by the court as a basis to set aside the sealing order.

The movant, now an adult incarcerated in the penitentiary, sought the sealing of a juvenile proceeding which occurred in 1970. That proceeding involved a 1969 burglary of a business. The record indicates that in January 1971 the movant, as a child, was found to have violated the then existing juvenile code—that final disposition was deferred. Future action was to depend upon the child's compliance with the conditions of probation; the child was to be under the supervision of a probation officer until further order of the juvenile court.

The motion to seal the child's juvenile record asserts: (a) that the movant's past record "including arrests which never resulted in any type of adjudication are affecting his Parole Board Eligibility"; and (b) that the movant's "day-to-day existence in the State Penitentiary is also being affected by his juvenile record." The Children's Court denied the motion to seal. We placed the appeal on the legal calendar to determine, under a view of the facts most favorable to the motion, whether § 32–1–45, *supra*, required that the juvenile record be sealed.

Without considering whether they were established in the Children's Court, we assume the following facts favorable to the motion:

(a) That the juvenile record has affected the movant's eligibility for parole from his current penitentiary incarceration. Thus, we do not consider what, if any, portion of the juvenile record could properly be considered by the parole board. *See*, §§ 32–1–33 and 32–1–44, N.M.S.A.1978, and the amendment to § 32–1–44 by 1981 N.M. Laws, ch. 36, § 32.

(b) That movant was sentenced to the penitentiary in November 1976 for auto burglary and larceny, both felonies, and was sentenced to the penitentiary in February 1977 for two counts of aggravated assault with firearm enhancement, which were also felonies. Movant is currently incarcerated under these sentences.

(c) That more than two years have elapsed since the final release of movant from the January 1971 order of the juvenile court.

(d) That there was an interval of more than two years between movant's release from the January 1971 juvenile court order and his commission of the crimes for which he was convicted in 1976 and 1977.

(e) That no felony charges were pending when the motion to seal was filed.

"[S]hall" in § 32–1–45, *supra*, is mandatory. Section 12–2–2(I), N.M.S.A.1978. We consider the provisions for mandatory sealing under § 32–1–45(A), *supra*.

"[I]ndividual" includes both "child" and "adult". *See*, § 32–1–3(A) and (B), N.M.S.A.1978. "[L]egal custody" is defined in terms of custody of a "child". *See*, § 32–1–3(J), N.M.S.A.1978. The elapse of two years since the final release of an individual from legal custody and supervision means the elapse of two years since a person, whether adult or child, has been finally released from a custody provision entered when that person was a child. Movant met this requirement of § 32–1–45(A)(1), *supra*.

The second portion of § 32–1–45(A)(1), *supra*, requires the elapse of two years since the *entry* of any judgment not involving legal custody or supervision. Movant met this requirement.

The first portion of § 32–1–45(A)(2), *supra*, includes a requirement that there not be a felony conviction within two years of filing the motion to seal. Other provisions of this first portion are not involved in this case. Movant met this requirement because more than two years had elapsed between his felony convictions and his motion to seal.

The second portion of § 32–1–45(A)(2), *supra*, requires that no proceeding seeking a felony conviction be pending at the time the motion to seal is filed. Movant met this requirement.

Having brought himself literally within the provisions for sealing, movant claims the trial court erred in denying his motion to seal. We disagree.

Section 32–1–45(A), *supra*, contemplates a sealing of Children's Court records upon a showing of two "clean" years. Movant's view is that if he waits more than two years after a subsequent felony conviction he is entitled to a sealing order. Section 32–1–45(A), *supra*, does not cover such a fact situation.

Section 32–1–45(E), *supra*, provides that a sealing order may be set aside, in the court's discretion, if there is a conviction of a crime subsequent to a sealing order. In this case, if movant, within two years after his release from the juvenile court order of January 1971, had obtained a sealing order, that sealing order could have been set aside, in the court's discretion, on the basis of the 1976 and 1977 felony convictions. Section 32–1–45(E), *supra*, provides that sealing orders are discretionary if there are subsequent crime convictions. Section 32–1–45(E), *supra*, is the applicable statutory provision in this case.

A movant for a sealing order may not obtain the benefit of the mandatory provisions of § 32–1–45(A), *supra*, by showing two "clean" years, then committing felonies, and then seeking a sealing order more than two years after his felony convictions. In such a situation, sealing is discretionary, not mandatory.

There being nothing indicating the court abused its discretion in denying the motion to seal, that denial is affirmed.

IT IS SO ORDERED.

HERNANDEZ, C. J., and WALTERS, J., concur.

634 P.2d 202

In the Matter of the Application of ANGEL FIRE CORPORATION for a Supplemental Well,

ANGEL FIRE CORPORATION, Applicant-Appellant,

v.

C. S. CATTLE COMPANY, Springer Ditch Company and The City of Springer, Protestants-Appellees,

v.

S. E. REYNOLDS, State Engineer, Party in Interest-Appellant.

No. 13581.

Supreme Court of New Mexico.

Sept. 22, 1981.

Montgomery & Andrews, John B. Draper, Santa Fe, for applicant-appellant.

Jeff Bingaman, Atty. Gen., G. Emlen Hall, Asst. Atty. Gen., Santa Fe, for appellant, State Engineer.

Paul A. Kastler, Raton, for protestants-appellees.

OPINION

PAYNE, Justice.

This appeal requires a determination of the proper procedure for appeal to the dis-

trict courts from actions taken by the State Engineer. § 72–7–1, N.M.S.A. 1978.

The relevant events transpired as follows:

September 8, 1978—Appellant Angel Fire applied for a supplemental water well.

September 22, 1980—The State Engineer issued findings and an order favorable to Angel Fire.

October 1, 1980—Angel Fire petitioned to modify the order.

October 6, 1980—C. S. Cattle Co. (C. S.) filed a Notice of Appeal in district court and mailed copies to Angel Fire's counsel.

October 28, 1980—The State Engineer issued a second order in the case, denying all significant modifications requested by Angel Fire but correcting an inconsequential error found in the September 22 order.

October 30, 1980—C. S. received a copy of the State Engineer's modification order of October 28, 1980.

October 30, 1980—Angel Fire was personally served with notice of C. S.'s appeal from the September 22 order.

December 31, 1980—Angel Fire moved to dismiss C. S.'s appeal on grounds that the court lacked jurisdiction because Angel Fire had not been personally served within thirty days after the September 22 decision.

March 10, 1981—The district court denied Angel Fire's motion to dismiss and authorized an interlocutory appeal.

Angel Fire appeals the district court's denial of its motion to dismiss.

Section 72–12–10, N.M.S.A. 1978, states that "[t]he decision of the state engineer shall be final in all cases unless appeal be taken to the district court within thirty days after his decision as provided by § 72–7–1 N.M.S.A. 1978." Section 72–7–1, N.M.S.A. 1978, states:

> A. Any applicant or other party dissatisfied with any decision, act or refusal to act of the state engineer may appeal to the district court. . . .
>
> B. Appeals to the district court shall be taken by serving a notice of appeal upon the state engineer and all parties interested within thirty days after receipt by certified mail of notice of the decision, act or refusal to act. If an appeal is not timely taken, the action of the state engineer is conclusive.
>
> C. The notice of appeal may be served in the same manner as a summons in civil actions brought before the district court or by publication is [in] some newspaper. . . once a week for four consecutive weeks. The last publication shall be at least twenty days prior to the date the appeal may be heard. Proof of service of the notice of appeal shall be made in the same manner as in actions brought in the district court and shall be filed in the district court within thirty days after service is complete.

The judiciary determines rules of procedure for cases within the judicial system, *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976) *cert. denied*, 436 U.S. 906, 98 S.Ct. 2237, 56 L.Ed.2d 404 (1978); *State v. Roy*, 40 N.M. 397, 60 P.2d 646 (1936), pursuant to its authority under the separation of powers doctrine N.M. Const., Art. III, § 1. However, the statute here establishes an administrative procedure for taking a case or controversy out of the administrative framework into the judicial system for review. Jurisdiction of the matters in dispute does not lie in the courts until the statutorily required administrative procedures are fully complied with. The courts have no authority to alter the statutory scheme, cumbersome as it may be. Accordingly, we reverse.

The statutory requirements are clear. "[A]ny decision, act or refusal to act of the state engineer" may be appealed. § 72–7–1. Thus, there is no requirement of finality. In the posture of the present case, C. S. is therefore required to appeal separately from the September 22 order and the

October 28 modification order if it contests each.

The statute requires service on all interested parties within thirty days. Thus, service on counsel will not suffice if service is not also made on the actual parties to the litigation. C. S.'s attempted appeal fails since no service was made upon Angel Fire until after the thirty-day period expired.

The remaining provisions are not before this Court.

The decision of the district court is reversed. The cause is remanded with directions to dismiss the appeal.

BE IT SO ORDERED.

SOSA, Senior Justice, and RIORDAN, J., concur.

634 P.2d 676

STATE of New Mexico,
Plaintiff-Appellee,
v.
Eugene NELSON, Defendant-Appellant.
No. 13386.

Supreme Court of New Mexico.

Sept. 30, 1981.

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

Jeff Bingaman, Atty. Gen., Arthur Encinias, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

PAYNE, Justice.

Nelson appeals from an habitual offender proceeding which identified him as having prior felony convictions and which imposed two concurrent life sentences upon his underlying two-count felony conviction. On the first day of the proceeding, a hearing was held on Nelson's competency. Written and oral expert opinions were presented. The evidence conflicted as to his competency, but the most recent evidence, presented orally, characterized Nelson as incompetent. The court determined that Nelson was competent for purposes of the proceeding. Nelson unsuccessfully sought a jury determination of the issue under Rule 35(b) New Mexico Rules of Criminal Procedure, N.M.S.A. 1978 (Repl. Pamp. 1980), claiming that a reasonable doubt had been raised. He also objected to the introduction of certain evidence. These alleged errors are the basis for this appeal.

I.

This case requires us to carefully examine certain aspects of the habitual offender proceeding, Sections 31–18–17 through 31–18–20, N.M.S.A. 1978 (Repl. Pamp. 1981). Specifically, we must examine the applicability to such proceedings of Rule 35(b), which sets forth the procedure for raising and determining competency, and related case law.

The habitual offender procedure was established as a means of determining whether a person convicted of a noncapital felony has incurred one or more prior felony convictions arising out of a separate transaction or occurrence. If found guilty, the sentence imposed for the immediate conviction is increased by a specified term, depending upon the number of prior convictions. § 31–18–17, N.M.S.A. 1978 (Repl. Pamp. 1981). Once charged as an habitual offender, the defendant must respond by stating whether he is the same person as charged in the information. If he denies the charge or refuses to answer, a jury is empaneled to inquire whether the offender is the same person. If the jury so finds, the increased sentence is mandatory. § 31–18–20.

The habitual offender statute has been held to be constitutional. *State v. James*, 85 N.M. 230, 511 P.2d 556 (Ct.App.), *cert. denied*, 85 N.M. 228, 511 P.2d 554 (1973). The statute does not create a new offense but merely provides a proceeding for enhancing sentences. However, the charge is serious and the potential for prejudice against unrepresented defendants is so great that a right to counsel has been recognized. *Johnson v. Cox*, 72 N.M. 55, 380 P.2d 199, *cert. denied*, 375 U.S. 855, 84 S.Ct. 117, 11 L.Ed.2d 82 (1963). We have held that the habitual offender proceeding is a sentencing procedure and not a trial of an offense. *State v. James*, 94 N.M. 604, 614 P.2d 16 (1980). Yet the proceeding possesses several characteristics of a trial (right to counsel, right to jury, rules of evidence, etc.). The statute itself refers to the defendant's "right to be *tried* as to the truth" of the allegations of the information. § 31–18–20(A)(2) (emphasis added).

A defendant's right to have his competency determined by a jury rather than by the court depends on the nature of the proceeding. Before making a final determination as to the nature of the habitual offender proceeding, however, it is necessary to examine and perhaps clarify the law as to the determination of competency.

We begin by quoting Rule 35(b)(2), which applies only to competency to stand trial.

> (2) *Determination.* The issue of the defendant's competency to stand trial shall be determined by the judge, unless the judge finds there is evidence which raises a reasonable doubt as the [to] the defendant's competency to stand trial.
>
> (i) If a reasonable doubt as to the defendant's competency to stand trail [sic] is raised prior to trial, the court, without a jury, may determine the issue of compe-

tency to stand trial; or, in its discretion, may submit the issue of competency to stand trial to a jury, other than the trial jury.

(ii) If the issue of the defendant's competency to stand trial is raised during trial, the trial jury shall be instructed on the issue. If, however, the defendant has been previously found by a jury to be competent to stand trial, the issue of the defendant's competency to stand trial shall be submitted to the trial jury only if the court finds that there is evidence which was not previously submitted to a jury which raises a reasonable doubt as to the defendant's competency to stand trial.

It is clear that any right to a jury determination arises only upon establishment of a reasonable doubt as to the defendant's competency to stand trial. If the doubt is raised before trial, there is no right to a jury determination, although the judge may, in his discretion, permit a jury other than the trial jury to determine competency. If the issue is raised during the trial, the defendant has the right to have the trial jury determine the issue (unless a previous jury found him competent). When the issue is raised after the trial, there is no right to a jury determination. *State v. Sena*, 92 N.M. 676, 594 P.2d 336 (Ct.App. 1979).

The defendant here asserts that this scheme is irreconcilable with case law, specifically with *State v. Noble*, 90 N.M. 360, 563 P.2d 1153 (1977). Judge Wood discussed this problem in *Sena, supra*, at 679–680, 594 P.2d 336:

> *Territory v. Kennedy* [15 N.M. 556, 110 P. 854 (1910)], and *State v. Folk*, [56 N.M. 583, 247 P.2d 165 (1952)], point out that the right to a jury trial on the question of competency to stand trial depended on the 1855–56 statute [Laws 1855–56, page 106; codified at § 41–13–3, N.M.S.A.1953 (Repl. Vol. 1964), repealed by 1967 N.M. Laws, ch. 231, § 1], which is quoted in *State v. Folk, [supra]*. The statute is not a model of clarity. *State v. Noble [supra]* and *State v. Chavez* [88 N.M. 451, 541 P.2d 631 (Ct.App.1975)], were of the view that a right to a jury trial existed on the issue of competency to stand trial, if by pretrial motion, there was reasonable doubt as to the defendant's competency to stand trial. Rule of Crim.Proc. 35(b)(2)(i), as amended in 1978, takes a more restricted view. That rule permits the competency to stand trial issue, when presented by pretrial motion, to be decided by the trial court or, in the trial court's discretion, by a jury. We cannot reconcile the amended rule with *State v. Noble, [supra]* and *State v. Chavez, [supra]*. We recognize, however, that the 1855–56 statute is ambiguous, requiring interpretation, and that language in *Territory v. Kennedy [supra]*, supports the approach taken in the amended rule. [*See* 15 N.M. at 559, 110 P. at 855.] See also language in connection with the motion for rehearing in *State v. Upton* [60 N.M. 205, 290 P.2d 440 (1955)].
>
> Although amended Rule of Crim. Proc. 35(b)(2)(i) is not applicable in this case, the approach taken by the rule indicates a restrictive approach to the right to a jury trial on the issue of competency to stand trial when the issue is presented for decision prior to trial. Such an approach is consistent with *In re Smith*, [25 N.M. 48, 176 P. 819 (1918)], which indicated there was no right to a jury trial on the issue of competency to be sentenced. Consistent with these views, we hold there is no right to a jury trial on the issue of competency to stand trial when that issue is first raised, as in this case, at the sentencing hearing.

The common law rule has been stated as follows:

> If the court, at any of these stages, has a reasonable doubt whether the defendant is so mentally disordered, it should suspend the criminal proceedings and hold an inquiry on the matter, with or without a jury. * * *

H. Weihofen, Insanity As a Defense In Criminal Law 333 (1933), quoted in *State v. Folk, supra*, 56 N.M. at 591, 247 P.2d at 170.

This common law rule applies in New Mexico, subject to the modification required by the 1855–56 statute which was

in effect at the time our Constitution was adopted. After carefully reviewing the cases, and in light of Rule 35(b), we hold that a restrictive approach is appropriate. Accordingly, the right to have a jury determination of competency attaches only where competency to stand trial is at issue and when a reasonable doubt is raised after the trial has begun but before it has ended. In all other instances, the judge has discretion to make the determination himself or to submit the issue to a non-trial jury.

In the present case, the competency hearing was initiated on the first day of the habitual offender proceeding. The State correctly points out that Rule 35(b) refers only to competency to be tried. Questions as to sentencing competency are always decided by a court alone regardless of when the question is raised. *In re Smith, supra; State v. Sena, supra.* We must therefore determine whether this proceeding is a "trial" in the constitutional sense.

We begin by noting that the habitual offender proceeding did not exist at the time of the adoption of our Constitution. It is purely a statutory proceeding. Since the legislature did not specify the manner in which competency should be determined in this proceeding, we are reluctant to enlarge the reach of the proceeding by requiring a jury determination unless the Constitution compels such a result. We have indicated that the constitutional right to a jury determination of trial competency should be limited to the specific right recognized in Rule 35. We recognize that the habitual offender proceeding has many of the characteristics of a "trial." However, its purpose is limited to very narrow issues. It does not involve a determination of guilt of any offense, but only the limited questions posed in the statute.

Considering all of these characteristics, we conclude that the habitual offender proceeding is not a trial in the constitutional sense for purposes of making a determination as to competency. Rule 35(b) does not apply to such proceedings.

The defendant was not entitled to have the question of competency determined by a jury.

Much of the defendant's brief discusses the evidence presented to the court below as to the defendant's competency. The defendant cites *State v. Lopez,* 91 N.M. 779, 581 P.2d 872 (1978), for the proposition that a defendant need only show incompetency by a preponderance of the evidence. *Lopez,* however, does not apply here. Under *Lopez,* if at trial the defendant shows incompetency by a preponderance of the evidence, its effect is merely to require that the question of competency be submitted to the jury. Where there is no right of jury determination of competency, as here, the proper standard of review of the judge's determination is whether it is supported by substantial evidence. *Id.* The evidence presented to the court was conflicting, and we cannot hold as a matter of law that the trial judge abused his discretion in finding that the defendant was competent. Accordingly, we affirm.

II.

The defendant argues that it was prejudicial for the court to admit in evidence documents relating to five informations, related to one prior conviction, but which had been nolle prosequied. He asserts that this evidence was irrelevant and could have confused and prejudiced the jury. The State responds that these five charges were an integral part of the resulting conviction because they showed why the defendant pleaded guilty to a lesser included charge. In addition, other evidence referring to these charges was not challenged by the defendant.

We are not persuaded that the State needed to introduce this evidence to prove identity and fact of prior conviction. At the same time, we do not see any possible harm to the defendant. The jury's participation in these proceedings is quite narrow and introduction of these charges could not have biased the jury's limited fact-finding duty.

Judgment is affirmed.

IT IS SO ORDERED.

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

634 P.2d 680

STATE of New Mexico, Petitioner,
v.
Mark Allen CHOUINARD, Respondent.
No. 13423.

Supreme Court of New Mexico.
Sept. 23, 1981.
Rehearing Denied Oct. 23, 1981.

Jeff Bingaman, Atty. Gen., Charles F. Noble, James Blackmer, Asst. Attys. Gen., Santa Fe, Sasha Siemel, Asst. Dist. Atty., for petitioner.

Nancy Hollander, Albuquerque, for respondent.

OPINION

PAYNE, Justice.

This petition for certiorari arose from the reversal of two separate convictions of the defendant, Mark Chouinard. The Court of Appeals also ordered the defendant discharged. 96 N.M. ——, 635 P.2d 986. We reverse.

The defendant was indicted on September 21, 1977, on nine counts of trafficking in cocaine. He failed to appear for arraignment and was not apprehended and arrested on the indictment until May 15, 1979. In the interval, on May 16, 1978, the district attorney mistakenly authorized a court order for destruction of the substance alleged to be cocaine, which was the physical evidence in the case against the defendant for all but Count VII. The defendant moved for dismissal on grounds of destruction of the evidence. The trial court denied the motion but tried Count VII separately from the remaining counts. The defendant was found guilty in both trials, and appealed. We granted certiorari to consider the Court of Appeals' reversal of both convictions.

I.

In his appeal from his conviction in the first trial (Count VII), the defendant alleged five points of error, three of which were considered by the Court of Appeals:

I. The classification of l-cocaine (cocaine derived from the coca leaf) as a narcotic is irrational.

II. The trial court erred when it refused to strike the testimony of the State's chemist when the defendant objected that the chemist's testimony was not competent.

III. The prosecution failed to prove beyond a reasonable doubt that the substance was l-cocaine and not some other substance.

A.

The constitutional challenge to classification of cocaine as a narcotic was considered by the Court of Appeals and we adopt their discussion. We hold that the State Legislature can, like Congress, rationally classify cocaine, a non-narcotic central nervous system stimulant, as a narcotic for penalty and regulatory purposes.

B.

The Court of Appeals also held that the State's failure to strike the incorrect testimony of the State's chemist was reversible error. We disagree. The relevant portion of the Controlled Substances Act, § 54–11–2(P), N.M.S.A. 1953 (Supp. 1975), states:

> "narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:
>
> * * * * * *
>
> (4) coca leaves and any salt, compound, derivative or preparation of coca leaves, any salt, compound, isomer, derivative or preparation which is a chemical equivalent of any of these substances except decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine; * * * *

See also § 54–11–7(A)(4), N.M.S.A. 1953 (Supp. 1975).

The defense in this action was that the substance transferred was not coca leaf cocaine, but a manufactured substance which was not the chemical equivalent of coca leaf cocaine. The State's analysis of the substance showed that it was a form of cocaine, but was not conclusive as to whether it was l-cocaine, a derivative of the coca leaf which is an anesthetic and a stimulant, or d-cocaine, which is man-made and may have little or not effect as either a stimulant or anesthetic.

The State's first expert chemist incorrectly testified that both d-cocaine and l-cocaine were derived from the coca leaf. However, the State's other expert witness and the defense's expert witness contradicted this testimony. The defense pointed out the erroneous testimony during examination of witnesses and in its closing argument. While the State did not affirmatively impeach its own witness, the error was discovered and contradicted during the trial.

This case is therefore distinguishable from those cited by the defense in which the error was not discovered until after the case had been submitted to the jury, *see Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), or in which the State failed to correct, before the case went to the jury evidence already known to be false, *see State v. Hogervorst*, 87 N.M. 458, 535 P.2d 1084 (Ct. App.), *cert. quashed*, 87 N.M. 457, 535 P.2d 1083 (1975). The defense asks us to extend these cases to find reversible error in the prosecutor's failure to affirmatively rebut the incorrect testimony of one of its witnesses even though another prosecution witness corrected the erroneous testimony and the defense extensively pointed out the error. We decline to go so far. Broad discretion in the admission or exclusion of expert evidence will be sustained unless manifestly erroneous. *Sanchez v. Safeway Stores, Inc.*, 451 F.2d 998 (10th Cir. 1971). The trial court was faced with conflicting expert testimony. We cannot require a trial court to take judicial notice of whatever facts are necessary to prove the validity of one expert's testimony in order to strike the other expert's erroneous testimony. Accordingly, we hold that the trial court's refusal to strike this testimony was not manifestly erroneous.

C.

The Court of Appeals held that consideration of the incorrect testimony resulted in a failure of proof on some of the elements of the crime charged. In a criminal prosecution the State has the burden of proving each element of the offense charged beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Carter*, 93 N.M. 500, 601 P.2d 733 (Ct. App.), *cert. denied*, 93 N.M. 683, 604 P.2d 821 (1979). In deciding if the State has met its burden we 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. Carter, supra.*

A conviction for trafficking in a controlled substance can be sustained by circumstantial evidence. *See State v. Burrell*, 89 N.M. 64, 547 P.2d 69 (Ct. App. 1976). From the evidence presented at trial regarding the circumstances in which the transaction occurred the jury could properly draw the inference that cocaine was involved, even without the incorrect testimony.

We reverse the Court of Appeals as to the first trial and remand the case to them for consideration of the remaining issues raised in the defendant's appeal.

II.

The basis for reversal in the second trial (on all the remaining counts) was the destruction of the evidence. The evidence was destroyed when the Bernalillo County District Attorney's office erroneously included it in a list of evidence no longer necessary for preservation. Neither the defendant's failure to appear nor the subsequent disappearance directly caused the destruction of the evidence. The question presented therefore is what sanctions will be applied against the State for its failure to preserve evidence.

In *United States v. Miranda*, 526 F.2d 1319 (2d Cir. 1975), *cert. denied*, 429 U.S. 821, 97 S.Ct. 69, 50 L.Ed.2d 82 (1976), the Second Circuit undertook careful review of federal cases in which the question of applying sanctions for loss of evidence arose. The defendant in that case sought to suppress testimony as to a certain conversation, a tape recording of which had been lost by the prosecution. The court held that the loss was merely inadvertent or negligent, and that the defense was not so greatly prejudiced by the unavailability of the recording at trial as to require the imposition of sanctions against the Government.

> In a criminal case, the Government plainly has the obligation to make available to the defense evidentiary material in its possession which is disclosable under the due process safeguards of *Brady v. Maryland*, 373 U.S. 83, [83 S.Ct. 1194, 10 L.Ed.2d 215] (1963). * * * *
>
> If the Government fails to carry out that obligation, a serious question arises

> as to whether such failure calls for the imposition of sanctions against the Government. Whether or not sanctions for nondisclosure should be imposed depends in large measure upon the extent of the Government's culpability for failure to make disclosable material available to the defense, on the one hand, weighed against the amount of prejudice to the defense which resulted, on the other.

Id. at 1324 (citations and footnote omitted).

The court mentioned its earlier decision in *United States v. Augello*, 451 F.2d 1167 (2d Cir. 1971), *cert. denied*, 405 U.S. 1070, 92 S.Ct. 1518, 31 L.Ed.2d 802 (1972), where it refused to order suppression of testimony concerning a conversation a tape of which had been destroyed. The court had relied on the first of the *Bryant* cases, *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971) (Bryant I); *United States v. Bryant*, 448 F.2d 1182 (D.C. Cir. 1971) (Bryant II). Those cases applied a pragmatic balancing approach, requiring the district court to

> Weigh the degree of negligence or bad faith involved, the importance of the evidence lost, and the evidence of guilt adduced at the trial in order to come to a determination that will serve the ends of justice.

439 F.2d at 653. The convictions in those cases were affirmed, after applying this balancing test, although the negligence of the agent was "regrettably great." However, the *Bryant* court specified that in future cases it would require rigorous and systematic rules for evidence preservation, and would examine the Government's observance of these rules.

The *Miranda* court summarized its review of cases from other circuits as follows:

> Other circuits have dealt with the loss of disclosable evidence by the Government on a case-by-case basis, and have refused to impose sanctions where the loss was inadvertent and not deliberate or in bad faith, and there was not such prejudice to the defendant as to deny him a fair trial. *See United States v. Love*, 482 F.2d 213 (5th Cir. 1973); *United States v. Sewar*, 468 F.2d 236 (9th Cir. 1972), *cert. denied*, 410 U.S. 916, 93 S.Ct. 972, 35 L.Ed.2d 278 (1973); *United States v. Shafer*, 445 F.2d 579, 581–82 (7th Cir.), *cert. denied*, 404 U.S. 986, 92 S.Ct. 448, 30 L.Ed.2d 370 (1971); *United States v. Rojas*, 502 F.2d 1042, 1044–45 (5th Cir. 1974). *See also United States v. Augenblick*, 393 U.S. 348, 89 S.Ct. 528, 21 L.Ed.2d 537 (1969), cited in *United States v. Augello, supra*, where the Supreme Court indicated that while sanctions should be imposed on the Government for bad faith suppression of evidence, they are not appropriate where the loss was in good faith and earnest efforts had been made to find the evidence, once its loss was discovered.

526 F.2d at 1327.

These cases are well reasoned and persuasive.

[redacted] New Mexico has adopted a three-part test to determine whether deprivation of evidence is reversible error. It was first stated in *State v. Lovato*, 94 N.M. 780, 617 P.2d 169 (Ct.App.1980), as follows:

1) The State either breached some duty or intentionally deprived the defendant of evidence;
2) The improperly "suppressed" evidence must have been material; and
3) The suppression of this evidence prejudiced the defendant.

Id. at 782, 617 P.2d at 171. *See also State v. Duran*, N.M., 630 P.2d 763 (1981); *Trimble v. State*, 75 N.M. 183, 402 P.2d 162 (1965); *Chacon v. State*, 88 N.M. 198, 539 P.2d 218 (Ct.App.1975). The purpose of the three-part test is to assure that the trial court will come to a determination that will serve the ends of justice. We consider the three-part test appropriate to a proper resolution of the question presented here. We do not construe the test to exclude the results of every test based on evidence which is no longer available. For example, where the evidence is used up during testing, a defendant is only able to cross-examine the State's witnesses. *Jamison v. State Racing Commission*, 84 N.M. 679, 507 P.2d 426 (1973). Thus if the substance in the present case had been used up during testing, the State would not have breached any

duty, and there would have been no due process violation. Also, where material is destroyed before its significance as evidence is realized, the defendant's inability to inspect or test does not deny him due process. *See State v. Stephens*, 93 N.M. 368, 600 P.2d 820 (1979).

Lovato, Trimble, and *Chacon* are each distinguishable from the present case. Chouinard essentially based his defense on the State's inability to prove that the substance he sold was l-cocaine. He did not contradict the State's presentation of the circumstances of the various transactions, nor did he attempt to explain the source of the substance or present any other evidence to show it was d-cocaine. During the trial, defense counsel carefully and thoroughly pointed out inconsistencies and apparent incompetence on the part of the State's expert witnesses. The jury was fully aware of the destruction of the evidence and of the possibility that further tests would have revealed that the substance was d-cocaine. However, considering all the evidence before it, and not just the test results, the jury found Chouinard guilty.

Lovato, supra, dealt with the invocation of a statutory presumption of guilt based on a blood alcohol test. Retesting could have made invocation of the presumption improper. This is significant because it appears that no other evidence was presented on the question of the defendant's intoxication. In the present case, the test results were no so determinative of guilt. *Lovato* also presented the court with an impermissible procedure for evidence preservation. In that case, there were no systematic rules to reasonably assure preservation of evidence. A court can hardly uphold such manifest indifference to proper law enforcement. The present case does not present such a situation since acceptable preservation procedures existed.

Lovato cited *Chacon* and *Trimble, supra,* for the proposition that "[n]o different standard applies because the nondisclosure is negligent rather than deliberate." *Chacon, supra,* at 199, 539 P.2d at 219.

Chacon, supra, presented a situation where the jury, and the defendant, were unaware during the trial of the prosecution's failure to disclose relevant evidence. This presented a question significantly different from the case at hand, where the destruction of evidence was fully presented to the jury for their consideration.

Trimble, supra, was a response to wholly inappropriate police conduct. There, evidence not necessary to the prosecution was taken, damaged and lost. The prosecutor apparently contradicted himself at trial as to the very existence of the lost items. The defendant specifically identified the contents of the lost evidence. Here, however, Chouinard did not say what the substance was, only that it might have been something other than illegal cocaine. There is no indication of prosecutorial misconduct at trial. The evidence preservation procedures followed by the district attorney were systematic and reasonably assure preservation of evidence.

This case thus presents a significant question of first impression. Even with the best of procedures, evidence may sometimes be lost as it was here. In such instances, what should be done?

Where the loss of evidence is not known during the trial, as in *Chacon, supra,* and the evidence is material and its absence prejudicial to the defendant, the only remedy is a new trial incorporating the lost evidence once it is found. Where the loss is known prior to trial, there are two alternatives: Exclusion of all evidence which the lost evidence might have impeached, or admission with full disclosure of the loss and its relevance and import. The choice between these alternatives must be made by the trial court, depending on its assessment of materiality and prejudice. The fundamental interest at stake is assurance that justice is done, both to the defendant and to the public.

We have cited *Chacon, supra,* as saying that no different standard applies because the nondisclosure is negligent rather than deliberate. The good faith of the State is irrelevant when the evidence lost is

material and prejudicial to the accused. But, where the State shows it did not act in bad faith, the defendant must show materiality and prejudice.

Determination of materiality and prejudice must be made on a case-by-case basis. The importance of the lost evidence may be affected by the weight of other evidence presented, by the opportunity to cross-examine, by the defendant's use of the loss in presenting the defense, and other considerations. The trial court is in the best position to evaluate these factors.

Applying this analysis here, we conclude that the trial judge did not abuse his discretion as a matter of law. In the posture of this case, we cannot say that there is a realistic basis, beyond extrapolated speculation, for supposing that availability of the lost evidence would have undercut the prosecution's case. Chouinard made no assertion and introduced no evidence that the substance was other than what the State said it was. His only defense was that the State's tests were insufficiently conclusive. In light of all the circumstances, the jury found otherwise.

Accordingly, we reverse the Court of Appeals as to the second trial and reinstate the judgment of the district court.

BE IT SO ORDERED.

EASLEY, C. J., and FEDERICI, J., concur.

SOSA, Senior Justice, dissenting.

RIORDAN, J., not participating.

634 P.2d 685

CITY OF SANTA FE, Historic Neighborhood Association, Southeast Neighborhood Association, Old Don Gaspar Neighborhood Association, Historic Hillside Area Neighbors, Tano Road Association, Rodeo Road Association, Plaintiffs-Appellees,

v.

Alex ARMIJO, the Commissioner of Public Lands, State of New Mexico, Defendant-Appellant.

No. 13388.

Supreme Court of New Mexico.

Oct. 5, 1981.

Jeff Bingaman, Atty. Gen., Thomas L. Dunigan, Deputy Atty. Gen., Santa Fe, for defendant-appellant.

Coppler & Walter, Frank Coppler, Richard C. Bosson, Santa Fe, for plaintiffs-appellees.

OPINION

RIORDAN, Justice.

The City of Santa Fe (city) and several private neighborhood associations brought an action against the Commissioner of Public Lands seeking to enjoin the Commissioner from maintaining an oil field pumping rig on the premises of the State Land Office Building in violation of Santa Fe's historical district zoning ordinances (ordinances). Santa Fe, N.M., Code ch. 36, art. XXVI, §§ 36–312 through 36–324 (1973). The plaintiffs alleged that the Commissioner failed to comply with the ordinances by not obtaining a permit before placing the pumping rig on the premises. The district court found in favor of plaintiffs and held that the Commissioner was to comply with the ordinances because New Mexico's Historic District Act (Act), §§ 3–22–1 through 3–22–5, N.M.S.A. 1978, empowered the city to apply its ordinances to state agencies, institutions and officials. The Commissioner appeals. We reverse.

A number of issues are raised on appeal; however, one is dispositive: Do Santa Fe's historical zoning ordinances apply to the Commissioner of Public Lands' building?

There are a number of general principles governing a municipality's authority to apply zoning requirements to state land. A state governmental body is not subject to local zoning regulations or restrictions. *Matter of Suntide Inn Motel*, 563 P.2d 125, 127 (Okl.1977). A city has no inherent right to exercise control over state land. *See, City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 413, 389 P.2d 13, 15 (1964); *Town of Mesilla v. Mesilla Design Center & Book Store*, 71 N.M. 124, 376 P.2d 183 (1962). A city's power to zone state property must be delegated to the city by state statute. Statutes granting power to cities are strictly construed, and any fair or reasonable doubt concerning the existence of an asserted power is resolved against the city. *Village of River Forest v. Midwest Bank & Trust Co.*, 12 Ill.App.3d 136, 139, 297 N.E.2d 775, 777 (1973). Cities have only such power as statutes expressly confer without resort to implication. *Sanchez v. City of Santa Fe*, 82 N.M. 322, 481 P.2d 401 (1971). Thus, no power or authority may be claimed by a municipality by inference or implication from a statute. Municipalities have only those powers *expressly* delegated by state statute.

In applying the above principles, we must determine which state statute authorized Santa Fe's historical district zoning ordi-

nances. The ordinances were enacted October 30, 1957. The only state statutes authorizing municipality zoning at that time were the "Zoning Regulations," §§ 14–28–9, 14–28–10 and 14–28–11, N.M.S.A. 1953, which were first enacted in 1927. These statutes were repealed by 1965 N.M. Laws ch. 300 and were replaced by the same 1965 Act as §§ 14–20–1 and 14–20–2, N.M.S.A. 1953 (Cum.Supp.1965) (now codified as §§ 3–21–1 and 3–21–2, N.M.S.A. 1978). We held in *City of Santa Fe v. Gamble-Skogmo, Inc., supra,* that Santa Fe's historical district zoning ordinances were enacted under these statutes.

These "Zoning Regulations" gave the municipality a general grant of zoning powers. However, the regulations do not give the municipalities express power to apply zoning regulations to state land. Therefore, the city's ordinances as originally enacted do not apply to state land. The trial court found, however, that the state's Historic District Act authorized the city's ordinances.

The state's Historic District Act was enacted in 1961, (1961 N.M. Laws ch. 92, §§ 1 through 5, codified as §§ 14–50–1 through 14–50–5, N.M.S.A. 1953 (Cum.Supp.1961); repealed by 1965 N.M. Laws ch. 300 and reenacted by the 1965 Act as §§ 14–21–1 through 14–21–5, N.M.S.A. 1953 (Cum. Supp.1965) (now codified as § 3–22–1 through § 3–22–5) four years after the enactment of the Santa Fe ordinances. The only way in which the Act could have authorized, validated or extended the ordinances' application to state property, is by ratification. In order to validate or extend by ratification the application of a previously enacted municipal ordinance, two requirements must be satisfied.

The first requirement is that there must have been some previously existing state statute which authorized the enactment of the particular municipal ordinance. Curative statutes can validate irregular exercise of power where the initial power to enact such an ordinance has already been granted. However, a curative statute cannot ratify a void municipal ordinance nor validate an application of an ordinance where there was no power to enact the ordinance in the first instance. *209 Lake Shore Drive Bldg. Corp. v. City of Chicago,* 3 Ill.App.3d 46, 51, 278 N.E.2d 216, 220 (1971); *Village of River Forest v. Midwest Bank & Trust Co., supra.* This requirement was not satisfied. When the city enacted its historical district zoning ordinances, there were no state statutes authorizing the application of such an ordinance to state property. There were general zoning laws at the time authorizing the enactment of the ordinances, *City of Santa Fe v. Gamble-Skogmo, Inc., supra,* but these laws did not permit application of ordinances to state property. Any attempted application of such ordinances to state property prior to the enactment of the Historic District Act would have been invalid.

The second requirement is that the state statute must name or in some way identify the ordinance which is intended to be validated or extended by ratification. *State ex rel. Brelsford v. Retirement Board,* 41 Wis.2d 77, 84, 163 N.W.2d 153, 156 (1968); *Village of River Forest v. Midwest Bank & Trust Co., supra.* The state Act does not expressly refer to the historical district zoning ordinances of the City of Santa Fe nor does it refer generally to historical district zoning ordinances promulgated by municipalities prior to its enactment. This requirement is not met.

Further, the City of Santa Fe argues that in 1973 it "readopted" its historical zoning ordinances under the authority of the Historic District Act and thereby cured the invalidity of the ordinance with respect to its purported application to state property. This argument ignores the stated intention of the city in adopting the 1974 code. The intent of the council was clearly stated in Santa Fe, N.M. Code ch. 1, § 1–3 (1973).

> *Sec. 1–3. Provisions considered as continuations of existing ordinances.*
>
> The provisions appearing in this Code, so far as they are in substance the same as those of the 1953 Code and all ordinances adopted subsequent to the 1953 Code and included herein, shall be considered as

continuations thereof and not as new enactments.

Thus, in accordance with Section 1–3 of the City Code, the ordinances were merely continued unaffected by the 1973 codification and were not "reenacted" or "readopted" by the council in 1973.

It is true that a municipality may cure the invalid application of a city's ordinance by subsequent council enactment. The proceedings to cure such a defect must be undertaken with the full knowledge of the invalidity and with an intent to remedy the invalidity by the council's legislative action. 5 E. McQuillin, *Municipal Corporations*, § 16.93 (3rd rev. ed. 1969). "Ratification [of an invalid municipal ordinance] to be effective, must be made with full knowledge of all the facts relating to the act ratified." *McCracken v. City of San Francisco*, 16 Cal. 591, 626 (1860). There is no evidence that the city council was aware of the defect in the historical district ordinances and intended to cure them by their actions in 1973.

We do not need to address the question as to whether the wording of the Historic District Act allows the regulation of state land by a municipality. However, as we have already stated, a city has only such power as a state statute *expressly* confers without resorting to implication. *Sanchez v. City of Santa Fe, supra.* If the state's Act is to include the regulation of state land, then it will be up to the municipality to show where *express* authority was conferred on them.

The decision of the district court is reversed.

IT IS SO ORDERED.

FEDERICI, J., concurs.

SOSA, Senior Justice, specially concurs.

SOSA, Senior Justice, special concurring.

I concur only in the result reached by the majority opinion. I agree that, under the facts of this case, the City of Santa Fe had no zoning ordinances applicable to state property. This is true, however, not because they lacked the requisite authority to enact historical district zoning ordinances applicable to state property, but because they lacked a valid ordinance with which to do so. The City's 1973 recodification was not a reenactment of the City's zoning ordinances enacted in 1957 pursuant to the statutory predecessor of §§ 3–21–1 and 3–21–2, which did not apply to state land. If the City had reenacted its ordinances subsequent to 1961 when the state authorized, in broad and general plenary language, the power of municipalities to regulate *all* lands, the City's ordinances would apply to the State Land Office.

Once the Santa Fe City Council reenacts the ordinances, they will apply to state land pursuant to the Historic District Act. Section 3–22–2 of the Act makes it very clear that municipalities have full and complete power to regulate *historical* districts in furtherance of the historical heritage of this state.

> The legislature of the state of New Mexico hereby declares that the historical heritage of this state is among its most valued and important assets, and that it is the intention of Sections 3–22–1 through 3–22–5 N.M.S.A. 1978, to *empower * * * municipalities * * * with as full and complete powers to preserve * * the historic areas * * * as it is possible for this legislature to permit under the constitution * * *.* (Emphasis added.)

There is nothing in the statute which limits its applicability only to private land. Indeed, had the Legislature intended for municipalities to be able to zone only private land, there would have been no need to enact the Historic District Act, because §§ 3–21–1 and 3–21–2 already enabled municipalities to zone private land. "Full and complete powers" includes the power over state land lying within historic areas.

634 P.2d 689

Johnny VIGIL, Plaintiff-Appellant,

v.

Jim RUSH and Sam Rush, Individually and d/b/a Rush Construction Company, Defendants-Appellees.

No. 13464.

Supreme Court of New Mexico.

Oct. 5, 1981.

George M. Scarborough, Espanola, for plaintiff-appellant.

Roy G. Hill, Deming, for defendants-appellees.

OPINION

TIBO J. CHAVEZ, District Judge.

Johnny Vigil, appellant, sought declaratory relief absolving him of liability for the loss of an insulation blower owned by Sam and Jim Rush. The trial court found: (1) Sam and Jim Rush bailed the insulation blower to Vigil, and (2) Vigil, as bailee, expressly accepted responsibility for the loss of the item. We affirm.

The sole issue presented to us is whether there is substantial evidence to support the trial court's finding that Vigil had expressly agreed to be responsible for the loss of the insulation blower.

Vigil had entered into a verbal agreement with Sam and Jim Rush for the use of an insulation blower. Vigil hired the equipment with an option to purchase. The equipment was delivered to Vigil and was subsequently destroyed by fire through no fault of Vigil.

The general rule of law is that the bailee is not an insurer of goods bailed to him unless a statute or an express contract states otherwise. *United States v. Seaboard Machinery Corporation*, 270 F.2d 817 (5th Cir.1959), *cert. denied*, 362 U.S. 941, 80 S.Ct. 806, 4 L.Ed.2d 770 (1960); Annot., 28 A.L.R.3d 513 (1969); 8 Am.Jur.2d *Bailments* § 215 (1980).

At trial, Sam Rush said:

> Q: Okay. Did you have any conversation about any possible damage or destruction of the machine?
>
> A: Johnny asked me, if something should happen, what does it cost me? And, I told him that the entire unit as it sat with the trailer and the equipment was $8500.00.

It is for the trier of fact, not us, to determine the credibility of Sam Rush's testimony *Baker v. Benedict*, 92 N.M. 283, 587 P.2d 430 (1978); *Durrett v. Petritsis*, 82 N.M. 1, 474 P.2d 487 (1970).

The trial court accepted Sam Rush's testimony as true. We conclude that this testimony established an express contract in which Johnny Vigil would pay for the loss of the insulation blower.

The trial court accepted Sam Rush's testimony as true. We conclude that this testimony clearly established that Vigil would pay for the loss of the insulation blower. We agree that this is substantial evidence which a reasonable mind would accept as adequate to support the trial court's conclu-

sion. *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).

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

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

634 P.2d 690

Richard S. MECHEM and Verna L. Mechem, his wife, Plaintiffs-Appellants,

v.

CITY OF SANTA FE, et al., Defendants-Appellees.

No. 13503.

Supreme Court of New Mexico.

Oct. 5, 1981.

Sommer, Lawler & Scheuer, Joseph G. Lawler, Houston Lee Morrow, Santa Fe, for plaintiffs-appellants.

Coppler & Walter, Frank R. Coppler, Santa Fe, for defendants-appellees.

White, Koch, Kelly & McCarthy, Daniel H. Friedman, Santa Fe, amicus curiae.

OPINION

FEDERICI, Justice.

This is an appeal from the District Court of Santa Fe County. Appellant, Richard S. Mechem (Mechem), sought declaratory and injunctive relief from the effect of a restriction imposed in a special exception by the Board of Adjustment of Santa Fe (City) upon the person and property of Mechem. Mechem alleges that the personal restriction is unconstitutional, illegal, ultra vires and null and void. The parties stipulated to all pertinent facts and to the admissibility of the evidence presented. The trial court denied appellant relief. We reverse.

In 1967, the Santa Fe Board of Adjustment granted a special exception to operate a private tennis club in an R–1 district in Santa Fe. In granting the exception, the City required that the special exception terminate with any change in ownership of the premises. In 1976, the City approved an expansion of the tennis facility. During those proceedings, Mechem questioned the enforceability of the restriction referred to above. Soon thereafter, neighbors of Mechem who opposed the expansion of the facility brought an action in district court in an attempt to prevent the expansion, but were unsuccessful. In 1977, Mechem discovered that a facility similar to his own had been granted a special exception in an R–1 district without imposition of the added restriction at issue here. Mechem at that time again requested that the restriction be lifted, but the City refused to lift it. In 1978, claiming changed circumstances due to marital difficulties, Mechem again requested that the restriction be lifted. The City refused to act upon Mechem's request, even though the request had been placed on the agenda of the City Council for December 13, 1978. This suit was filed on January 5, 1979.

The issues we discuss on appeal are:

I. Whether Mechem is barred from the present action by the statute of limitations;

II. Whether Mechem is barred from the present action by unclean hands;

III. Whether Mechem is barred from the present action by laches; and

IV. Whether the City has the authority to impose a restriction on ownership of property when granting a special exception to a zoning ordinance.

I.

In deciding whether Mechem is barred by the statute of limitations from initiating the present proceedings, we look to the applicable statute, Section 3–21–9, N.M.S.A. 1978. It reads:

> A. Any person aggrieved by a decision of the zoning authority, or any officer, department, board or bureau of the zoning authority may present to the district court a petition, duly verified, setting forth that the decision is illegal, in whole or in part, and specifying the grounds of illegality. The petition shall be presented to the court within thirty days after the decision is entered in the records of the clerk of the zoning authority.

The record shows that Mechem did not appeal to the district court following the 1967 and 1976 proceedings between the City and Mechem wherein the restriction was imposed. He may not now directly attack the restriction imposed by the City, *Bolin v. City of Portales*, 89 N.M. 192, 548 P.2d 1210 (1976), unless the restriction is void. *See Nesbit v. City of Albuquerque*, 91 N.M. 455, 575 P.2d 1340 (1977).

Mechem contends that he may collaterally attack the prior determination made by the City in 1967 and 1976, and the statute of limitations is therefore inapplicable. The basis of Mechem's collateral attack is that the City acted beyond the scope of its statutory authority and its actions were ultra vires and void. Collateral attack of a city ordinance was upheld in *Dale J. Bellamah Corporation v. City of Santa Fe*, 88 N.M. 288, 291, 540 P.2d 218, 221 (1975), where the court stated:

> Various courts have permitted collateral attacks upon ordinances which are void in the sense that the legislative body had no constitutional or statutory power to pass it or because the ordinance was never legally enacted. *State v. Vargas*, 6 Conn. Cir. 69, 265 A.2d 345 (1969); *Bowling Green-Warren County Airport Bd. v. Long*, 364 S.W.2d 167 (Ky.Ct.App.1962); *Simmons v. Holm*, 229 Or. 373, 367 P.2d 368 (1961); 6 E. McQuillen, Municipal Corporations § 20.14 (3rd ed. rev. 1969). Since [§ 3–21–9] *does not present the exclusive method for attacking invalid ordinances, we hold that a collateral attack upon the ordinance was permissible in the instant case.* (Emphasis added.)

Compare Bolin v. City of Portales, supra, and *Serna v. Board of Cty. Com'rs of Bernalillo County*, 88 N.M. 282, 540 P.2d 212 (1975).

Collateral attack upon judicial proceedings has been permitted where the determinations of judicial bodies are found to be void. *Nesbit v. City of Albuquerque, supra.* Collateral attack has likewise been permitted to challenge an administrative determination which is void because it was made without express or implied statutory power. *See State v. Civil Service Board*, 226 Minn. 253, 32 N.W.2d 583 (1948); *Foy v. Schechter*, 1 N.Y.2d 604, 154 N.Y.S.2d 927, 136 N.E.2d 883 (1956).

In *Bischoff v. Hennessy*, 251 S.W.2d 582 (Ky.1952), based upon facts similar to those in this case, the Kentucky court held that a thirty-day time limitation applicable to a zoning action was not exclusive and an action was permitted beyond the thirty-day limitation period, where the zoning authority acted illegally, and vested rights were denied in violation of the law or the constitutional provisions.

We hold that Mechem is entitled to collaterally attack the restriction imposed upon him by the City that made the special exception personal to him.

II.

The City contends that Mechem may not seek equitable relief because he has unclean hands. The key element under this doctrine is that Mechem's misconduct must be related to the transaction giving rise to the claim involved here. "What is material is not that plaintiff's hands are dirty, but that he dirtied them in acquiring the right he now asserts, ..." *Republic Molding Corporation v. B. W. Photo Utilities*, 319 F.2d 347 (9th Cir. 1963), cited in D.B. Dobbs, *Remedies* § 2.4 at 46 (1973).

The City argues that the tennis facility is being run as a business enterprise rather than as a private club. It claims that since Mechem has expanded the operation beyond the type of club he represented to City officials he would run, his actions were deceitful and amount to unclean hands. Mechem counters, stating that the record supplies ample evidence of instances of agreement and harmony between the City and himself directly related to the expansion of the club.

The record indicates that the special exception was granted to Mechem in 1967 upon the following conditions: (1) daylight hour operation only; (2) membership was not to exceed a maximum of 100; (3) no liquor was to be sold on the premises; and (4) this special exception was to remain valid only so long as the ownership and operation remained in the name of Mechem. In 1976, Mechem was allowed to expand his operation subject to the following additional conditions: (1) all sales by the Pro Shop were to be limited to members only; (2) the use of guest cottages was to be limited to members only; (3) membership was not to exceed 150; and (4) additional tennis courts were to be permitted north of Camino Corrales and the tract south of Camino Corrales was to be utilized as an off-street parking area only. These facts indicate that Mechem had two major transactions with the City regarding the conditions under which he was to operate his tennis facility. First, in 1967, he acquired the special exception which gave him the right to operate the facility in a residential zone, and second, in 1976, he acquired the right to expand his operation. It was in the 1967 transaction that Mechem became subject to

the restriction at issue. Whether or not Mechem's later conduct relating to the expansion of his facility was inequitable, is irrelevant to the determination of whether he was guilty of unclean hands at the time he acquired the exception in 1967. If Mechem had sought an equitable remedy to protect his right to expand his tennis facility, then his acts relating to how he expanded the facility would be relevant. This is not the case here. The record does not show that Mechem intended to expand his facility beyond the scope of the conditions contained in the special exception at the time he acquired it. The right to challenge the restriction at issue was acquired in 1967 when it was granted. The acts of Mechem in 1967 upon which the City relies for its defense of "unclean hands" cannot be used as a defense in the present proceedings.

III.

The City contends that Mechem is barred from bringing the present suit by laches.

The elements of laches are: (1) the City's invasion of Mechem's rights; (2) delay in asserting Mechem's rights, once Mechem had notice and opportunity to take legal action; (3) lack of knowledge by the City that Mechem would assert his rights; and (4) injury or prejudice to the City in the event relief is accorded to Mechem or the suit is not held to be barred. *Butcher v. City of Albuquerque*, 95 N.M. 242, 620 P.2d 1267 (1980). Whether or not the rule governing laches is to be applied depends upon the circumstances in each particular case. *Hart v. Northeastern N.M. Fair Ass'n.*, 58 N.M. 9, 265 P.2d 341 (1953). Laches is not favored and the rule is applied only in cases where a party is guilty of inexcusable neglect in enforcing his rights. *Cain v. Cain*, 91 N.M. 423, 575 P.2d 607 (1978).

We do not believe that the rule of laches applies in this case. While Mechem did not assert his rights between 1967 and 1978, the delay alone does not necessarily constitute laches. In *Trujillo v. Padilla*, 79 N.M. 245, 442 P.2d 203 (1968), the court stated that laches is not necessarily a matter of time, but a question of the inequity of permitting the claim to be enforced. Mechem's inaction from 1967 to 1976 must be considered in the light of all the facts in the case as they relate to the element of laches.

The evidence falls short of proving that the City was prejudiced. The City has not materially changed its position to its detriment during this period, it has pointed to no evidence that has become unavailable, nor has it expended money or incurred new obligations in reliance upon Mechem's inaction. The City cannot claim prejudice because of an expanding commercial enterprise in a neighborhood when the City itself approved the enterprise. If Mechem has expanded the enterprise beyond the permitted special exception, that issue is not properly addressed in this lawsuit, nor is it a basis for a claim of laches by the City.

Absent a showing of prejudice, the doctrine of laches is not available to the City.

IV.

Having disposed of the above preliminary issues, we now turn to the merits of Mechem's claim, that the restriction upon personal ownership is ultra vires and void.

The City obtains its authority to zone from Sections 3–21–1 through 3–21–26, N.M.S.A. 1978 (Orig. Pamp. and Cum.Supp. 1981). It has no zoning authority beyond that provided by statute. *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964). Section 3–21–1, N.M.S.A. 1978 limits the regulations and restrictions the City may impose when zoning:

> A. For the purpose of promoting health, safety, morals or the general welfare, a . . . municipality . . . may regulate and restrict within its jurisdiction the:
>
> (1) height, number of stories and size of buildings and other structures;
>
> (2) percentage of a lot that may be occupied;
>
> (3) size of yards, courts and other open space;
>
> (4) density of population; and

(5) location and use of buildings, structures and land for trade, industry, residence or other purposes.

Section 3–21–8, N.M.S.A. 1978 (Cum.Supp. 1981), allows the City to grant special exceptions in certain situations:

C. . . . [T]he zoning authority by a majority vote of all its members may:

(1) authorize, in appropriate cases and subject to appropriate conditions and safeguards, special exceptions to the terms of the zoning ordinance or resolution:

(a) which are not contrary to the public interest;

(b) where, owing to special conditions, a literal enforcement of the zoning ordinance will result in unnecessary hardship; and

(c) so that the spirit of the zoning ordinance is observed and substantial justice done. . . .

If the City has authority to terminate a special exception upon a change in ownership, it must be found in the above statutes. The statutes do not expressly provide for regulation of land by making a special exception personal to a particular owner. Any power to do so must be by necessary implication and must reasonably relate to the objectives of zoning. Otherwise the regulation is ultra vires and unenforceable. *See Vlahos v. Little Boar's Head District*, 101 N.H. 460, 146 A.2d 257 (1958); *Olevson v. Zoning Board of Review*, 71 R.I. 303, 44 A.2d 720 (1945).

In *Olevson*, a restriction similar to that involved in this case was held to be invalid. The court reasoned that the restriction went beyond the zoning function of regulating real estate and attempted to regulate ownership.

The City contends that even under *Olevson* the conditions of the special exceptions now in issue do not restrict ownership because Mechem can sell his property at any time, and then the burden is upon the new owners to apply for a renewal of the special exception. However, the basis of the court's decision in *Olevson* was that the zoning authority is limited to regulating matters relating to the real estate itself and not the person who owns or occupies it. A restriction upon ownership, the court held, amounts to a mere license or privilege to an individual and is not related to the use of the property. Our Court has also previously stated that zoning concerns regulation of the *uses* of land and buildings. *See Bd. of Cty. Com'rs., Etc. v. City of Las Vegas*, 95 N.M. 387, 622 P.2d 695 (1980).

We hold that it is not within the proper function of the zoning authority to condition an exception to the use of real property upon personal rights of ownership rather than use.

The City points out that an agreement was negotiated between the parties. It argues that regardless of any authority the City may have, Mechem is bound by the agreement. In *Edmonds v. Los Angeles County*, 40 Cal.2d 642, 255 P.2d 772 (1953), the court applied promissory estoppel to prevent a plaintiff from circumventing an agreement he made with zoning officials. In *Bringle v. Board of Supervisors of County of Orange*, 54 Cal.2d 86, 4 Cal.Rptr. 493, 351 P.2d 765 (1960), a landowner was unsuccessful in revoking an agreement he made with zoning officials which committed him to the grant of an easement in exchange for a variance. Even so-called "contract zoning" has been upheld under certain circumstances. *See* R. Anderson, *American Law of Zoning 2d* § 9.21 (1976). We have no quarrel with the rule announced in those cases. The question here, however, is one of limits. As the court in *Olevson, supra*, stated:

> It seems clear, speaking generally, that under the terms of the statute and of the ordinance applicable in this cause the respondent zoning board of review is given broad discretion in fixing conditions and safeguards when variances or exceptions are permitted. That discretion, however, is not unlimited.

Id., 44 A.2d at 722. The cases cited by the City do not involve the type of restriction involved in this case. While it is true that Mechem is not specifically restricted from

selling his property, the effect of the condition expressed in the exception and variance is to do just that. Mechem cannot sell the property and a purchaser cannot buy it without subjecting themselves to the probability of substantial and costly changes in the character of the property together with significant diminution in value of the property.

Even if the restriction at issue were negotiated, it is not enforceable because it is ultra vires. A zoning authority may not impose conditions upon a special exception whether it is negotiated or not if it has no power to impose the conditions. *See Olevson, supra.*

The trial court is reversed and directed to enter judgment in accordance with this opinion.

We do not express an opinion on whether Mechem is now in compliance with the other special conditions originally imposed by the City. We further express no opinion on their applicability to any prospective successor in interest to Mechem's property.

IT IS SO ORDERED.

RIORDAN, J., and STOWERS, District Judge, concur.

634 P.2d 695

NEW MEXICO STATE LABOR AND INDUSTRIAL COMMISSION, ex rel. Leslie L. TOLMAN, Plaintiff-Appellant,

v.

DEMING NATIONAL BANK, a national banking association, Defendant-Appellee.

No. 13401.

Supreme Court of New Mexico.

Oct. 6, 1981.

Ralph E. Ellinwood, Dist. Atty., Deming, David A. Lane, Asst. Dist. Atty., Silver City, for plaintiff-appellant.

Sherman & Sherman, Benjamin M. Sherman, Deming, for defendant-appellee.

OPINION

EASLEY, Chief Justice.

New Mexico State Labor and Industrial Commission (Commission) sued Deming National Bank (Bank) on behalf of Leslie Tolman (Tolman) to recover money compensation in lieu of vacation time. The case was submitted on stipulated facts and the district court entered judgment in favor of Bank. The Commission appeals and we affirm.

The sole question is whether the Bank's Personnel Guidelines is against public policy and void in that it prevents Tolman from collecting vacation pay when she voluntari-

ly terminated her employment prior to the date she had selected to take her vacation.

The stipulated facts state that Tolman was employed by the Bank as a teller from May 24, 1977 through August 4, 1978. Tolman asserts that she was entitled to a two-week vacation for 1978 under Paragraph "X" of the Bank's written Personnel Guidelines. The Guidelines provided that choice of vacation time must be submitted prior to April 15th of the year of vacation and approved by the supervisor and personnel officer. Paragraph "X" further stated, "No compensation in lieu of vacation shall be paid either to those who voluntarily or involuntarily terminate before their selected vacation time."

Tolman was aware of the Personnel Guidelines, including Paragraph "X". In April 1978, she submitted her choice of time for the vacation to commence September 15, 1978. On July 15, 1978, Tolman gave notice of intent to terminate her employment with the Bank, and did terminate her employment on August 4.

An employee has no right to a paid vacation in absence of an agreement, either express or implied. *See Marine Inspection Serv., Inc. v. Alexander*, 553 S.W.2d 185 (Tex.Civ.App.1977); *Interstate Hosts, Inc. v. Thompson*, 435 S.W.2d 957 (Tex.Civ.App.1968); Annot., 91 A.L.R.2d 1078 (1963). Thus, Tolman's right to a paid vacation derived solely from the Bank's Personnel Guidelines which sets forth vacation rights and the terms and conditions. One of the conditions of vacation pay is that vacation time be actually taken. The Guidelines quite clearly provide that employees are not entitled to compensation in lieu of vacation.

We cannot agree with Tolman that this condition is unconscionable or against public policy. In *Bondio v. Joseph Binder, Inc.*, 24 So.2d 398, 401 (La.App.1946), the court noted the justifications for denying payment in lieu of vacation time:

> The stipulation in the contract for the allowance of a vacation to employees is merely a recognition by management and labor that a short interval of complete rest and relaxation from daily routine with the benefit of full pay is essential to the mental and physical wellbeing of the workman. Such vacations or rest periods not only redound to the good of the daily worker but also to industry, in that the employee returns to his job refreshed, healthier and with new vigor and zeal. Vacation, therefore, contemplates a continuance of employment. The parties to the agreement, in contracting for the allowance of vacations, did not intend that the stipulation should be considered as providing a cash bonus in lieu of vacation pay for those employees who might see fit to discontinue their employment prior to the time the employer fixed the dates upon which the vacations would be given.

Tolman seeks to receive the benefits of the Personnel Guidelines without complying with the conditions. The condition that vacation pay would only be paid for vacation time actually taken was reasonable. We therefore affirm the decision of the trial court.

IT IS SO ORDERED.

PAYNE, FEDERICI and RIORDAN, JJ., concur.

SOSA, Senior Justice, respectfully dissents.

634 P.2d 696

Ranald MOSHER, Plaintiff-Appellee,

v.

BITUMINOUS INSURANCE CO., Insurers, Defendant-Appellant,

and

Justis Supply Co., Inc., Employer, and New Hampshire Insurance Group, Defendants.

No. 5069.

Court of Appeals of New Mexico.

Sept. 24, 1981.

John E. Schindler, Palmer & Frost, P. A., Farmington, for defendant-appellant.

Benjamin S. Eastburn, Hynes, Eastburn, Hale & Palmer, Farmington, for plaintiff-appellee.

OPINION

LOPEZ, Judge.

Bituminous Insurance Company appeals an award of total disability to Ranald Mosher under the Workmen's Compensation Act.

On October 20, 1979, while in the course of his employment for Justis Supply Co., Ranald Mosher fell down a stairway. He injured several parts of his body, including his back. Mosher went to Dr. Coats, who ordered x-rays and prescribed medication for Mosher. Mosher filed an accident report with Justis. The medical costs resulting from the accident were paid by New Hampshire Insurance Group, the workmen's compensation carrier for Justis at that time. Justis changed its workmen's compensation carrier to Bituminous Insurance Company on November 15, 1979.

Mosher continued to suffer symptoms from this accident, although he was able to work. On December 12, 1979, again while in the course of his employment with Justis, Mosher was delivering a carton of welding gloves to a power plant. When he lifted the carton from the back of a pickup and turned, he heard a clicking noise in his back, immediately experienced severe pain in his back and left leg, and fell to the ground. When he returned to Justis, his supervisor had already left.

The following day, Mosher went to Dr. Coats, who put him on bed rest and then hospitalized him. Mosher tried to return to work, but was unable to handle it, so Dr. Coats referred him to Dr. Welch, a neurosurgeon. Dr. Welch performed surgery on Mosher's back. Mosher was never able to return to work after surgery. Mosher spoke with his supervisor at Justis regularly after the December 12, incident, and kept him informed of his condition.

Dr. Welch testified at trial that the second injury was the cause of Mosher's disability, and the trial court adopted Dr. Welch's opinion. Finding No. 6 states that "Dr. Welch specifically relates to the second injury as being the one that precipitated Plaintiff's disability, to a reasonable medical probability."

Bituminous appeals the judgment in favor of Mosher, arguing that Mosher did not give notice to Justis of the second *accident.* Section 52–1–29, N.M.S.A.1978, states:

> A. Any workman claiming to be entitled to compensation from any employer shall give notice in writing to his employer *of the accident and of the injury* within thirty days after their occurrence; unless, by reason of his injury or some other cause beyond his control, the workman is prevented from giving notice within that time, in which case he shall give notice as soon as may reasonably be done, and at all events not later than sixty days after the occurrence of the accident.
>
> B. No written notice is required to be given where the employer or any superintendent or foreman or other agent in charge of the work in connection with which the accident occurred had actual knowledge of its occurrence.

The trial court made the following Finding No. 9 pertaining to notice:

> Notice of both injuries was had by the employer in writing; the first with an Employer's First Report of Injury, and the second by virtue of Equitable Insurance forms filled in by the Plaintiff and delivered to the employer. Moreover, as to the second injury, knowledge of same was admitted by Mr. Pousson, the Plaintiff's immediate supervisor and in light of the nature of the injuries, the Plaintiff is not to be required to be so sophisticated in medical knowledge as to distinguish between the two injuries when symptoms of the first continued through the time of the second.

Bituminous challenges the above-quoted finding on grounds that the court did not find notice of the second accident, so the requirements of § 52–1–29 were not met. This challenge is answered in two ways:

1. Finding No. 9 is not entirely clear as to the second accident. However, it is proper for this court to review all the evidence to clarify or construe this finding. *Heisel v. York*, 46 N.M. 210, 125 P.2d 717 (1942). The testimony shows that the plaintiff verbally reported the accident and injuries to his supervisor and kept in touch with him when he was in the hospital. There is substantial evidence in the record of actual notice of the second accident.

2. The defendants requested a finding of no notice of the second accident. Proof of notice in a workmen's compensation case is not essential to establish liability. It is an affirmative defense asserted by the employer, which the employer must prove. In this case the trial court refused the defendants' requested finding. This refusal is deemed a finding against the defendants. *Lopez v. Barboa*, 80 N.M. 338, 455 P.2d 842 (1969); *Gallegos v. Wilkerson*, 79 N.M. 549, 445 P.2d 970 (1968); *H. T. Coker Const. Co. v. Whitfield Transp., Inc.*, 85 N.M. 802, 518 P.2d 782 (Ct.App.1974). The remaining question is whether there is substantial evidence to support a finding of notice of a second accident.

The following testimony by Mosher appears in the transcript:

Q. And after you got back from the doctor you are talking about that same day now?

A. No sir, it was the next day.

Q. O.K. next day you called in and said you were hurt and related it to an accident you had on the job, is that right?

A. That's correct.

Q. And at all times after that did you tell Mr. Pousson that same thing, I mean that you weren't working because of injuries?

A. That's right.

Q. When you talked to Mr. Pousson after Dec. 12th did you give him the specifics about the Dec. 12th incident where you were and what you were doing. What did you tell him?

A. I told him that I had made a delivery to the power plant and in the process of taking the box of gloves out of the back I had severe pain in my back, I fell and came back.

Q. When did you tell him this?

A. It was the next day because it was by the time I got back Mr. Pousson had already gone home and the shop was pretty well ready to close.

Q. You told him on the 13th of December?

A. That's correct.

Mosher also testified that he was in frequent contact with his supervisor concerning his condition between December 12 and December 20, and that he reported the results of Dr. Welch's examination to his supervisor. Doris Newberry, an employee of Justis, helped Mosher fill out insurance forms confirming disability.

The verbal report by Mosher of the second accident and injury to his supervisor, coupled with the ongoing contact with his supervisor regarding his condition, satisfies the requirement of actual knowledge of the second accident under § 52–1–29. *Waymire v. Signal Oil Field Service, Inc.*, 77 N.M. 297, 422 P.2d 34 (1966); *Lozano v. Archer*, 71 N.M. 175, 376 P.2d 963 (1962); *Rohrer v. Eidal International*, 79 N.M. 711, 449 P.2d 81 (Ct.App.1968).

Judgment is affirmed and plaintiff is allowed $1500 for attorney fees on this appeal.

IT IS SO ORDERED.

HENDLEY and SUTIN, JJ., concur.

634 P.2d 699

STATE of New Mexico ex rel. DEPARTMENT OF HUMAN SERVICES, Petitioner-Appellee,

v.

NATURAL MOTHER, Respondent-Appellant.

In the Matter of John DOE I, Jane Doe I, Jane Doe II, and John Doe II, Minor Children.

No. 5060.

Court of Appeals of New Mexico.

Sept. 24, 1981.

[redacted]

Robert Crollett, Dennis Sanchez, Northern New Mexico Legal Services, Taos, for respondent-appellant.

James W. Catron, Asst. Atty. Gen., for New Mexico Human Services Dept., Santa Fe, for petitioner-appellee.

OPINION

LOPEZ, Judge.

The natural mother (mother) appeals the termination of her parental rights to her four children pursuant to § 40–7–4, N.M.S.A.1978 (Supp.1980). We reverse.

The mother and natural father (father) have four children. In 1977, HSD investigated this couple after receiving a report of possible neglect of the three older children. The mother was pregnant with the fourth child.

A doctor examined the three children and found them to be thin, possibly malnourished. He also thought that the two older children were hyperactive.

At that time, the father was unemployed and had a drinking problem, and the family was being evicted from its home. HSD provided some services to the family, among which was to help the family relocate in a trailer in which the water and plumbing were continually broken, because the pipes kept freezing. The father continued to have unemployment problems, and in February, 1979, HSD instituted proceedings to remove the children from the home. The court found during removal proceedings that there was a danger of neglect if the children remained with their parents. The two older children were placed in one foster home, and the two younger children were placed in another. The children have remained separated in different foster homes since 1979.

During the interim between February, 1979, and the termination hearing in December, 1980, the mother made substantial changes in her life to ensure the return of her children:

1) The mother obtained a divorce from the father after efforts to resolve their marital difficulties failed. Although divorce may not be seen as an ideal solution to family problems, in this case it alleviated some of the problems created by the father's drinking and chronic unemployment. Despite the divorce, the father desires that the mother retain custody of the children.

2) The mother got a job at Pizza Hut, which she had kept for over a year at the time of trial.

3) The mother moved into an adequate trailer, and acquired necessary furnishings for the children.

4) The mother worked out a future plan whereby she and the children would live with her brother and his family in Missouri. The Family Services Division of Kansas City, Missouri, upon request of HSD, did a study of the brother's home, and approved placement of the mother and children there. Other members of the mother's family also live in the same area of Missouri, and have volunteered to help the mother and children. The mother arranged with Pizza Hut to transfer her job to Missouri.

The mother entered into several agreements with HSD, the purpose of which was to lead to an eventual reunification of the parents and children. The mother substantially complied in large part with the agreements, which covered such subjects as visitation, employment, counseling and home improvements. She became more successful in meeting the terms of each successive agreement. Without regard to those efforts by the mother, HSD sought termina-

tion of parental rights without allowing the children to be returned to her.

The legislature requires that "[t]he grounds for any attempted termination must be proved by clear and convincing evidence." Section 40–7–4(J), N.M.S.A.1978 (Supp.1980). Although not explicitly required by earlier termination statutes, the New Mexico courts had already imposed this strict burden of proof in parental termination cases, because rights of fundamental importance are involved. *Huey v. Lente*, 85 N.M. 585, 514 P.2d 1081 (Ct.App. 1973) (specially concurring opinion, adopted by the New Mexico Supreme Court in *Huey v. Lente*, 85 N.M. 597, 514 P.2d 1093 (1973)); *Nevelos v. Railston,* 65 N.M. 250, 335 P.2d 573 (1959). As to the definition of "clear and convincing,"

> In *Nevelos* the Supreme Court used the phrases "clear and satisfactory something almost akin to proof beyond a reasonable doubt, or by 'clear and indubitable evidence.'" I am convinced that what the Court in *Nevelos* meant was that burden of proof which is "something stronger than a mere 'preponderance' and yet something less than 'beyond a reasonable doubt.'" (Citations omitted).

Huey v. Lente, 85 N.M. at 596, 514 P.2d at 1092. The record in this case does not indicate that this burden was met by the state. *See Lumpkins v. McPhee*, 59 N.M. 442, 286 P.2d 299 (1955).

HSD conceded in its answer brief that there was not substantial evidence in the record to support findings justifying termination under § 40–7–4(B)(4). The only other section applicable to this case is 40–7–4(B)(3), which states:

> The court shall terminate parental rights with respect to a minor child when the child is a neglected or abused child as defined in Section 32–1–3 N.M.S.A.1978 and the court finds that the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future despite reasonable efforts by the department or other appropriate agency to assist the parent in adjusting the conditions which render the parent unable to properly care for the child.

The findings to support termination under this section are not supported by clear and convincing evidence. The court found that the children were neglected in February, 1979, when they were originally placed in foster care. But there is no clear and convincing evidence upon which to determine that the children were neglected by the mother at the time of the hearing, or would be neglected in the future.

Most of the evidence presented to the trial court by HSD is not useful in determining whether the mother's parental rights should be terminated. HSD presented extensive testimony pertaining to the parents, children, and their homes during the period from June, 1977, to February, 1979. That evidence was useful to show conditions during that period of time. However, considering the amount of time that had elapsed until the hearing in December, 1980, and the considerable changes in the mother's circumstances, that evidence was stale for the purpose of determining whether those conditions persisted at the time of the hearing or would persist into the future.

HSD also brought in testimony about the existing and past foster homes of the four children since 1979. That evidence was irrelevant in determining whether the mother's parental rights should have been terminated. We reiterate that the process of making a determination of termination of parental rights under § 40–7–4 does not include a comparison of the relative merits of the environments provided by the foster parents and by the natural parents. *Huey v. Lente*, 85 N.M. at 595, 514 P.2d at 1091. The only consideration is whether the environment provided for the children by the parents, in this case the mother, is and will be adequate under the statute.

Other evidence presented by HSD pertinent to the mother's case consisted of testimony by social workers and a psychologist to the effect that they did not think the mother had changed in terms of her parenting abilities. In 1979, the psychologist decided that the mother suffered from "im-

mature personality disorder." At trial, some of the bases for the witness' opinion that the mother had not changed since 1979 were that 80% of people with a disorder such as "immature personality" do not change, and that the mother still lacked "common sense" because she confided in the psychologist a month before the termination hearing, knowing that the hearing was upcoming. This latter reason provides an interesting comparison with the testimony from the social workers that the mother had not changed because she refused to open up or confide in them or in counselors recommended by them. That evidence is conflicting and speculative; it is not the kind of proof necessary for termination of parental rights.

The trial court made the following findings pertaining to the requirements for termination under § 40–7–4(B)(3), N.M.S.A. 1978 (Supp.1980):

> 7. The petitioner [HSD] provided counseling services of various kinds to the respondent-parents in continuing efforts to have them acquire adequate parenting skills, and although [the mother] substantially complied with the attendance, and [the father] did not, there is no demonstrable improvement in their ability to provide adequate home care for the children.
>
> 9. The natural parents suffer from a mental disorder classified as an "inadequate personality syndrome" which keep them from learning adequate parenting skills.
>
> 11. At the time of removal, the children were neglected as provided by § 32–1–3, N.M.S.A.1978 and the conditions of neglect are unlikely to change in the foreseeable future despite more than reasonable efforts by the petitioner to assist the parent in adjusting the conditions which render the parent able to properly care for the child.

For the reasons discussed above, we hold that the record does not provide clear and convincing evidence to support those findings.

The trial court's findings relating to the mother's plan to move to Missouri with the children are:

> 8. The respondents are now divorced, and [the father] wishes custody of the children to go to [the mother]. [The mother] is now working steadily and wishes to go to Missouri with the children where she could reside with relatives; [the father] works only occasionally and has no declared future plans. The present condition of the children is such that [the mother's] wishes are not realistic.
>
> 10. The children continue to be hyperactive and although all have improved substantially since separation from the natural parents, each requires continued individual attention which cannot be provided by the natural parents or by [the mother's] extended family.

The homestudy of the brother's home in Missouri resulted in a very favorable report which recommended it as a suitable placement for the mother and children. HSD disregarded the recommendation and went ahead with termination proceedings. Two social workers testified that they did not approve of the brother's home as a suitable environment for the children, principally because both the brother and his wife had been previously married; because the mother had not been in close contact with her relatives in Missouri for the past five years, and because they did not know whether the relatives could provide for the special needs of the children. This testimony does not provide clear and convincing evidence that the children would not be provided adequate, or even excellent care in Missouri, and it totally disregards the information and recommendations it commissioned the Missouri officials to make.

HSD failed to comply with the statute in another respect. The termination statute requires that HSD make "reasonable efforts * * * to assist the parent in adjusting the conditions which render that parent unable to properly care for the child. * * * " HSD did not make a reasonable effort to assist the mother in finding a situation suitable for her and her children. To the con-

trary, by rejecting the realities of the mother's efforts and the favorable homestudy, it appears that HSD was bent upon thwarting the mother in her efforts to adjust conditions so that she would properly care for her children. We must conclude that HSD acted in bad faith by requesting the homestudy when it is obvious that HSD had no intention of following its recommendations.

In summary, the mother arranged for a good environment in Missouri in which to raise her children; she received the promise of help in Missouri from several members of her family; she found employment which is ongoing in order to provide for herself and her children; she demonstrated a sustained interest in having her children with her.

The statute requires that "the court shall give primary consideration to the physical, mental and emotional welfare and needs of the child." Undoubtedly, the trial court made every effort to comply with this proviso. But this cannot be done to the utter exclusion of consideration of the rights of a parent to raise her children. This proviso cannot be read to mean that the children are entitled to a "better" environment than that provided by the mother, if the one provided by the mother is acceptable to society. *Huey v. Lente*, 85 N.M. at 597, 514 P.2d at 1093. In this case, the mother has made efforts to provide an acceptable environment for the children. She has not been afforded the opportunity to demonstrate what kind of a parent she would be today. *See Hyatt v. Hyatt*, 24 Ariz.App. 170, 536 P.2d 1062 (1975).

Because we reverse on the failure of HSD to meet the statutory requirements for parental termination, we do not reach the other issues raised by the mother. The judgment of the trial court is reversed, and this case is remanded to the trial court with instructions that it enter judgment returning custody of the children to the mother on the condition that she and the children move to Missouri to live with her brother.

HENDLEY and WALTERS, JJ., concur.

634 P.2d 1234

John SCOTT, Petitioner,

v.

John F. RIZZO, Respondent.

Sidney C. CLAYMORE, Plaintiff-Appellant,

v.

CITY OF ALBUQUERQUE, Defendant-Appellee.

Paul J. JORDAN, Plaintiff-Appellant,

v.

CITY OF ALBUQUERQUE, et al., Defendants-Appellees.

Max D. McCREARY, Petitioner,

v.

Paul J. JORDAN, Respondent.

CITY OF ALBUQUERQUE, Petitioner,

v.

Sidney C. CLAYMORE, Paul Jordan, Michael DeHerrera and Max D. McCreary, Respondents.

No. 13235, 13442, 13450 and 13451.

Supreme Court of New Mexico.

Feb. 12, 1981.

Bruce P. Moore, Thomas A. Simons, IV, Santa Fe, Miller, Stratvert, Torgerson & Brandt, Ranne B. Miller, Albuquerque, White, Koch, Kelly & McCarthy, Booker Kelly, Santa Fe, Johnson & Lanphere, D. James Sorenson, Keleher & McLeod, P. A., Robert C. Conklin, Charles A. Pharris, George R. "Pat" Bryan, III, Jeffrey L. Baker, Albuquerque, Miller, Stratvert, Torgerson & Brandt, Alan C. Torgerson, Albuquerque, Hinkel, Cox, Eaton, Coffield & Hensley, Stuart D. Shanor, Roswell, Tansey, Rosebrough, Roberts & Gerding, P. C., Byron Caton, Farmington, Peter R. Moughan, Jr., Larry D. Beall, Shaffer, Butt, Thornton & Baehr, P. C., Paul L. Butt, Deborah S. Davis, Civerolo, Hansen & Wolf, P. A., Carl J. Butkus, William H. Carpenter, Bette R. Velarde, Albuquerque.

UPON CERTIORARI

This Court granted certiorari in *Scott v. Rizzo* and in the consolidated cases of *Claymore v. City of Albuquerque* and *Jordan v. City of Albuquerque, et al.* We also granted in *Scott v. Rizzo* a motion to consolidate with the *Claymore* and *Jordan* cases. These cases involve the issue of comparative negligence. This issue has been addressed time and time again by this Court and we know and understand the importance of this doctrine. It is the decision of this Court that we adopt in toto the opinion authored by Judge Walters of the Court of Appeals thereby adopting comparative negligence as a recognized legal doctrine in New Mexico. While this marks a significant change in the law of negligence, we feel that it will improve the administration of justice. We have held before that long-term adherence to a rule does not, by itself, justify its continuance if justice demands its abolition. "Merely because a court made rule has been in effect for many years does not render it invulnerable to judicial attack once it reaches a point of obsolescence." *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975). *See also, Flores v. Flores*, 84 N.M. 601, 506 P.2d 345 (Ct.App.1973); *State v. Gunzelman*, 85 N.M. 295, 512 P.2d 55 (1973); *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973); *Stang v. Hertz Corporation*, 83 N.M. 730, 497 P.2d 732 (1972); *State ex rel. Reynolds v. Molybdenum Corp. of Amer.*, 83 N.M. 690, 496 P.2d 1086 (1972); *Williamson v. Smith*, 83 N.M. 336, 491 P.2d 1147 (1971).

Judge Walter's opinion is an excellent analysis of the issue of comparative negligence. For this reason, we adopt the Court of Appeals' decision. We also realize that the legislature is now in session and may wish to address the issue.

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

OPINION

WALTERS, Judge.

This is a consolidated matter concerned with two plaintiffs who filed separate suits in Bernalillo County, both claiming accidental injuries caused by negligence of the respective defendants. In each case, defendants denied negligence and affirmatively alleged contributory negligence on the part of plaintiff. In each case, plaintiff moved to strike the defense of contributory negligence. The trial judge, assigned to both cases, denied the motions to strike. At the same time, the orders of denial contained the necessary language to permit application for interlocutory appeals, and

proceedings in both actions were stayed. The Supreme Court granted the applications. By order, it transferred both matters to this court "with instructions to address the issues notwithstanding prior decisions."

Two recent decisions of the Supreme Court provide the perspective for this order. *Commercial U. Assur. v. Western Farm Bur., Inc.*, 93 N.M. 507, 601 P.2d 1203 (1979), referred to New Mexico's continued adherence to contributory negligence as a bar to recovery; and *City of Albuquerque v. Redding*, 93 N.M. 757, 605 P.2d 1156 (1980), referred to comparative negligence as "more enlightened." There would have been no need for the order unless the question of contributory negligence versus comparative negligence was open. We view the Supreme Court order as directing us to decide the question as if we were writing on a blank slate.

We are asked by plaintiffs to assume, for the purpose of this appeal, that defendants were negligent, that plaintiffs were likewise negligent, and that the concurrent negligence of the adverse parties contributed proximately to the injuries sustained by plaintiffs. We approach the issue from that standpoint because it permits us to analyze the question legally and intellectually, free of any influence from other facts in either case, apparent or alleged or discussed in the briefs, at this stage of the proceedings.

The legal issue thus presented is whether New Mexico should judicially declare that the existence of contributory negligence be no longer a complete bar against a plaintiff's recovery, but that it be replaced by a system of comparative negligence which would assess damage liability directly proportionate with fault.

We hold that the doctrine of comparative negligence more equitably apportions damages and, in the interest of fundamental justice, is adopted in this jurisdiction and replaces the "all-or-nothing" rule of contributory negligence.[1]

In reaching this conclusion we have had the benefit of extensive and exhaustive briefings by the parties, by amicus Alliance of American Insurers, and by amicus New Mexico Defense Lawyers Association. Additionally, there is a plethora of written material in favor of and opposed to each doctrine. The subject has been researched and analyzed, not only in scholarly court decisions but by legal writers, almost beyond absorption.[2]

We have attempted a thorough examination of the numerous authorities, with careful attention being accorded to the arguments made on both sides of the question, and are persuaded that logic, justice, and experience compel the result we reach today.

Thus, we shall not attempt, nor do we believe it necessary, to once again discuss in depth the history, case law, and statutory developments so thoroughly dissected by others over the past five decades. Rather, as briefly as is consonant with judicial in-

1. By this we mean that the doctrine of contributory negligence no longer applies as a complete bar to recovery. In effect, contributory negligence remains a partial bar to the extent that plaintiff's negligence shall proportionately reduce the amount of damages attributable to the entire injury to which a non-negligent plaintiff would be entitled.

2. E. g., Goldberg, *Judicial Adoption of Comparative Fault in New Mexico: The Time is at Hand*, 10 N.M.L.Rev. 3 (1980); Woods, *The Quickening March of Comparative Fault*, TRIAL magazine, Nov. 1979; Heft & Heft, *Comparative Negligence Manual* (1978); Fleming, *Foreword to Comparative Negligence at Last—By Judicial Choice*, 64 Calif.L.Rev. 239 (1976); Schwartz, *Judicial Adoption of Comparative Negligence*, 51 Ind.L.J. 281 (1976); James Kalven, Keeton, Leflar, Malone and Wade, *Comments on Maki v. Frelk; Comparative v. Contributory Negligence: Should the Court or Legislature Decide*, 21 Vand.L.Rev. 889 (1968); Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 Ark.L.Rev. 89 (1959); Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U.Fla.L.Rev. 135 (1958); 2 F. Harper & F. James, *The Law of Torts*, §§ 21.1–22.3 (1956); Prosser, *Comparative Negligence*, 51 Mich.L.R. 465 (1953); Turk, *Comparative Negligence on the March*, 28 Chi-Kent L.Rev. 189 (1950); Malone, *The Formative Era of Contributory Negligence*, 41 Ill.L.Rev. 151 (1946). This list is not exhaustive.

tegrity, we consider (1) the power of the courts to adopt a comparative negligence rule; (2) the ramifications of any such adoption upon existing common-law and statutory tort liability concepts; and (3) the appropriate form of comparative negligence to be adopted. We dispose first of the jurisdictional question raised in one of the briefs.

I.

Amicus New Mexico Defense Lawyers Association asserts at the outset that this court has no authority to decide the issue presently before us because it was improperly brought by interlocutory appeal to the Supreme Court in the first instance, and thereafter improperly referred to us by that court. The Association argues that "the interlocutory appeal [is] based on tort and is.... in the Court of Appeals," § 34–5–8, N.M.S.A.1978; therefore, it should not have been filed in the Supreme Court. It contends, secondly, that the relief requested requires overruling case law promulgated by the Supreme Court, and this court is without power to do so, citing *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973).

We do not consider whether the question is properly raised. *See St. Vincent Hospital v. Salazar*, 95 N.M. 147, 619 P.2d 823 (S.Ct. 1980). Nevertheless, this argument may be answered summarily. These cases are before us for consideration by virtue of the Supreme Court's orders directing us to decide the issue "notwithstanding prior decisions." As an inferior court, we are to obey orders of the Supreme Court. *Alexander v. Delgado, supra.* This Court has no authority to review orders of the Supreme Court. *Collins v. Michelbach*, 92 N.M. 366, 588 P.2d 1041 (1979); *State v. Scott*, 90 N.M. 256, 561 P.2d 1349 (Ct.App. 1977). Thus, we do not decide the question of our jurisdiction; rather, we comply with the Supreme Court order.

II.

The early nineteenth-century English case of *Butterfield v. Forrester*, 11 east 60, 103 Eng.Rep. 926 (K.B.1809), is traditionally accepted by most but not all commentators (see *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973), Justice Roberts' dissent) as the progenitor of the contributory negligence rule. *Butterfield* reflected the concept prevalent at the time that a plaintiff's irresponsibility in failing to use due care for his own safety erased whatever fault could be laid at defendant's feet for contributing to the injury. *See* F. Harper and F. James, Law of Torts, § 22.1 at 1198 (1956). That view flowered during the industrial revolution, with judges protective of the growth of fledgling businesses, and solicitous that material and industrial progress be unhampered by the economic burdens attending liability for negligent injury to others. They uncritically and enthusiastically embraced the judge-made common-law of *Butterfield, supra*,[3] and enabled it to gain an entrenched status in the common-law of this country. Nevertheless, as Justice Williams noted in *Placek v. City of Sterling Height*, 405 Mich. 638, 275 N.W.2d 511, 515 (1979), few writers dispute the substantial injustices suffered because of the contributory negligence doctrine; and as a result of those apparent injustices, few common-law jurisdiction, including thirty-five states in this country, have failed to repudiate the doctrine.[4] New Mexico is one of the re-

3. *See* Malone, *the Formative Era of Contributory Negligence*, 41 Ill.L.Rev. 151, 156–58 (1946).

4. The states adopting comparative fault are as follows: Alaska: *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975); Arkansas: Ark.Stat.Ann. §§ 27–1763 to –1765 (Repl.1979); California: *Li v. Yellow Cab Co.*, 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226 (1975); Colorado: Colo.Rev. Stat. § 13–21–111 (1973 & Supp.1978); Connecticut: Conn.Gen.Stat.Ann. § 52–572h (Supp. 1979); Florida: *Hoffman v. Jones*, 280 So.2d 431 (Fla.1973); Georgia: Ga.Code Ann. §§ 94–703 (1978), 105–603 (1968); Hawaii: Haw.Rev. Stat. § 663–31 (1976); Idaho: Idaho Code §§ 6–801, –802, –804 (1979); Kansas: Kan.Stat. Ann. § 60–258a (1976); Louisiana: La.Civ.Code Ann. art. 2323 (West 1971); Maine: Me.Rev. Stat.Ann. tit. 14 § 156 (Supp.1980); Massachusetts: Mass.Ann.Laws ch. 231 § 85 (1974); Michigan: *Placek v. City of Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (1979); Minnesota: Minn.Stat.Ann. § 604.01 (1978); Mississippi: Miss.Code Ann. § 11–7–15 (1972); Mon-

maining fifteen states which have not done so up to the present date.

It is argued by all defendant parties and friends of the court that any adoption of comparative negligence [5] should be made by the legislature, not the courts. This is the argument which has been presented in every jurisdiction where courts have considered abolishing this anachronistic "all-or-nothing" doctrine. Despite acknowledgement that contributory negligence originated with a judicial decision, we are urged that the fundamental constitutional separation-of-powers principle insists upon abstention by the judiciary. That contention points out that the legislature has recognized the common-law rule of contributory negligence as a part of the law in this jurisdiction, because it has enacted certain statutes [6] which were intended to mesh with or provide exceptions to the traditional effect of a contributory negligence finding. Thus, they argue, the legislature has integrated the doctrine into the statutory law of New Mexico. Coupled with this proposition is the suggestion, the *sine qua non*, that because the New Mexico legislature has six times considered the subject of substituting comparative for contributory negligence in the last quarter century, and each time it has failed to enact a bill repudiating the contributory negligence defense, the court must accept the legislature's inaction as its ratification of the doctrine.

We are not persuaded by these arguments for several reasons. First, and as we noted in *Salazar v. St. Vincent Hospital*, 95 N.M. 150, 619 P.2d 826 (Ct.App.1980), *cert. quashed* September 30, 1980, the common law remains as the rule of practice and decision in New Mexico, "except as superseded or abrogated by statute or constitution, or held to be inapplicable to conditions in New Mexico." *Ickes v. Brimhall*, 42 N.M. 412, 79 P.2d 942 (1938). We are not convinced that the conditions in New Mexico differ in any significant degree, if at all, from conditions in all common-law jurisdictions throughout the world, with the exception of fourteen other states in this country, which have abandoned the contributory negligence rule in favor of comparative negligence.

Second, the inaction of the legislature parallels its relative inaction on the matter of sovereign immunity until the judicial decision in *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975). Nevertheless, the Supreme Court there said:

> The doctrine of sovereign immunity has always been a judicial creation without statutory codification, and, therefore, can also be put to rest by the judiciary. [Citations omitted.] Merely because a court made rule has been in effect for many years does not render it invulnerable to judicial attack once it reaches a point of obsolescence. (88 N.M. at 589–590, 544 P.2d 1153.)

It would not be unreasonable to argue that the legislature's inaction on the several bills

tana: Mont.Code Ann. § 27–1–702 (1979); Nebraska: Neb.Rev.Stat. § 25–1151 (1979); Nevada: Nev.Rev.Stat. § 41.141 (Supp.1979); New Hampshire: N.H.Rev.Stat.Ann. § 507:7–a (Supp.1979); New Jersey: N.J.Stat.Ann. § 2A:15–5.1 to –5.3 (West Supp.1979–1980); New York: N.Y.Civ.Prac.Law §§ 1411–1413 (1978); North Dakota: N.D.Cent.Code § 9–10–07 (1975); Oklahoma: Okla.Stat.Ann. tit. 23 §§ 13, 14 (West Supp.1979–1980); Oregon: Or. Rev.Stat. §§ 18.470, 18.475, 18.480, 18.485, 18.490 (1977); Pennsylvania: 42 Pa.Cons.Stat. Ann. § 7102 (Purdon 1980 Pamphlet); Rhode Island: R.I.Gen.Laws Ann. § 9–20–4, –4.1 (Supp.1980); South Dakota: S.D. Codified Laws § 20–9–2 (1979 Rev.); Texas: Tex.Rev. Civ.Stat.Ann. art. 2212a (Vernon's Supp.1979); Utah: Utah Code Ann. §§ 78–27–37, –38, –41 (1977); Vermont: Vt.Stat.Ann. tit. 12 § 1036 (1973); Washington: Wash.Rev.Code Ann. § 4.22.010 (Supp.1980); West Virginia: *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W.Va.1979); Wisconsin: Wis.Stat.Ann. § 895.045 (West Supp.1980); Wyoming: Wyo.Stat. § 1–1–109 (1977); Puerto Rico: P.R.Laws Ann. tit. 31 § 5141 (1968).

5. A more appropriate term might be "comparative liability," or "comparative fault." We cast this discussion in the more familiar language of "comparative negligence" because the great bulk of the writings on the subject so refers to it.

6. We are referred, specifically, to §§ 28–7–4, 41–3–1, et seq., 41–4–1, et seq., 52–1–8, 52–3–7, 63–3–23, and 63–3–6, N.M.S.A.1978.

proposed is indicative of its belief that it is more appropriate for the judiciary than the legislature to open the door which the judiciary initially closed.[7] Legislative inaction may also be considered as resulting from legislative inertia. See *Comments on Maki v. Frelk*, supra, page 895. Whatever the reason, if any, for legislative inaction, that reason does not bar the judiciary from reconsidering a judge-made rule. *Hicks v. State, supra.* Similarly, legislative enactments designed to make the judge-made rule work or ameliorate its harshness cannot be taken as legislative integration of the rule into statutory law.

We hold that the contributory negligence rule has long since reached that point of obsolescence for reasons we discuss, *infra.* Moreover, since the "rule is not one made or sanctioned by the legislature, but . . . depends for its origins and continued viability upon the common law," it is a rule peculiarly for the courts to change if it is no longer validly justified. *Flores v. Flores*, 84 N.M. 601, 506 P.2d 345 (Ct.App.1973). This conclusion adheres to the observation of Mr. Justice Brandeis in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 52 S.Ct. 443, 76 L.Ed. 815 (1932), at footnote 15 in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975): "This court, in other appropriate contexts, has not hesitated to overrule an earlier decision and settle a matter of continuing concern, even though relief might have been obtained by legislation." (421 U.S. at 409, 95 S.Ct. at 1715, 44 L.Ed.2d at 261.)

III.

Defendants and friends of the court assert that existing statutes, doctrines, and uniform jury instructions will be subject to confusion, uncertainty, and revision if we adopt comparative negligence. This same argument was met in *Li v. Yellow Cab. Co. of Calif.*, 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226 (1975), and *Hoffman v. Jones*, 280 So.2d 431 (Fla.1973). The contentions in those cases were similar to those made here: that application of a comparative negligence rule would impose insurmountable difficulties upon the fact-finders with respect to such concepts as contribution and indemnity among joint tortfeasors, assumption of risk, last clear chance, attractive nuisance, wilful and wanton misconduct, sudden emergency, minor plaintiffs, mitigation of damages, and other rules of the law.

We agree with the Florida and California courts that the fears of administering the doctrine are greater than the reality. Indeed, in *Zambito v. Southland Recreation Enterprises, Inc.*, 383 So.2d 989 (Fla.App. 1980), and *Blackburn v. Dorta*, 348 So.2d 287 (Fla.1977), the Florida courts have ably dealt with some of these presumed difficulties. Under comparative negligence, rules designed to ameliorate the harshness of the contributory negligence rule are no longer needed. *Kaatz v. State, supra*, footnote 4. With the adoption of comparative negligence, the last clear chance rule is abolished. *Li v. Yellow Cab. Co. of California, supra.* Also abolished is the distinction between ordinary and gross negligence. *See Gray v. Esslinger*, 46 N.M. 421, 130 P.2d 24 (1942). Assumption of risk as a form of negligence (*see Williamson v. Smith*, 83 N.M. 336, 491 P.2d 1147 (1971)), and other liability concepts based on or related to negligence of either plaintiff, defendant, or both, are subject to the comparative negligence rule.

Instructions concerning the minor plaintiff and the child under seven years embrace and elucidate when and how, in such

7. *Molitor v. Kaneland Com. Unit Dist.*, 18 Ill.2d 11, 25, 163 N.E.2d 89, 96 (1959). Two justices, in *Syroid v. Albuquerque Gravel Prod. Co.*, 86 N.M. 235, 522 P.2d 570 (1974), appear to have been willing to abolish this doctrine, recognized by the majority in *Syroid* to be a common-law creature of the courts. As pointed out by *Goldberg, supra*, at 10 N.M.L.Rev. 3, 27–28, the force of *Syroid* has been "seriously undermined" by the shift to comparative negligence, since *Syroid* was decided, in those other jurisdictions relied on by the *Syroid* court to refuse to do so. *See also, Fleming*, 64 Calif.L.Rev. at 279–280, regarding the peculiar sensitivity to and experience of the courts with the contributory negligence inequities which better equips them to recognize the need for change.

cases, theories of negligence provide a basis for liability. The comparative negligence doctrine should not affect basic preliminary questions to be answered in such cases.

We make no effort to catalog or determine how various rules will be affected by the comparative negligence doctrine. Adaptations will be made on a case-by-case basis. Our purpose is to emphasize that if negligence or negligence-related concepts are a basis for liability, the comparative negligence doctrine applies, and common sense will assist in its fair application.

The thrust of the comparative negligence doctrine is to accomplish (1) apportionment of fault between or among negligent parties whose negligence proximately causes any part of a loss or injury, and (2) apportionment of the total damages resulting from such loss or injury in proportion to the fault of each party. To reach those purposes of the doctrine, we have great faith in the ability of our state's trial judges to sort out any problems that may arise. They undoubtedly will submit special interrogatories to the jury,[8] and pending any changes by our Supreme Court in court rules or jury instructions, we recommend special interrogatories to facilitate the entry of a judgment that will conform to the jury's determination of the proper apportionment of fault. In multiple party cases, interrogatories will address the question of liability between each plaintiff and each defendant, to reflect such apportionment.

With respect to the suggestion that we should also consider the effect of the comparative negligence doctrine upon strict liability claims, we need not decide that point at this time. We do make some observations, however, relying upon the capability of the trial judge to resolve such issues when confronted with a special factual situation requiring adaptation of the rule of comparative negligence: (1) Plaintiff's "conventional" contributory negligence has been held to be inapplicable as an affirmative defense in strict liability cases. *Jasper v. Skyhook Corp.*, 89 N.M. 98, 547 P.2d 1140 (Ct.App.1976), *rev'd* on other grounds, 90 N.M. 143, 560 P.2d 934 (1977). Nevertheless, New Mexico does not equate "strict" liability with "absolute" liability; plaintiff's conduct is still a material, although limited, issue. (2) Under the view that the comparative negligence doctrine delineates a *comparative causation* analysis, some courts[9] logically have extended the application of the rule to strict liability design cases, reasoning that the consideration of the jury, under proper instructions, should be focused upon the part played by plaintiff's "misconduct" (rather than his "negligence") which contributed to the injury suffered by use of defendant's defective product. The "misconduct" phrase would embrace such defenses as assumption of risk, misuse or abnormal use of the product, or the "negligence" concept of voluntarily and unreasonably proceeding to encounter a known danger. Such an extension does not clash with these defenses previously allowed to be raised in this jurisdiction, *see, e. g., Rudisaile v. Hawk Aviation Inc.*, 92 N.M. 575, 592 P.2d 175 (1979), in strict liability actions. They simply would not be a complete bar to recovery. *Bendorf v. Volkswagenwerk Aktiengeselischaft*, 88 N.M. 355, 540 P.2d 835 (1975).

We are of the opinion that existing decisions, both in New Mexico and in thirty-five

8. The mechanics of special verdicts are discussed, with suggested examples provided, in the exceptionally thorough article at 60 Marquette L.Rev. 201 (1977), Decker & Decker, *Special Verdict Formulation in Wisconsin. See also* n.1., *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*, 411 F.Supp. 598, at 600 (D.C.Idaho 1976), and *Placek v. City of Sterling Heights, supra.* The special verdict discussions provide a useful guide in framing special interrogatories under N.M.R.Civ.P. 49.

9. *Thibault v. Sears, Roebuck and Co.*, 118 N.H. 802, 395 A.2d 843 (1978); *Daly v. General Motors Corp.*, 20 Cal.3d 725, 144 Cal.Rptr. 380, 575 P.2d 1162 (1978); *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*, 411 F.Supp. 598 (D.C. Idaho 1976); *Stevens v. Kanematsu-Gosho Co., Inc.*, 494 F.2d 367 (1st Cir. 1974); *Bentzler v. Braun*, 34 Wis.2d 362, 149 N.W.2d 626 (1967). *See also* Twerski, *From Defect to Cause to Comparative Fault: Rethinking Some Product Liability Concepts*, 60 Marquette L.Rev. 297 (1977); Restatement (Second) of Torts, § 402A, Comment n (1965).

other jurisdictions in this country, provide sufficient guidelines to permit our New Mexico trial courts to adapt and apply the comparative negligence philosophy to actual controversies and specific factual circumstances, as they arise. The presumed difficulties of doing so are outweighed by the injustices attendant upon any delay in adopting the comparative negligence (fault) rule. *See Kirby v. Larson*, 400 Mich. 585, 256 N.W.2d 400, 417–418 (1977).

IV.

The demise of contributory negligence as a defense can be justified from several points of view. The predominant argument for its abandonment rests, of course, upon the undeniable inequity and injustice in casting an entire accidental loss upon a plaintiff whose negligence combined with another's negligence in causing the loss suffered, no matter how trifling plaintiff's negligence might be. Liability based on fault is the cornerstone of tort law, and a system such as contributory negligence which permits one of the contributing wrongdoers to avoid all liability simply does not serve any principle of fault liability.

Various inroads upon the contributory negligence defense as well as the frequently suggested jury's disregard of instructions in its attempt to ameliorate the harshness of the rule, express the convictions of jurists, lawyers, and laymen alike that justice is not achieved by the anachronistic and inequitable contributory negligence rule of law.

Convinced as we are that the almost universal trend toward comparative negligence-comparative fault principles reflects the more humane, the more fundamentally just system of apportioning liability in accordance with respective fault, we now confront the form of comparative negligence most suitable for adoption and implementation in New Mexico.

We believe, as did the United States Supreme Court [10] and other courts which have adopted the comparative negligence doctrine,[11] that the "pure" form is superior and preferable to other comparative systems.

We can anticipate that, ordinarily, where the negligence of both plaintiff and defendant will be at issue, a counterclaim will be filed. The "pure" form will not permit unjust enrichment of either party. Instead, the plaintiff's percentage of contributing fault will reduce his recovery of total damages suffered in an amount equal to his degree of fault, at the same time exposing him to liability to and recovery by defendant for injuries incurred by defendant as a result of plaintiff's proportionate negligence. Regardless of the degrees of comparative fault of the parties, the principle of requiring wrongdoers to share the losses caused, at the ratio of their respective wrongdoing, more fairly distributes the burden of fault than does any "modified" system which allows a 49% negligent plaintiff to recover 51% of his damages, but denies any recovery at all to one who is found to have contributed 50% of the total negligence. *See* Prosser, *Comparative Negligence*, 51 Mich.L.Rev. 465, 493–494 (1953).

The examples of "unfairness" in applying the pure system, cited by counsel in the briefs are not well reasoned. They posit the accident in which plaintiff, 70% at fault, suffers a $500,000 loss; and defendant, 30% at fault, sustains $40,000 in damages. Under comparative fault principles, plaintiff would recover $150,000 and defendant, $28,000. How can it be argued that such a result would be unfair, when each party would be held responsible to the other for the harm caused to that other person by his proportionate fault? It surely is a fairer allocation of liability than the "modified" forms which require plaintiff to have been less negligent than or not more than equally as negligent as defendant. Those formu-

10. *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975).

11. *See Placek v. City of Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (1979). *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975); *Li v. Yellow Cab. Co.*, 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226 (1975); *Hoffman v. Jones*, 280 So.2d 431 (Fla.1973).

lae punish either the plaintiff or counterplaintiff who is but slightly more negligent with bearing his own loss and about one-half of the losses of the other party as well. See Keeton, et al., *Comments on Maki v. Frelk*, 21 Vand.L.Rev. 889, 911 (1968). In cases of multiple defendants, if plaintiff's individual fault exceeds the individual degree of fault of each other defendant—even though the totality of defendants' fault exceeds plaintiff's—under the "modified" concepts, plaintiff recovers nothing.

We believe the California court [12] correctly assessed the modified "50%" form as one which "simply shifts the lottery aspect of the contributory negligence rule to a different ground." We add the "gross-slight" form of comparative negligence to that appraisal, as well. Those rules do not abrogate contributory negligence; they merely slightly reduce defendant's chances of a defense verdict if there is a showing of plaintiff's contributory negligence. Pure comparative negligence denies recovery for one's own fault; it permits recovery to the extent of another's fault; and it holds all parties fully responsible for their own respective acts to the degree that those acts have caused harm.

Considering all of these reasons, we conclude that adoption of a rule of pure comparative negligence more nearly synthesizes the long-standing legal thought on the subject than any other form. We therefore hold that a pure comparative negligence standard shall supersede prior law in New Mexico, and that a plaintiff suing in negligence shall no longer be totally barred from recovery because of his contributory negligence.

V.

The final issue to be decided is the time when and the cases to which the comparative negligence rule shall be applied. We have considered the manner in which the courts in *Hoffman v. Jones*, 280 So.2d 431 (Fla.1973); *Li v. Yellow Cab. Co., supra; Kaatz v. State*, 540 P.2d 1037 (Alaska 1975), and *Placek v. City of Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (1979), have dealt with this question, and we are of the mind that a compromise retroactivity somewhere between the extremes of those cases should prevail.

Therefore, we hold that the rule herein adopted be applicable to the instant case and all cases filed hereafter. Further, in those appropriate cases in which trial commences after the date on which this opinion becomes final, including those which may be remanded for retrial for whatever reason, comparative negligence shall be applicable. And, finally, the new rule shall be applicable to any case presently pending in the appellate courts in which the issue is preserved.

The orders denying plaintiff's motions to strike are overruled. The cases are remanded for further proceedings in which the doctrine of pure comparative negligence shall be applied. It is so ordered.

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

12. *Li v. Yellow Cab. Co. of Calif.*, 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226, 1242 (1975).

634 P.2d 1242

In the Matter of Howard B. McCLELLAN, Attorney at Law.

No. 13643.

Supreme Court of New Mexico.

May 20, 1981.

Disciplinary Proceeding.

This matter coming on for consideration by the Court at the time and place heretofore set;

AND IT APPEARING TO THE COURT, that the Respondent has been notified as

prescribed by law of the time and place for this hearing and has filed no entry of appearance or other pleading showing cause why he should not be disciplined in the identical manner heretofore imposed by the District of Columbia Court of Appeals;

And good cause appearing;

NOW IT IS ORDERED that HOWARD B. McCLELLAN be and he hereby is disbarred from the practice of law in the State of New Mexico effective immediately and is prohibited from holding himself out to be an attorney at law, licensed to practice here.

634 P.2d 1243

In the Matter of Michael James CONWAY, Attorney at Law.

No. 13770.

Supreme Court of New Mexico.

July 29, 1981.

Original Disciplinary Proceeding.

ORDER

BY THE COURT:

IT HAVING BEEN MADE TO APPEAR by certified copy of a judgment entered April 6, 1981, in the United States District Court for the Northern District of California, that MICHAEL JAMES CONWAY, an attorney, regularly admitted to practice law in the Courts of this state, has been convicted of a felony under the laws of the United States within the meaning of Rule 13 of our Rules Governing Discipline.

IT IS ORDERED that MICHAEL JAMES CONWAY be and he hereby is suspended from the practice of law in all Courts of this state, and the matter is referred to the Disciplinary Board and its Disciplinary Counsel is directed immediately to file a petition instituting formal proceedings before an appropriate Hearing Committee. This suspension shall remain in effect until further order of the Court.

634 P.2d 1243

In the Matter of Frederick Allen SMITH, Attorney at Law.

No. 13800.

Supreme Court of New Mexico.

Aug. 10, 1981.

Original disciplinary proceeding.

ORDER

THIS MATTER HAVING COME ON FOR HEARING before the Court upon the report of Chief Disciplinary Counsel and a certified copy of a judgment of the United States District Court for the Western District of Washington, entered July 7, 1981, whereby it appears that FREDERICK ALLEN SMITH, an attorney of this Court, has been convicted of a felony and serious crime; to-wit: a violation of Title 18 U.S.C. Section 1542 (making a false statement in an application for passport);

NOW PURSUANT to Rule 13 of this Court's Rules Governing Discipline, it is ordered that FREDERICK ALLEN SMITH is suspended effective immediately from the privilege of practicing law before the Courts of this state until further order of the Court.

AND IT FURTHER APPEARING TO THE COURT that other and unrelated charges are now pending and awaiting trial against the same FREDERICK ALLEN SMITH before Hearing Committee C of the Southern Disciplinary District and that the convenience of all concerned would be served by reference of this matter to that committee;

IT IS FURTHER ORDERED that this matter be, and it hereby is, referred to this Court's Disciplinary Board with direction immediately to assign it to Hearing Committee C, Southern District (Ben S. Shantz, Chairman) and Disciplinary Counsel is directed immediately to file a petition instituting formal proceedings hereon before such hearing committee.

634 P.2d 1244

In the Matter of Harold M. MORGAN, Esquire.

No. 13231.

Supreme Court of New Mexico.

Sept. 9, 1981.

Disciplinary Proceeding.

IT HAVING BEEN MADE TO APPEAR TO THE COURT by affidavit of Glen L. Houston, Attorney at Law, that the respondent, HAROLD M. MORGAN, has served the time heretofore prescribed for practice under probationary conditions and supervision by our Order of August 13, 1980, 95 N.M. 653, 625 P.2d 582, and has fully complied with the conditions of his probation;

NOW IT IS ORDERED that HAROLD M. MORGAN, Esquire, be and he hereby is released from probation and the conditions thereof with respect to his license to practice law in the courts of this state.

634 P.2d 1244

Richard BUZBEE, Reggie D. Bell, and Richard Chapman, Petitioner and Intervenors,

v.

Hon. Thomas A. DONNELLY, Hon. Lorenzo F. Garcia, Hon. Bruce E. Kaufman, District Judges, Respondents.

STATE of New Mexico, Plaintiff-Appellee,

v.

Richard Nave CHAPMAN, et al., and Narciso Telles Flores, et al., Defendants-Appellants.

Nos. 13783, 13789.

Supreme Court of New Mexico.

Sept. 25, 1981.

Rehearing Denied Oct. 23, 1981.

Jeff Bingaman, Atty. Gen., Charles Baldonado, Deputy Sp. Prosecutor, Santa Fe, for plaintiff-appellee.

John Bigelow, Public Defender, Martha A. Daly, Asst. Appellate Defender, Mark Donatelli, Penitentiary Defense Director, Richard A. Winterbottom, Asst. Public Defender, Santa Fe, for petitioners Chapman & Flores.

Bruce J. MacAllister, Santa Fe, for appellant Sandoval.

William G. Walker, Albuquerque, for appellant Chavez.

Charles Driscoll, Albuquerque, for appellants Casaus & Sandoval.

John L. Walker, Albuquerque, for petitioner Buzbee.

Ellen Pines, Santa Fe, Garvin A. Isaacs, Oklahoma City, Okl., for appellant Colby.

Narciso Garcia, Jr., Albuquerque, for petitioner Bell.

C. Richard Baker, Chief Sp. Prosecutor, Charles Baldonado, Deputy Sp. Prosecutor, Theodore E. Lauer, Asst. Sp. Prosecutor, Santa Fe, for respondent District Judges.

Jeff Bingaman, Atty. Gen., Carol Jean Vigil, Heidi Topp Brooks, Asst. Attys. Gen., Santa Fe, for amicus curiae.

OPINION

EASLEY, Chief Justice.

Decisions in five cases that came to us on interlocutory appeals and prerogative writs are consolidated in this opinion. Eight defendants are charged with ten counts of first-degree murder that occurred during the New Mexico State Penitentiary riot of February 1980, in which a total of thirty-three persons were killed.

In all cases, the defendants moved to dismiss the indictments, claiming that the prosecutors knowingly withheld exculpatory evidence from the grand jury, in violation of Section 31–6–11(B), N.M.S.A.1978 (Cum.Supp.1980). The trial courts in all cases denied defendants' motions to dismiss.

Two interlocutory appeals were granted by the Court of Appeals, which consolidated the cases and certified them to this Court. Three other cases came to this Court on writs of prohibition and were consolidated with the two cases from the Court of Appeals. Thus we address the issues in five cases on an in-depth basis in anticipation of the same and similar issues arising in subsequent riot cases. We affirm the decisions of all the trial courts on the issues raised.

Richard Nave Chapman, Herman Richard Buzbee and Michael Dennis Colby were indicted for the first-degree murder of Larry Wayne Smith. Jesus Jose Antunez, Paul Casaus, Lorenzo Chavez, Narciso Telles Flores and Jose Moises Sandoval were indicted for the first-degree murder of Ramon Acuna Madrid. Herman Richard Buzbee, Richard Nave Chapman and Reggie Bell were indicted jointly, but will be tried separately, for the first-degree murder of Donald Gossens.

The issues are:

1. Whether defendants' prior self-serving claims of innocence must be presented to the grand jury under the recent statute which requires the prosecutor to present evidence of which he is aware that directly negates guilt, or whether the evidence must also meet the other statutory test of being evidence such as would be admissible at trial.

2. Whether evidence, known to the prosecutor, which is contradictory to evidence submitted to the grand jury, qualifies as evidence that directly negates guilt and must be submitted to the grand jury.

3. Whether the refusal of the prosecutor to present to the grand jury prior statements by defendants that they are innocent, and other testimony that contradicted witnesses who testified before the grand jury, constitutes a violation of the defendants' due process rights to a fair trial.

4. Whether evidence that the prosecutor promised each of the grand jury witnesses that he would not be placed back in the New Mexico penitentiary system, must be presented to the grand jury as evidence that directly negates guilt, because it affects the credibility of witnesses.

The allegedly exculpatory evidence in each of these cases is of three types: (1) statements of defendants in which they denied involvement in any killings and claimed they never entered Cell Block 4, the site of these homicides; (2) prior statements of grand jury witnesses and other witnesses which are inconsistent with testimony presented to the grand jury, some of which reflected on the credibility of witnesses, and (3) promises made to grand jury witnesses that, if they gave statements, they would not be returned to the penitentiary of New Mexico or any other satellite facility.

The District Attorney admits that he was aware of the withheld evidence in question and that it was not presented to the grand jury. It is the State's position that the prosecutors had no duty to present these types of evidence.

HISTORICAL BACKGROUND

For over eight hundred years, since the Assize of Clarendon in 1166, the English institution of the grand jury has been in existence. I W. Holdsworth, *History of English Law* 321–23 (7th rev. ed. 1956). Over the centuries in Great Britain, the grand jury not only served to discover and present for trial persons suspected of criminal wrongdoing, but also served to protect the citizens against oppressive actions by the Crown.

Blackstone, in describing the function of the grand jury said: "they are only to hear evidence on behalf of the prosecution: for the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to enquire upon their oaths, whether there be sufficient cause to call upon the party to answer it." IV W. Blackstone, *Commentaries on the Laws of England*, 300 (1769). The grand jury was abolished in Great Britain in 1933.

The grand jury's historic functions were found by our early settlers to be basic to the protection of individual liberties, and the grand jury was transplanted here as a closely-guarded institution in the basic law of our country.

There has been a continuing debate over the years, particularly in the federal system, concerning the respective relationships of the Executive and Judicial Branches to the federal grand jury. Some claim that the court has broad discretionary powers to supervise the grand jury; others assert that the grand jury is an arm of the Executive, since it is basically a law enforcement agency. The United States Supreme Court, in *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), pointed out that the grand jury is a pre-constitutional institution, given constitutional stature by the Fifth Amendment but not relegated by the Constitution to a position within any of the three branches of the government. "The federal grand jury is a constitutional fixture in its own right . . . ." *Nixon v. Sirica*, 487 F.2d 700, 712 n. 54 (D.C.Cir. 1973); *United States v. Chanen*, 549 F.2d 1306 (9th Cir.), *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977).

In fact, under the common law and constitutional provisions, the grand jury is considered to be an independent agency from both the Executive and the Judicial Departments, with "both court and prosecutor play[ing] supportive and complementary roles." *Chanen, supra* at 1312.

In *Chanen*, the court held that courts should not encroach upon the manner in which the prosecutor presents the government's case to the grand jury "unless there is a clear basis in fact and law for doing so", because it "could readily prove subversive of the doctrine of separation of powers." *Id.* at 1313. "But under the constitutional scheme, the grand jury is not and should not be captive to any of the three branches." *Id.* at 1312.

The framers of the New Mexico Constitution saw fit to create the grand jury under the Bill of Rights, instead of placing it under the Executive Department or the Judiciary. N.M.Const. art. 2, § 14. Our Constitution also contains a provision that a criminal defendant may be charged by information as well as by grand jury indictment, and provides details as to the makeup of the grand jury and its procedures.

Generally, the additions made were consistent with the common law practices at the time our State Constitution was written.

Except for statutory provisions, hereinafter discussed, the basic laws and decisions governing grand juries have been remarkably similar between the states and the federal system. Federal constitutional considerations make the federal decisions germane to most every case. There is a vast body of case law, some of it in hopeless conflict. We present cases representative of the general principles.

The responsibilities of the grand jury have changed very infrequently and very little over the years and continue to include both the determination of whether there is probable cause that a person committed a crime and the protection of citizens from the arbitrary and oppressive acts of their government. *Calandra, supra.* The grand jury "has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused. . . ." *Wood v. Georgia*, 370 U.S. 375, 390, 82 S.Ct. 1364, 1373, 8 L.Ed.2d 569 (1962). Wide latitude has been given to grand juries to investigate criminal activity. Generally, the grand jury system is unrestrained by the technical, procedural and evidentiary rules governing the conduct of criminal trials. *Calandra, supra.*

The traditional role of the grand jury is described by Mr. Justice Jackson in his dissenting opinion in *Cassell v. Texas*, 339 U.S. 282, 302, 70 S.Ct. 629, 639, 94 L.Ed. 839 (1950):

> Its power is only to accuse, not to convict. Its indictment does not even create a presumption of guilt; all that it charges must later be proved before the trial jury, and then beyond a reasonable doubt. The grand jury need not be unanimous. It does not hear both sides but only the prosecution's evidence, and does not face the problem of a choice between two adversaries. Its duty is to indict if the prosecution's evidence, unexplained, uncontradicted and unsupported, would warrant a conviction. If so, its indictment merely puts the accused to trial. The difference between the function of the trial jury and the function of the grand jury is all the difference between deciding a case and merely deciding that a case should be tried.

Mr. Justice Holmes authored *Holt v. United States*, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910), in which it was charged that the indictment should be dismissed because incompetent evidence had been presented to the grand jury. The Court denied the relief, saying: "The abuses of criminal practice would be enhanced if indictments could be upset on such a ground." *Id.* at 248, 31 S.Ct. at 4. The United States Supreme Court has also refused to invalidate an indictment from a grand jury that considered evidence that had been obtained in violation of the Fourth Amendment, *Calandra, supra*, and in which evidence had been obtained in violation of the Fifth Amendment; and *Lawn v. United States*, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958).

The following cases represent the general rule or great weight of authority in the federal system. The government need not produce percipient witnesses to testify before the grand jury. *United States v. Short*, 493 F.2d 1170 (9th Cir. 1974). An accused has no right to be called as a witness before a grand jury that is considering his indictment. *United States v. Salsedo*, 607 F.2d 318 (9th Cir. 1979). There is a strong presumption of regularity accorded to the findings of grand juries. *United States v. West*, 549 F.2d 545 (8th Cir.), *cert. denied*, 430 U.S. 956, 97 S.Ct. 1601, 51 L.Ed.2d 806 (1977). A federal prosecutor is the hand of the President in the prosecution of offenses, and the courts are not to interfere with the free exercise of discretionary powers of the prosecutor in his control over criminal prosecutions. *United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied, Cox v. Hauberg*, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965).

Generally, courts have been most cautious in invalidating indictments for alleged

grand jury misconduct of the prosecutor. *Beatrice Foods Co. v. United States*, 312 F.2d 29 (8th Cir.), *cert. denied*, 373 U.S. 904, 83 S.Ct. 1289, 10 L.Ed.2d 199 (1963). In *United States v. Samango*, 607 F.2d 877, 881 (9th Cir. 1979), the court said, "The Court's power to dismiss an indictment on the ground of prosecutorial misconduct is frequently discussed but rarely invoked." Dismissal has been limited to those few instances where the prosecutor has clearly abused the grand jury process. 8 Moore's Federal Practice, 2d Edition ¶ 6.04[1] (1981).

Even where the government knows that an indictment is based partially on perjured testimony, the court must consider whether the perjured testimony is material. *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974). Perjured testimony does not call for dismissal where the testimony before the grand jury, excluding the allegedly perjured testimony, showed sufficient competent evidence to prove probable cause. *Coppedge v. United States*, 311 F.2d 128 (D.C.Cir.1962), *cert. denied*, 373 U.S. 946, 83 S.Ct. 1541, 10 L.Ed.2d 701 (1963). Only in a flagrant case, and perhaps where knowing perjury, relating to a material matter, has been presented to the grand jury should the trial judge dismiss an otherwise valid indictment returned by an apparently unbiased grand jury. To hold otherwise would allow a mini-trial as to each presented indictment. *United States v. Kennedy*, 564 F.2d 1329 (9th Cir. 1977), *cert. denied, Myers v. U. S.*, 435 U.S. 944, 98 S.Ct. 1526, 55 L.Ed.2d 541 (1978).

In 1956 the United States Supreme Court handed down what has proven to be a landmark decision bearing on the issues involved here in *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956). The single issue presented was whether a defendant may be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury. Costello claimed a violation of his Fifth Amendment rights under the grand jury section.

The *Costello* Court discussed Mr. Justice Holmes' opinion in *Holt, supra*, in which the Court held that abuses of criminal practice would be enhanced if indictments could be upset on such a ground. The Court in *Costello* added:

> The same thing is true where as here all the evidence before the grand jury was in the nature of "hearsay." If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

350 U.S. at 363, 76 S.Ct. at 408–09.

The Court stated that there were no persuasive reasons to establish a rule permitting such challenges; that such a rule would run counter to the whole history of the grand jury institution; that neither justice nor the concept of a fair trial requires such a change. The Court found that the defendants would have a right to strict observance in the trial of the case to all of the rules designed to bring about a fair verdict. "Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial." *Id.* at 364, 76 S.Ct. at 409.

Costello is the last word from the United States Supreme Court on the issues stated. There are hundreds of decisions out of lower federal courts attempting to apply *Costello* to varying factual patterns. Some of these and later Supreme Court cases which are claimed as relevant will be later analyzed in the context of due process issues.

So long as *Costello* remains a controlling opinion, a prosecutor can have no legally enforceable duty to divulge exculpatory

> evidence to a grand jury. A prosecutor need only convince a grand jury to indict. He need not also convince a court that a grand jury's indictment was fair. Given the current state of the law, any contrary conclusion short of a Supreme Court decision or statutory authority is neither legally nor pragmatically binding.

Note, *Grand Jury: A Prosecutor Need Not Present Exculpatory Evidence*, 38 Wash. & Lee L.Rev. 110, 123 (1981).

With this historical backdrop, we examine the ways in which New Mexico's statutory and case law diverge from the general rules as indicated by the above cases.

One very significant departure from the common law doctrine, giving prosecutors almost total discretion as to the kind of evidence that can be submitted to the grand jury, was the Act of February 7, 1854; 1853–54 N.M.Laws at p. 66; §§ 3128, 3129, N.M.S.A. 1915. It was provided that only "legal evidence", i.e., such as given by witnesses, "produced and sworn before them [the grand jury]"; or legal documentary evidence could be submitted. § 3128. "Legal evidence" and "the best evidence in degree, to the exclusion of hearsay or secondary evidence" is admissible. § 3129. This version of the law was in effect for 115 years, until it was slightly modified by 1969 N.M.Laws, ch. 276, § 11.

The amendments of 1969 added "other physical evidence" to the two types of evidence previously approved, that is, witness testimony and documentary evidence, and expanded the definition of permissible evidence to provide that "all evidence must be such as would be legally admissible upon trial." 1969 N.M.Laws, *supra.*

Amendments adopted in 1979 did not change the "legally admissible" requirement. However, in a paragraph in the same section, the Legislature added a new provision that requires the prosecutor to submit to the grand jury any evidence of which he is aware that "directly negates the guilt" of the defendant. § 31–6–11(B), N.M.S.A.1978 (Cum.Supp.1980). The full text reads:

> 31–6–11. *Evidence before grand jury.*
>
> A. *Evidence* before the grand jury *upon which it may find an indictment* is the oral testimony of witnesses under oath and any documentary or other physical evidence exhibited to the jurors. *All evidence must be* such as would be *legally admissible* upon trial.
>
> B. It is the duty of the grand jury to weigh all the evidence submitted to it, and when it has reason to believe that other *competent evidence* is available that may explain away or disprove a charge or accusation or that would make an indictment unjustified, then, it should order the evidence produced. The target shall be notified of his target status and be given an opportunity to testify, if he desires to do so, unless the prosecutor determines that notification may result in flight, endanger other persons, obstruct justice, or the prosecutor is unable with reasonable diligence to notify said person. The *prosecuting attorney* assisting the grand jury *shall present evidence that directly negates the guilt of the target* where he is aware of such evidence. (Emphasis added.)

Although it is not material to our decision here, the Legislature in 1981 further amended Section A, above, to eliminate the requirement that evidence be "legally admissible upon trial" and added this clause: "The sufficiency and competency of the evidence upon which an indictment is returned shall not be subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury." *Id.* (Cum.Supp.1981). Thus, New Mexico has gone full circle back to the common law. This amendment places our grand jury in much the same position as those in the federal system and makes the federal case law set out in this opinion even more significant in the future.

1. *DEFENDANTS' SELF–SERVING DECLARATIONS OF INNOCENCE*

The first question is whether defendants' self-serving declarations of innocence should have been presented to the grand jury as evidence directly negating guilt; or

whether the prosecutor was correct in withholding them because they were not evidence such as would be admissible at trial. Defendants claim that the statute mandates that evidence directly negating guilt must be submitted whether or not it would be admissible at trial, that the new language modifies and controls the old.

The issue calls for statutory construction to determine what the Legislature intended. We must examine these and related statutes in historical perspective and give the words their usual meaning. *Arnold v. State*, 94 N.M. 381, 610 P.2d 1210 (1980).

Our statutes in the past have been very favorable to targets of an investigation as compared to some other jurisdictions. They have limited the kinds of evidence that may be submitted to the grand jury. The 1969 amendment added to the types of evidence that could be introduced by the prosecutor. We can presume that the Legislature knew the meaning of the words it used at that time when it said: "All evidence must be such as would be legally admissible upon trial." The law was reasonably well settled at that time as to what evidence was admissible in a trial. The Legislature must have acted advisedly when it left that same sentence in the statute when an amendment was incorporated into the section in 1979 adding the provision that the prosecutor "shall present evidence that directly negates the guilt of the target. . . ."

The definition of evidence before a grand jury having been established for ten years as evidence that would be admissible on trial, the addition of a requirement that evidence directly negating guilt be submitted did not vary that definition. As it bears on the issue here, we hold that the statute as a whole means the prosecutor shall present evidence, that would be admissible at trial, which directly negates the guilt of the target.

There is no question but that the defendants' claims that they are not guilty directly negates their guilt. The next question is whether the evidence is such as would be admissible at trial. The answer is that the statements are inadmissible as hearsay, except under certain situations that are not pertinent here. *See State v. Duran*, 91 N.M. 35, 570 P.2d 36 (N.M.App.), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977), *cert. denied*, 435 U.S. 972, 98 S.Ct. 1615, 56 L.Ed.2d 65 (1978); *State v. Hunt*, 83 N.M. 753, 497 P.2d 755 (Ct.App.), *cert. denied*, 83 N.M. 740, 497 P.2d 742 (1972); *State v. Snow*, 84 N.M. 399, 503 P.2d 1177 (Ct.App.), *cert. denied*, 84 N.M. 390, 503 P.2d 1168 (1972); *State v. Russell*, 37 N.M. 131, 19 P.2d 742 (1933); *State v. Davis*, 30 N.M. 395, 234 P. 311 (1925); *State v. Klasner*, 19 N.M. 474, 145 P. 679 (1914) and 2 Wharton's Criminal Evidence, § 303, (13th ed. 1972); 29 Am.Jur.2d *Evidence* § 621 (1967 & Am. Supp.1981). Wharton explains that "A self-serving declaration is excluded because there is nothing to guarantee its testimonial trustworthiness. If such evidence were admissible, the door would be thrown open for obvious abuse. . . ." *Id.* at 98.

We hold that the prosecutor properly withheld the statements because they were not such evidence as would be admissible at trial. We affirm the decisions of the trial courts in this regard.

2. *CONTRADICTORY EVIDENCE WITHHELD*

Defendants claim that the indictments should be dismissed because the prosecutor withheld other evidence from the grand jury of which he was aware that contradicted evidence submitted to the grand jury. The essence of this claim is that the prosecutor must submit *all* evidence to the grand jury that tends to negate the guilt of defendants, regardless of whether it is direct or circumstantial, material or immaterial, and whether admissible or inadmissible at trial.

We summarize the withheld statements as follows:

1. A witness, who did not testify before the grand jury, did not identify a defendant in his statement as being one of those implicated.

2. A witness identified a defendant in testifying before the grand jury but had

not identified the same defendant in his prior statement.

3. A witness, who did not testify before the grand jury, said in a statement that the way a murder was carried out was different than what was described by other witnesses before the grand jury.

4. A witness, who testified before the grand jury, named other persons as participants but not the defendant.

5. A witness whose grand jury testimony implicated a defendant had given a previous statement in which he was confused as to the identity of the defendant.

6. Statements that the killers were masked.

7. Statements that a defendant was present for a while at a killing, but the witness did not see the defendant participate in the killing.

8. A witness, who testified before the grand jury, but changed his mind or made a mistake as to the identity of the perpetrator in his prior statement.

Although this indirect or circumstantial evidence may be inconsistent with that presented to the grand jury, we inquire whether it directly negates guilt. Basic to the analysis of this issue is a determination of the legislative intent in specifying that evidence *directly* negating guilt should be furnished the grand jury. A most logical assumption is that the intent was also to proscribe the use of evidence *indirectly* negating guilt. When a statute uses terms of art, we interpret these terms in accordance with case law interpretation or statutory definition of those words, if any. *See State v. Aragon*, 55 N.M. 423, 234 P.2d 358 (1951); *State v. Grissom*, 35 N.M. 323, 298 P. 666 (1931); *Burch v. Ortiz*, 31 N.M. 427, 246 P.2d 908 (1926); *Bradley v. United States*, 410 U.S. 605, 93 S.Ct. 1151, 35 L.Ed.2d 528 (1973).

Neither the statutes nor case law give us any help with a specific definition of the term "directly negating" guilt. However, given the history of the statutes here, where hearsay and secondary evidence were specifically not allowed for 115 years and the fact that the law was then changed to allow any evidence that would be admissible at trial, we believe the Legislature was thinking in terms of the traditional categories of evidence. The only common sense explanation for the use of the words in question is that the Legislature intended to permit the use of *direct* evidence negating guilt and to prohibit the use of indirect, or circumstantial, evidence negating guilt.

Direct evidence is evidence which, if believed, proves the existence of the fact without inference or presumption. *People v. Thomas*, 87 Cal.App.3d 1014, 151 Cal. Rptr. 483 (Ct.App.1979); *State v. Thompson*, 519 S.W.2d 789 (Tenn.1975); *Frazier v. State*, 576 S.W.2d 617 (Tex.Cr.App.1978). Direct evidence is actual knowledge gained through a witness' senses. *State v. Hubbard*, 351 Mo. 143, 171 S.W.2d 701 (1943); *see also State v. Farrington*, 411 A.2d 396 (Me.1980); *State v. Musgrove*, 178 Mont. 162, 582 P.2d 1246 (1978).

The court in *State v. Lewis*, 177 Neb. 173, 128 N.W.2d 610, 613 (1964), used the following definition: "Otherwise stated, direct evidence is proof of facts by witnesses who saw acts done or heard words spoken, while circumstantial evidence is proof of collateral facts and circumstances from which the mind infers the conclusion that the facts sought to be established in fact existed." *United Textile Workers v. Newberry Mills, Inc.*, 238 F.Supp. 366, 372 (W.D.S.C.1965).

All of the withheld evidence in our case, other than the self-serving statements of defendants, is circumstantial in nature. It does not directly negate the guilt of the defendants. It must be aided by inferences or presumptions. The prosecutor had no duty under the statutes to submit this evidence to the grand jury.

Our decision on this issue differs in part with the theory expressed in dicta by the Court of Appeals in *State v. Herrera*, 93 N.M. 442, 601 P.2d 75 (N.M.App.1979), and followed in later cases, which holds that knowingly withholding *exculpatory* evidence from a grand jury denies the defendant due process. That Court obviously

holds the view that "evidence tending to negate" guilt, "exculpatory" evidence and evidence directly negating guilt all have the same meaning. *State v. Harge*, 94 N.M. 11, 606 P.2d 1105 (N.M.App.1979). The terms have also been used synonymously by the Court of Appeals in *State v. Sanchez*, 95 N.M. 27, 618 P.2d 371 (N.M.App.1980); *State v. Lampman*, 95 N.M. 279, 620 P.2d 1304 (N.M.App.1980); *State v. Gonzales*, 95 N.M. 636, 624 P.2d 1033 (N.M.App.1981).

In *Gonzales* the Court stated: "Exculpatory evidence is evidence reasonably tending to negate guilt." Withholding such evidence violates defendants' due process rights, the Court said. *State v. Payne*, 96 N.M. 347, 630 P.2d 299 (N.M.App.1981). Our opinion in *Maldonado v. State*, 93 N.M. 670, 604 P.2d 363 (1979) did not address this issue directly.

Prior to the enactment of the statute in question, our courts were concerned only with "exculpatory" evidence in the context of our dispute here. Until the Legislature used the term "directly" negating guilt there was no need to define terms. It is plain that there are at least two distinct types of exculpatory evidence, i. e., direct exculpatory evidence and circumstantial exculpatory evidence. Since the plain meaning of the statute is that the prosecutor is obligated to present to the grand jury only direct exculpatory evidence, we hold that it was not error for him to withhold circumstantial exculpatory evidence. That evidence was inadmissible to the same extent as secondary and hearsay evidence under the old statute. To the extent that *Payne, supra; Gonzales, supra; Sanchez, supra; Lampman, supra; Harge, supra; Herrera, supra*; and other cases are contrary to our opinion on this issue, they are hereby specifically overruled.

Defendants rely heavily on *Johnson v. Superior Court*, 124 Cal.Rptr. 32, 539 P.2d 792 (1975), in which that court based its decision on statutory grounds and declined to consider due process and equal protection issues. Our statute is very similar to the one that was considered in *Johnson* in that the California law gave the grand jury the right to order evidence produced which it has reason to believe will explain away the charge. The Court in *Johnson* ruled that an indictment was subject to dismissal where the prosecutor had knowledge of such evidence, but did not produce it, even though neither the defendant nor the grand jury requested that it be presented. We reject the reasoning that would force a prosecutor to engage in a guessing game as to what bits and pieces of evidence might tend to be exculpatory at trial and then demand that the prosecutor produce *all* of it for the grand jury, whether or not requested by the grand jury.

In fact, for evidence to be admissible at trial on behalf of the defendant, it must all be relevant to his innocence, that is, it must reasonably tend to negate guilt. Thus, to apply the *Johnson* standard would be to saddle the State in many instances with the burden of presenting the defendant's whole case to the grand jury, as well as the State's case. This would lead to ridiculous consequences and would be a subversion of many of the traditional purposes of the grand jury system. We refuse to adopt such a drastic and unwarranted position.

Much of the withheld circumstantial evidence would have reflected on the credibility of the witnesses who testified before the grand jury. Defendants would have us dismiss the indictment because this evidence was not presented for that purpose. In the absence of flagrant prosecutorial misconduct that was responsible for the jury indicting a defendant, we decline to adopt a rule that an indictment is bad because it is based on testimony of a witness whose credibility may later be subject to question. *United States v. Sullivan*, 578 F.2d 121 (5th Cir. 1978). "Such a rule of law would necessitate independent judicial review of the credibility of grand jury witnesses, an exercise that would infringe upon the traditional independence of the grand jury." *United States v. Guillette*, 547 F.2d 743, 753 (2d Cir. 1976), *cert. denied*, 434 U.S. 839, 98 S.Ct. 132, 54 L.Ed.2d 102 (1977); *United States v. Brown*, 574 F.2d 1274 (5th Cir.), *cert. denied*, 439 U.S. 1046, 99 S.Ct. 720, 58 L.Ed.2d 704 (1978).

3. *DUE PROCESS CONSIDERATIONS*

Defendants claim that the failure of the prosecutor to present all the evidence in question to the grand jury violates their Fifth Amendment rights to a fair trial. Although our decision on the first two points effectively disposes of the issues on statutory grounds, we feel constrained to address the due process questions in order to clarify this Court's position in that regard. We are aware of the 1981 amendment which eliminates the sentence that required all evidence to be such as would be admissible at trial. Thus, we look at the federal case law with new interest.

The United States Supreme Court has held that a primary duty of the grand jury is to protect the innocent from oppressive prosecution. *Wood v. Georgia, supra.* "While recognizing this function, the Supreme Court has nevertheless repeatedly shaped its holdings so as to prevent litigious interference with grand jury proceedings." Comment, *Grand Jury,* 11 Rutgers-Camden L. J. 359, 363 (1980); *Calandra, supra; United States v. Dionisio,* 410 U.S. 1, 18, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1973); *Costello, supra*; Keeney and Walsh, American Bar Association's Grand Jury Principles, 14 Idaho L.Rev. 545 (1978). However, one case in particular, *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), which does not mention evidence in a grand jury context, is having a profound influence on some lower federal courts. After examining further the rationale which we perceive supports the Supreme Court's present rulings, we will discuss the theories developed from *Brady.*

The United States Supreme Court in *Dionisio, supra* at 17, 93 S.Ct. at 773, stated:

> Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws.

Courts do not want exclusionary rules, suppression hearings, evidentiary rules or mini-trials to disrupt or delay the grand jury's function. Keeney and Walsh, *supra.*

In *Lawn, supra* at 349, 78 S.Ct. at 317, the Court stated that the United States Supreme Court had several times ruled that an "indictment returned by a legally constituted nonbiased grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment." (*Citing Holt, supra.*)

In *United States v. Blue,* 384 U.S. 251, 86 S.Ct. 1416, 16 L.Ed.2d 510 (1966), the Supreme Court held that, if the government acquired incriminating evidence in violation of the Fifth Amendment and presented that evidence to the grand jury, the defendant was not entitled to quash the indictment, but would, at most, be entitled to suppress the evidence at trial.

The Supreme Court refused to extend the exclusionary rule to grand jury proceedings in *Calandra, supra,* because of the potential injury to the historic role and functions of the grand jury, holding that such action would seriously impede the grand jury, delay and disrupt the proceedings, halt the orderly progress of investigations, necessitate extended litigation of issues only tangentially related to the primary objective, and result in protracted interruption.

Costello is still the law of the land. There is no Supreme Court ruling requiring exculpatory evidence to be presented. That Court has never ruled that withholding exculpatory evidence from a grand jury violates a target's due process rights to a fair trial and that this requires the dismissal of an indictment. However, a few lower federal courts and state courts have done so, generally based upon flagrant prosecutorial misconduct resulting in unfairness to defendants. In the vast majority of the cases the courts have refused to question the integrity of grand jury indictments.

Numerous recent federal cases have addressed the issue of prosecutorial misconduct in failing to present various types of evidence to the grand jury and whether dismissals of the indictments were warranted. There is no requirement under the

federal laws or rules that evidence negating guilt shall be submitted to a grand jury. Since New Mexico has such a requirement, these cases are examined solely in relation to due process questions arising out of a failure to present this type of evidence.

The court, in *United States v. Cederquist*, 641 F.2d 1347 (9th Cir. 1981), recognized that an indictment may be dismissed for prosecutorial misconduct based upon the Fifth Amendment's Due Process Clause or upon the court's inherent supervisory powers but stated that the constitutionally-based independence of grand juries and prosecutors necessarily limits a court's review of the grand jury proceedings. Evidence was withheld which circumstantially negated criminal intent. The court held that dismissal is required only in flagrant cases in which the grand jury has been overreached or deceived in some significant way and where the prosecutor's conduct significantly infringed upon the ability of the grand jury to exercise its independent judgment.

Other cases are: *United States v. Lasky*, 600 F.2d 765 (9th Cir.), *cert. denied*, 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979) (prosecution is not required to present the grand jury with evidence which would tend to negate guilt); *United States v. Trass*, 644 F.2d 791 (9th Cir. 1981) (the prosecutor need not present all available exculpatory information or all material bearing on the credibility of potential witnesses); *United States v. Wander*, 601 F.2d 1251 (3d Cir. 1979) (speculative views of the prosecutor on the credibility of witnesses need not be submitted); *United States v. Ciambrone*, 601 F.2d 616 (2d Cir. 1979) (an indictment is not defective because a defendant did not have an opportunity to present his version of the facts before the grand jury. The prosecutor had failed to advise the grand jury that the defendant had been threatened, which motivated him to testify falsely at a prior trial.); *United States v. Kennedy*, 564 F.2d 1329 (9th Cir.), *cert. denied, Myers v. U. S.*, 435 U.S. 944, 98 S.Ct. 1526, 55 L.Ed.2d 541 (1978), (dismissal is warranted only in a flagrant case of failure to present exculpatory matter, and perhaps where knowing perjury, relating to a material matter, has been presented to the grand jury).

The Tenth Circuit Court of Appeals has steadfastly refused to "pierce the armor" of the grand jury and has held that "indicted defendants do not have a right to challenge the fairness of a grand jury." *United States v. Thomas*, 632 F.2d 837, 846 (10th Cir. 1980). The court relied heavily on *Costello* in refusing to dismiss an indictment handed down by grand jurors who were exposed to news stories concerning local heroin traffic, which allegedly biased the members. *United States v. Hubbard*, 603 F.2d 137 (10th Cir. 1979) (submission of hearsay and conjecture to the grand jury does not warrant dismissal of indictment); *United States v. Addington*, 471 F.2d 560 (10th Cir. 1973).

The Court in *United States v. DeVincent*, 632 F.2d 155 (1st Cir. 1980), pointed out that to accede to the defendant's position that an indictment be dismissed for failure to submit evidence would involve considerable duplication of effort and would endanger compliance with the various time limits.

Implicit in the decisions of most of the courts that have addressed the issue of the dismissal of an indictment because of prosecutorial misconduct or basic unfairness that violates due process, is the concept that substantial prejudice to the defendant must be demonstrated before the province of the independent grand jury is invaded. *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); *United States v. Birdman*, 602 F.2d 547 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed.2d 668 (1980); *United States v. Addington, supra.*

The courts that have dismissed indictments have generally recognized the prosecutor's right to use some discretion in the presentation of evidence to a grand jury but have ruled that this does not entitle him to mislead it or to engage in fundamentally unfair tactics. *Ciambrone, supra*; Comment, *Grand Jury, supra.* Examples of "fundamentally unfair tactics" are: (1) the

prosecution obtaining an indictment on basis of evidence known to be perjurous; and (2) the prosecution leading a grand jury to believe it has received eye-witness rather than hearsay testimony. *Id.; United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974); *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972).

However, the court in *Ciambrone, supra*, took a contrary view and ruled that the failure of the attorney to reveal the possible existence of threats against the defendant's life fell far short of the kind of misleading conduct or deception that would warrant dismissal of the indictment.

Cases holding that the grand jury must be advised of exculpatory information are: *United States v. Provenzano*, 440 F.Supp. 561 (S.D.N.Y.1977); *United States v. Phillips Petroleum Co.*, 435 F.Supp. 610 (N.D. Okl.1977); *United States v. Braniff Airways, Inc.*, 428 F.Supp. 579 (W.D.Tex.1977); *United States v. DeMarco*, 401 F.Supp. 505 (C.D.Cal.1975), *aff'd*, 550 F.2d 1224 (9th Cir.), *cert. denied*, 434 U.S. 827, 98 S.Ct. 105, 54 L.Ed.2d 85 (1977).

It is claimed that the majority view will result in the erosion of the power and effectiveness of the grand jury, by allowing a prosecutor to mislead it by withholding relevant evidence tending to negate the defendant's guilt. Comment, *Grand Jury, supra.*

Other cases in which indictments were dismissed are *United States v. Basurto, supra; United States v. Gallo*, 394 F.Supp. 310 (D.Conn.1975). In *Basurto, supra*, the prosecutor learned prior to trial that an unindicted co-conspirator, who had testified to the defendants' activities before the grand jury, had lied in material respects. The prosecutor did not notify the court or the grand jury of the perjury and proceeded to trial. The court held that the Due Process Clause of the Fifth Amendment is violated where the indictment is based partially on perjured testimony, where the perjured testimony is material, and when jeopardy has not attached. *See United States v. Goldman*, 451 F.Supp. 518 (S.D.N.Y.1978); *Frink v. State*, 597 P.2d 154 (Alaska 1979); *Giefels v. State*, 590 P.2d 55 (Alaska 1979); *State v. Harwood*, 45 Or.App. 931, 609 P.2d 1312 (Ct.App.1980).

It is significant, however, that the Second Circuit's decision in *Ciambrone* is the only federal finding at the circuit level that suggests a prosecutor must divulge exculpatory information to a grand jury, and that finding was only dicta. Note, *supra* 38 Wash. & Lee L.Rev. 110 (1981). "Rather than give the *Estepa* rule constitutional standing, the second circuit justified its holding in *Estepa* as an extension of its supervisory power over the district courts." *Id.; Estepa, supra.*

"None of the courts that have dismissed indictments address the Supreme Court's holding in *Costello* that a court should not dismiss a facially valid indictment because the grand jury heard inadequate evidence." Note, *supra* 38 Wash. & Lee L.Rev. 117 (1981).

A few lower federal courts have attempted to extend the *Costello* rule, or circumvent it, by applying the principles enunciated in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The Court in *Brady* held that the prosecutor has a duty to divulge exculpatory evidence to a defendant when that defendant requests specific material before trial. *Brady does not* address what type of evidence ought to be submitted before a grand jury. It is a pre-trial discovery case. In their efforts to develop more liberal guidelines than are indicated in *Costello*, some courts are looking to *Brady*. To do this, courts have equated a grand jury proceeding with a trial.

We decline to follow this reasoning, as it has some obvious flaws. The determination of materiality of a breach of a prosecutor's duty to disclose favorable evidence to the defendant is different in the grand jury context than it is at trial because the standard of proof required is different. *Galtieri v. Wainwright*, 582 F.2d 348 (5th Cir. 1978). The grand jury standard is probable cause, while at trial it is proof beyond a reasonable doubt. The materiality and quantum of evidence to show probable cause, justifying

the return of an indictment, is far less than is necessary at trial to prove a defendant's guilt beyond a reasonable doubt. An indictment is only a formal accusation of guilt. *See State v. Blea*, 84 N.M. 595, 506 P.2d 339 (Ct.App.1973). A stricter test of materiality is placed on evidence withheld from a grand jury because its finding of probable cause is much harder to overcome by the withheld evidence than a verdict of guilt beyond a reasonable doubt by the jury at trial. Thus, the quantum and materiality of suppressed evidence required for remedial court action is greater at the grand jury level. This is evident in our case. Each of the defendants has been linked with the murder of one or more of the victims by eye-witness testimony. Defendants' protestations of innocence and other circumstantial exculpatory evidence was withheld. Even if the withheld evidence had gone to the grand jury, it is plain that the indictments would still be fully supported on the issue of probable cause. However, it is equally clear that withholding some of this exculpatory evidence at trial would taint a verdict.

In *Brady*, a request was made for statements, but the prosecution failed to disclose to Brady before or during trial his companion's statement in which the latter confessed to the killing for which Brady was being prosecuted. The Supreme Court held that the suppression of evidence "favorable to the defendant on request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*, 373 U.S. at 87, 83 S.Ct. at 1196–97. *Brady* adopts a concept of fairness, rather than dwelling on prosecutorial misconduct, and focuses on prejudice to the defendant.

Brady established the prosecution's constitutional obligation to disclose evidence that would be material to the defense of the accused. The lower federal courts immediately started fashioning standards, but it was not until *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) that the Supreme Court identified the criteria to be used to decide whether evidence is sufficiently "material" to make its nondisclosure a constitutional error. *United States v. Weidman*, 572 F.2d 1199 (7th Cir.), *cert. denied*, 439 U.S. 821, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978).

In *Agurs*, as in *Brady*, the Court was not ruling on an evidentiary question affecting a grand jury, but one involved in the trial of the case.

The Court in *Agurs*, established three levels of materiality for the excluded evidence at trial: (1) that which the prosecutor knew to be perjured, in which case the conviction must be set aside if there is a "reasonable likelihood that the false testimony could have effected the judgment of the jury." *Id.*, 427 U.S. at 103, 96 S.Ct. at 2397; (2) specific evidence for which there has been a pretrial request. "[I]mplicit in the requirement of materiality is the concern that the suppressed evidence might have effected the outcome of the trial." *Id.* at 104, 96 S.Ct. at 2398; (3) where a general request or no request has been made, the test is whether the omitted evidence creates a reasonable doubt as to the defendant's guilt that did not otherwise exist.

"We are dealing with the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment. . . ." *Id.* at 107, 96 S.Ct. at 2399. The construction would apply to the comparable clause in the Fourteenth Amendment applicable to trials in state courts. The Court held that if evidence has no probative significance, no purpose would be served to order a new trial because of its suppression.

> It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.

Id. at 112–3, 96 S.Ct. at 2402.

The Tenth Circuit court in *United States v. Jackson*, 579 F.2d 553 (10th Cir.), *cert. denied, Allen v. U. S.*, 439 U.S. 981, 99 S.Ct.

569, 58 L.Ed.2d 652 (1978), has placed the burden on the defendant to establish that the failure to disclose evidence under the *Agurs* test is a denial of due process. *See United States v. Harris*, 462 F.2d 1033 (10th Cir. 1972); *United States v. Brumley*, 466 F.2d 911 (10th Cir. 1972), *cert. denied*, 412 U.S. 929, 93 S.Ct. 2755, 37 L.Ed.2d 156 (1973).

In *United States v. Gaston*, 608 F.2d 607 (5th Cir. 1979), the court held that in determining whether the nondisclosure of evidence rises to denial of due process, a strict standard of materiality is applied. *People v. Filis*, 87 Misc.2d 1067, 386 N.Y.S.2d 988 (1976); *Wander, supra; Trass, supra. United States v. Gardner*, 611 F.2d 770 (9th Cir. 1980) holds that if the prosecution is uncertain about the materiality of the information within its possession, it may submit that information to the trial court for an *in camera* inspection and evaluation. *United States v. Brown*, 574 F.2d 1274 (5th Cir. 1978).

The language used by our Court of Appeals, that withholding exculpatory evidence violates a defendant's due process rights, in effect, establishes a per se sanction of dismissal if *any* exculpatory evidence is knowingly withheld. This leaves no room for considering whether the absence of the evidence affected the outcome of the grand jury proceeding or whether the defendant suffered any prejudice, both of which are required in most other jurisdictions that permit challenges to grand jury indictments.

To serve the public interest by an automatic sanction of dismissal under these circumstances is to disservice another public interest by frustrating prosecution of criminals. *Birdman, supra.* Such a ruling would lead in our case to windfall dismissals of the indictments against these defendants where even the slightest bit of inconsequential exculpatory evidence has been withheld. We reject this view of the law and overrule *Herrera* and the succeeding cases that adopt, or appear to adopt, this view.

We dispose of these issues on state statutory grounds. We do not perceive a due process question. The United States Supreme Court has not mandated that a due process violation exists under circumstances such as ours. *Costello, supra.* We find no compelling reason to do so.

This Court ruled in *State v. Chance*, 29 N.M. 34, 221 P. 183 (1923) that an indictment duly returned into court and regular on its face cannot be challenged with respect to the kind and degree of evidence. The Court further held that there would have to be clear statutory authority authorizing such a review, and that in its absence, the courts are without power to review the sufficiency, legality or competency of the evidence upon which an indictment is returned. There is no court review provided in our statutes.

We still subscribe to the decision in *Chance.* We hold that opening up indictments for challenge would halt the orderly progress of investigations, would cause extended litigation on unimportant issues and would frustrate the public's interest in the fair and expeditious administration of the criminal laws. It would be an intrusion into the separate provinces of the constitutionally independent offices of the grand jury and the prosecutor. In any event, the claimed misconduct would be cured at trial.

We have said that the grand jury should not be the tool of the prosecutor and that he *must* abide by the letter and the spirit of the laws, including the one precluding the use of inadmissible evidence when obtaining indictments. *Maldonado, supra.* That holds true here. But, we are further holding that failure to do so does not reach constitutional dimensions under the circumstances. Although the 1981 amendment does not require admissible evidence, there was no change made in Section 31–6–6, N.M.S.A. 1978, which provides for the grand jurors to take an oath that they will receive "legal evidence", and no change made in Section 31–6–11(B), which sets forth the grand jury's right to order "competent" evidence produced if they have reason to believe it is available. The amendment made no real change. Part of the grand jury reforms in 1979, which were

designed to prevent prevelant abuses of the grand jury system by some prosecutors, was the statutory proviso that: "The prosecuting attorney shall conduct himself in a fair and impartial manner at all times when assisting the grand jury." The prosecutor oath as a lawyer and his duties as an officer of this Court demand no less.

We do not find a due process violation here. However, even if we did adopt the rule of some other jurisdictions that an indictment may be overturned under the due process clause for "flagrant prosecutorial misconduct", the defendants would receive no relief. The prosecutors in our cases were simply following the directions of the Legislature by withholding the evidence in question. There was not the perjury, deceit or malicious overreaching found to be essential before most courts would permit an attack on an indictment. There is no showing that the prosecutors' conduct infringed upon the independent judgment of the grand jurors.

Furthermore, if we applied the tough *Brady-Agurs* test to the evidence here, defendants would not prevail. In examining the record we find that, as to each defendant, the evidence withheld is not of sufficient materiality to suggest that it would, if introduced, have changed the vote of the grand jury on the issue of probable cause. Considering the eye-witness testimony to the murders and other information, the omitted evidence does not create a reasonable doubt of any defendant's guilt. There is no likelihood that the introduction of the evidence would have changed the result.

The trial courts were not in error on this issue.

4. *PROMISES BY THE PROSECUTOR TO WITNESSES*

The prosecutor promised each penitentiary inmate who testified that he would not be returned to the New Mexico State Penitentiary or any of its satellite facilities. Defendants claim these agreements should have been presented to the grand jury because they are material to the issue of credibility of the witnesses. This issue is settled by holdings elsewhere in this opinion regarding the withholding of evidence bearing on the credibility of witnesses.

We affirm the decisions of the various trial courts as to all issues and defendants and remand the cases to the district courts for trial.

IT IS SO ORDERED.

FEDERICI and RIORDAN, JJ., concur.

SOSA, Senior Justice, and WOOD, Senior Judge, Court of Appeals, respectfully dissenting.

SOSA, Senior Justice, and WOOD, Senior Judge, dissenting.

We dissent from the holding that the prosecutor had no duty to present defendants' exculpatory statements to the grand jury. We specially concur with the remainder of the majority's opinion.

A grand jury determines whether there is probable cause to accuse, and also protects persons against unfounded accusations. § 31–6–10, N.M.S.A.1978 (Cum.Supp.1980). *See Baird v. State*, 90 N.M. 667, 568 P.2d 193 (1977). In performing these functions, a grand jury hears evidence presented by the prosecutor. The Legislature has directed the prosecutor to conduct himself or herself fairly and impartially, § 31–6–7, N.M.S.A.1978 (Cum.Supp.1980), and to present evidence which negates the guilt of the target when the prosecutor is aware of that evidence, § 31–6–11(B), N.M.S.A.1978 (Cum.Supp.1980). Consistent with these legislative requirements, a grand jury "is not, and should not be, the tool of the prosecuting authority to manipulate at will." *Davis v. Traub*, 90 N.M. 498, 500, 565 P.2d 1015, 1017 (1977). These appeals present the question of whether the prosecutor withheld exculpatory evidence from the grand jury. We discuss: (1) the standard for presentation of exculpatory evidence; (2) what is exculpatory evidence; (3) how exculpatory evidence is determined; and (4) the exculpatory evidence claims made.

1. *The Standard For Presenting Exculpatory Evidence To A Grand Jury*

The prosecutor is to present exculpatory evidence when such evidence is known to the prosecutor. § 31–6–11(B); *see State v. Herrera*, 93 N.M. 442, 601 P.2d 75 (N.M. App.1979). Recently, in *State v. Payne*, 96 N.M. 347, 630 P.2d 299 (N.M.App.1981), the Court of Appeals suggested that "known" might include "should have known." This suggestion is not involved in these appeals; it is undisputed that the withheld evidence, allegedly exculpatory, was known to the prosecutor.

In *Herrera, supra* at 444, 601 P.2d at 77, the Court of Appeals held that "[a] knowing withholding of evidence tending to negate guilt is fundamentally unfair and violates due process." Section 31–6–11(B) requires the presentation of evidence that "directly negates" guilt. In light of our definition of exculpatory evidence, and how that evidence is to be determined, it is unnecessary to determine, in these cases, whether there is any material difference in the two requirements. If the withheld evidence did not "tend" to negate guilt, it did not "directly" negate guilt. We use the "tend to" phrase hereinafter, but this use is not to be taken as adoption of that phrase as the standard.

2. *What Is Exculpatory Evidence?*

Section 31–6–11(B) refers to evidence which negates guilt. Evidence which negates guilt is exculpatory evidence; that is, evidence that indicates the defendant is not guilty of the crime charged. *Herrera, supra.* Webster's Third New International Dictionary 794 (1976) states that exculpate "indicates a freeing from blame, fault, or guilt." Exculpatory evidence comprehends evidence which tends to negate guilt or, stated affirmatively, supports the innocence of the defendant. *Com. v. St. Germain*, —— Mass. ——, 408 N.E.2d 1358, 1363 n.6 (1980).

Evidence is not exculpatory "merely because the defendant so labels it." Evidence is not exculpatory even though it may be favorable to the defendant if the evidence "is merely collateral or impeaching." To be exculpatory, that is, to negate guilt, the evidence must tend "to establish defendant's innocence of the crimes charged." *Com. v. Lochman*, 265 Pa.Super. 429, 402 A.2d 513, 518 (1979).

3. *How Exculpatory Evidence Is To Be Determined*

In determining whether evidence is exculpatory, the withheld evidence is not to be evaluated in relation to evidence that was presented to the grand jury. *See Maldonado v. State*, 93 N.M. 670, 604 P.2d 363 (1979). The allegedly exculpatory evidence is to be evaluated without reference to any other evidence. *See Payne, supra.* Whether withheld evidence is exculpatory is not to be determined on the basis of the prosecutor's subjective belief, *Herrera, supra*, or on the basis of the prosecutor's belief that the withheld evidence is false. *State v. Sanchez*, 95 N.M. 27, 618 P.2d 371 (N.M.App. 1980).

Whether evidence is exculpatory is to be determined by objectively examining the withheld evidence and determining whether, in itself, the withheld evidence indicates that a defendant is not guilty of the crime charged. *Herrera, supra; State v. Harge*, 94 N.M. 11, 606 P.2d 1105 (N.M.App.1979). The withheld evidence in *Herrera*, that defendant was not present at the time of the child abuse or at the time of prior acts of child abuse, indicated that defendant was not guilty of aiding or abetting the child abuse and, thus, it was exculpatory. The withheld evidence in *State v. Gonzales*, 95 N.M. 636, 624 P.2d 1033 (N.M.App.1981), that the victim's vehicle forced defendant's pickup off the street, did not indicate whether the defendant did or did not shoot the victim in self-defense and, thus, was not exculpatory.

4. *The Exculpatory Claims Made*

The claims made by defendants divide into three parts: (A) defendants' exculpatory statements; (B) evidence allegedly inconsistent with evidence presented to the grand jury; and (C) promises made to witnesses who testified before the grand jury.

A. Defendants' Exculpatory Statements

Colby, in his statement, said that he never saw anyone killed during the penitentiary riot; that he never entered Cellblock 4, where Smith was killed.

Buzbee stated that he did not hit or kill anyone and that he did not go into Cellblock 4 during the riot.

Chapman stated that the extent of his activities during the riot was to help out some friends who had taken overdoses of drugs; then he overdosed himself and knew nothing until he woke up in the hospital.

Chavez stated that he remained in his unit during the riot except when he helped take some inmates outside; that he had no weapon and did not see anyone get murdered, hit or stabbed.

Bell stated that he did not get out of his cell until late in the riot and did not hurt anyone other than someone named Tapia, who had tried to hurt Bell.

The prosecutor does not contend that the statements of Colby, Buzbee, Chapman, Chavez and Bell are not exculpatory. The prosecutor contends that the requirement, stated in *Herrera, supra*, to present exculpatory evidence was modified by the legislative reforms enacted in 1979. This contention is not answered by the majority opinion.

As amended by 1979 N.M.Laws ch. 337, § 8, Section 31–6–11(B) reads:

> B. It is the duty of the grand jury to weigh all the evidence submitted to it, and when it has reason to believe that other competent evidence is available that may explain away or disprove a charge or accusation or that would make an indictment unjustified, then, it should order the evidence produced. The target shall be notified of his target status and be given an opportunity to testify, if he desires to do so, unless the prosecutor determines that notification may result in flight, endanger other persons, obstruct justice, or the prosecutor is unable with reasonable diligence to notify said person. The prosecuting attorney assisting the grand jury shall present evidence that directly negates the guilt of the target where he is aware of such evidence.

The second sentence of § 31–6–11(B) permits the target, in some instances, to testify before the grand jury. The third sentence directs the prosecutor to present evidence which negates guilt. According to the prosecutor, the requirement that exculpatory evidence be presented applies only when the defendant is not able to present his testimony to the grand jury. Thus, the prosecutor would modify his duty to present exculpatory evidence as follows: 1) when given the opportunity to testify before the grand jury, defendant could present his own exculpatory statement and the prosecutor would have no obligation to do so; 2) in all other instances, it would be the prosecutor's obligation to present exculpatory evidence. Section 31–6–11(B) is not so worded.

The legislative direction to present exculpatory evidence does not depend on whether the target has an opportunity to testify before the grand jury; without qualification, the Legislature stated that exculpatory evidence "shall" be presented. This mandatory statutory direction, *see* § 12–2–2(I), N.M.S.A.1978, is not ambiguous and is to be given effect as written. *Methola v. County of Eddy*, 95 N.M. 329, 622 P.2d 234 (1980).

The prosecutor's contention that he has no duty to present a defendant's exculpatory statement when a target is given the opportunity to testify before the grand jury, would also introduce a procedural complication to the Legislature's unambiguous direction. The complication would be whether the target was given the opportunity to testify, and the answer would require several factual determinations. *See Rogers v. State*, 94 N.M. 218, 608 P.2d 530 (Ct.App.1980), concerning the opportunity to testify. If the defendant did not in fact testify, an evidentiary determination would be required as to whether a defendant had been given the opportunity to testify; this determination would have to be made in order to decide whether the prosecutor had the duty to present a defendant's exculpatory statement. A prosecutor cannot inter-

ject this procedural complication to avoid his noncompliance with the legislative requirement of § 31–6–11(B). Prosecutors must abide by the letter and spirit of the law. *Maldonado, supra.*

The prosecutor never argued in the district court that defendants' statements were inadmissible evidence. The argument was not raised in the State's briefs in the interlocutory appeals. In reaching and deciding this question, the majority of the Court has broken the long-established appellate rule that arguments not raised before the district court will not be considered on appeal. *State v. Parrillo,* 94 N.M. 98, 607 P.2d 636 (Ct.App.1979).

Section 31–6–11(A), N.M.S.A.1978 (Cum. Supp.1980), requires that evidence "such as would be legally admissible upon trial" be presented to the grand jury and that evidence "that directly negates the guilt of the target" be presented to the grand jury pursuant to § 31–6–11(B). The results reached when evidence which is exculpatory, as in this case, is also inadmissible, depend upon a review of the pertinent statutes, prior case law and sound public policy. We disagree with the majority's rigid construction of the statute, making it the rule that only admissible evidence be presented to the grand jury. We disagree because of (1) this Court's recent decision in *Maldonado, supra,* (2) the overriding public policy evident in the grand jury statutes that the grand jury have the benefit of evidence which gives it a full understanding of the facts of the case, and (3) established public policy favoring judicial economy and simplification of judicial procedures.

(1) In *Maldonado,* the defendant claimed that his indictment should have been dismissed because the prosecutors presented inadmissible evidence to the grand jury. Defendant relied specifically on Section 31–6–11(A). This Court, in a unanimous opinion, accepted the fact that inadmissible evidence was presented, but, nonetheless refused to reverse. *Maldonado* followed *State v. Chance,* 29 N.M. 34, 221 P. 183 (1923). Section 31-6-11(A) has been given no effect when called upon to protect a defendant's rights before the grand jury. The majority, in its opinion, utilizes this same provision to justify the prosecutor's failure to present clearly exculpatory evidence to the grand jury which is allegedly inadmissible. Basic fairness requires that provisions of our grand jury statutes be applied evenhandedly. *See* § 31–6–7, N.M. S.A.1978 (Cum.Supp.1980).

We are not unmindful of legislative intent. *Maldonado* reduced the requirement that only admissible evidence be presented to the grand jury to an unenforced directive. The Legislature apparently agreed with *Maldonado's* approach to the problem of inadmissible evidence before the grand jury. Since *Maldonado,* the Legislature amended Subsection (A) of § 31–6–11 (1981 N.M. Laws ch. 238, § 1), excluding the requirement that only evidence admissible at trial be presented to a grand jury. While the amended statute is not applicable to this case, the amendment shows a legislative intent that rules of evidence not be used to prevent a fully-enlightened grand jury.

(2) The function of the grand jury is to determine whether there is probable cause to accuse.

> 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,* [89 N.M. 631, 556 P.2d 39 (Ct.App.1976)] supra.

Herrera, supra, 93 N.M. at 444, 601 P.2d at 77. *See* the dissent of Justice Botts in *Chance, supra.* An example of the grand jury becoming a tool of the prosecutor appears in *Sanchez, supra.* An opinion of this Court which allows prosecutors to shield from the grand jury evidence which, if believed, leads to the conclusion that defendant is not guilty of the crimes charged is contrary to clear legislative intent.

(3) Prior to this decision by the majority, judges faced with a motion to dismiss an indictment because of the exclusion of exculpatory evidence had two relatively simple questions to answer: (a) does the evidence negate guilt on the part of the accused, and (b) was it withheld from the grand jury? The majority opinion adds a third and far more complicated issue. The district court must determine if the withheld exculpatory evidence was admissible.

The admissibility or inadmissibility of evidence is rarely apparent by reference to the item of evidence alone. A determination of admissibility often requires that extensive foundational requirements be met. This problem becomes clear when one considers a situation where a third person makes an out-of-court statement which negates guilt on the part of the accused. The statement may be admissible evidence if the foundational requirements of any one of the hearsay exceptions is met. But how can a determination of the admissibility of the evidence be made at the grand jury stage of the proceedings?

We would hold that defendants' exculpatory statements given to investigators were wrongfully excluded from the grand jury. We would reverse the district court's order which refused to dismiss the indictments against defendants Chapman, Buzbee, Colby, Chavez and Bell.

B. Withheld Evidence Inconsistent With Evidence Presented To The Grand Jury

All of the defendants claim that the withheld statements are inconsistent with the evidence presented to the grand jury.

The fact that withheld evidence is inconsistent with evidence presented to the grand jury raises no issue unless the withheld evidence is exculpatory. "Inconsistent" evidence does not equate to "exculpatory" evidence. For example: In statement A (withheld), the witness stated that he knew nothing about the crime being investigated. In statement B (presented to the grand jury), the witness stated that Jones committed the crime. Statements A and B are inconsistent, but neither are exculpatory of Jones. *State v. Lampman*, 95 N.M. 279, 620 P.2d 1304 (N.M.App.1980), is not to the contrary. The withheld statement in *Lampman*, attributed to the police officer investigating the accident, was that the victim's car came over into defendant's lane and hit defendant. Although the attributed statement was inconsistent with the police officer's testimony, reversal occurred because it was exculpatory and had been knowingly withheld.

The withheld statements relied on by defendants are not exculpatory because the statements, in themselves, do not negate the defendants' guilt of the crimes charged. This includes the statements examined by Judge Donnelly *in camera*. As an example, Melvin Kenneth Thomas signed a statement naming three participants in the killing of Madrid—Pete Esquibel, Jesus Antunuz and Moises Sandoval. Thomas stated he could only identify the three named, although others had participated. The questioner, in summarizing the statement, substituted the name of Casaus for Esquibel, and Thomas said: "Right. Paul Casaus shot him." Until the name of Casaus was substituted, Thomas' statement did not contain anything indicating Casaus was not involved in the killing of Madrid. After the name substitution, the statement became inculpatory as to Casaus.

The argument for considering Thomas' statement as exculpating Casaus is that Thomas named both Esquibel and Casaus as shooting the victim, and Thomas saw only one shooting. That Esquibel may have done the shooting witnessed by Thomas does not indicate that Casaus did not also shoot Madrid. Thomas' statement, although inconsistent, was not exculpatory.

The majority opinion goes to unwarranted extremes in ruling that the prosecutors had no duty to present the grand jury with evidence which is merely inconsistent with the grand jury testimony. We reach the same conclusion by relying on the plain meaning of § 31–6–11(B). We look at the words as written. *Methola, supra; State v. Ellenberger*, 96 N.M. 287, 629 P.2d 1216

(1981); and *Bd. of Cty. Com'rs, Etc. v. City of Las Vegas*, 95 N.M. 387, 622 P.2d 695 (1980). Nothing in the language of the statute supports the conclusion that the Legislature intended that the prosecutor present only direct evidence which directly negates guilt. Circumstantial evidence, if believed, may lead to inferences which also directly negate guilt. See *Herrera, supra*, for an example of circumstantial evidence which directly negated guilt, and *Gonzales, supra*, and *Payne, supra*, for examples of cases where circumstantial evidence did not negate guilt.

C. Promises By The Prosecutor

Each penitentiary inmate who testified before the grand jury was promised that he would not be returned to the penitentiary or any satellite facility. These promises by the prosecutor were not disclosed to the grand jury.

These promises are not exculpatory evidence, as we have defined exculpatory evidence in this dissenting opinion. The promises might bear on the credibility of witnesses at trial, but the promises do not tend to negate the guilt of any defendant.

The defendants' position goes beyond an exculpatory evidence contention. They urge that all promises must be disclosed. Regardless, these promises to grand jury witnesses have been disclosed and defendants may make appropriate use of the promises at trial. This disclosure is not pertinent to the issue of withholding exculpatory evidence.

The indictments of Colby, Buzbee, Chapman, Chavez and Bell should be dismissed because of the prosecutors' failure to disclose their exculpatory statements to the grand jury. The refusals to dismiss the indictments of Casaus, Flores and Sandoval should be affirmed.

634 P.2d 1264

Samuel ESPINDA, Petitioner-Appellant and Cross-Appellee,

v.

Ingrid ESPINDA, Respondent-Appellee and Cross-Appellant.

No. 13334.

Supreme Court of New Mexico.

Sept. 28, 1981.

Teel & Walker, William D. Teel, Albuquerque, for petitioner-appellant and cross-appellee.

Michael L. Danoff, Albuquerque, for respondent-appellee and cross-appellant.

OPINION

FEDERICI, Justice.

This is an appeal from the District Court of Bernalillo County. The suit was for divorce and property settlement. Husband appeals the issue involving military retirement pay, and wife cross-appeals on the issues of alimony and attorney fees. We reverse on the appeal and affirm in part and reverse in part on the cross-appeal.

Husband was in the military from February 1956 until January 1976. The parties were married in November 1959 and lived in Hawaii from the time of their marriage until 1976, when they moved to New Mexico. The parties were divorced while domiciled in New Mexico. Final decree of divorce was entered on August 13, 1979. The trial court found that husband's military retirement benefits were community property and one-half of the benefits were awarded to wife.

The issue presented on appeal is: Whether the husband's military retirement benefits are community property and subject to division upon dissolution of marriage.

In this State, the character of retirement pay is determined by the law of the state where it was earned. *Otto v. Otto*, 80 N.M. 331, 455 P.2d 642 (1969). However, that question is not involved in this case because husband's retirement pay is military. The character of nondisability military retirement has been preempted by federal law. *McCarty v. McCarty*, —— U.S. ——, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981).

In New Mexico, we have held that military retirement was community property for purposes of distribution of property upon dissolution of marriage. *LeClert v. LeClert*, 80 N.M. 235, 453 P.2d 755 (1969). In light of the decision in *McCarty, supra*, the case of *LeClert* and all other cases following *LeClert* are overruled insofar as they hold that military retirement pay is part of the community property subject to division upon dissolution of marriage.

In *McCarty, supra*, the Supreme Court of the United States held that federal law preempted and therefore precluded state law from dividing military retirement pay as community property pursuant to state community property laws. The military retirement pay was the separate property of the spouse who was entitled to receive it.

The result in *McCarty* is limited to the type of retirement involved in that case; namely, nondisability military retirement pay. The Supreme Court of the United States specifically limited *McCarty's* effect.

In distinguishing military nondisability retirement from other retirement plans, the Supreme Court of the United States said:

> The nondisability retirement system is noncontributory in that neither the service member nor the Federal Government makes periodic contributions to any fund during the period of active service; instead, retired pay is funded by annual appropriations. [Citations omitted.] In contrast, since 1957, military personnel have been required to contribute to the Social Security System. Pub.L. 84–881, 70 Stat. 870 (1956). See 42 U.S.C. §§ 410(*l*) and (m). Upon satisfying the necessary age requirements, the Army re-

> tiree, the spouse, an ex-spouse who was married to the retiree for at least 10 years, and any dependent children are entitled to Social Security benefits. See 42 U.S.C. §§ 402(a) to (f) (1976 ed. and Supp. III).
>
> Military retired pay terminates with the retired service member's death, and does not pass to the member's heirs.
>
> . . . .
>
> Appellant correctly notes that military retired pay differs in some significant respects from a typical pension or retirement plan.

Id., —— U.S. at ——, 101 S.Ct. at 2732, 2735. *Compare Miller v. Miller*, 96 N.M. 497, 632 P.2d 732 (1981).

In view of the holding in *McCarty, supra*, issued subsequent to the trial court decision here, we must conclude that the trial court erred in holding that husband's military retirement pay was part of the community property subject to division upon dissolution of marriage.

In her cross-appeal, wife presents two issues: (1) whether the family home is community property, and (2) whether the wife is entitled to alimony and attorney fees.

In support of Issue (1), wife introduced the following evidence: (a) a real property transaction loan containing the names of the husband and wife as customers; (b) a mortgage for the property containing the signatures of husband and wife; and (c) a deed for the home containing the names of husband and wife.

On the other hand, husband introduced evidence in the trial court that the $10,000 downpayment on the family home was made with funds from his separate property. While husband agrees that there is a presumption of community property, he relies on principles of tracing to show that he has satisfactorily rebutted the presumption. Husband introduced evidence to show that the downpayment originated from husband's inheritance as well as from the sale of a home in Hawaii which wife admitted was husband's separate property.

The evidence is conflicting. However, the trial court found in favor of husband. There is substantial evidence to support the trial court's findings and judgment.

As to Issue (2), we conclude that one of the reasons the trial court denied alimony and attorney fees was because the judge had determined that wife was entitled to one-half of husband's military retirement pay. We have now held that this was error. In view of that result, we remand the case to the trial court for further consideration of the request by wife for alimony and attorney fees. *See Miller v. Miller, supra.*

The cause is remanded to the trial court for further proceedings consistent with this opinion. In view of the results we have reached on appeal, each of the parties shall bear their own costs and attorney fees in this appeal.

IT IS SO ORDERED.

SOSA, Senior Justice, and PHILIP R. ASHBY, District Judge, concur.

634 P.2d 1266

FIRST NATIONAL BANK IN ALBUQUERQUE, Plaintiff-Appellee,

v.

Jesus M. ENRIQUEZ, aka Jesus Enriquez, Plaza Del Sol National Bank and Valle State Bank, Defendants-Appellees,

v.

Sally GUTIERREZ, Defendant-Appellant.

No. 13377.

Supreme Court of New Mexico.

Sept. 29, 1981.

Mirrer, Ryan, Orleans & Vener, Louis J. Vener, Albuquerque, for defendant-appellant.

Rodey, Dickason, Sloan, Akin & Robb, Robert M. St. John, Albuquerque, for plaintiff-appellee.

OPINION

RIORDAN, Justice.

First National Bank in Albuquerque (FNB) brought an action to set aside a quitclaim deed from Jesus Enriquez (Enriquez), to Sally Gutierrez (Gutierrez). FNB claimed that when Enriquez quitclaimed property to Gutierrez, he did so to hinder FNB's efforts to collect their judgment against Enriquez and to prevent a judgment lien from attaching to the property in violation of New Mexico Fraudulent Conveyance Act, § 56–10–4 N.M.S.A.1978. Gutierrez claimed that she was the lawful owner of the property and that Enriquez' alleged interest is from a forged deed. The district court found that the deed conveying the property to Enriquez was forged. But, the court also found that by permitting Enriquez to control her property, Gutierrez allowed FNB to rely on the alleged ownership of the real estate and is therefore estopped from asserting her interest. We reverse.

The issues on appeal are:

(1) Whether a forged deed transfers an interest in property; and

(2) Whether Gutierrez is estopped from asserting ownership because she allowed Enriquez to exercise control over her property.

In 1965, Gutierrez and her husband Carlos bought a house. At the time, they were minors so Richard and Lydia Gutierrez, brother and sister-in-law of Carlos, took legal title to the property but held title as constructive trustees for Sally and Carlos Gutierrez. Sally and Carlos Gutierrez were at all times the equitable owners of the property. A divorce in 1975 awarded the property to Sally Gutierrez who remained in possession. Also in 1975, a forged deed was executed transferring ownership of the property from Richard and Lydia Gutierrez to the defendant Jesus Enriquez, Sally Gutierrez' brother.

Enriquez had previously been involved in a "check-kiting" scheme in which he had obtained money from FNB. A judgment was entered against Enriquez in favor of FNB for recovery of the money. Before FNB could attach a judgment lien to the property in which Enriquez was owner of record, Enriquez quitclaimed the property to Sally Gutierrez. The district court set aside the quitclaim deed and allowed recovery to FNB on an estoppel theory even though it found that the deed from Richard and Lydia Gutierrez to Enriquez was forged.

I. *Forged Deed.*

The trial court concluded in its findings of fact and conclusions of law that the deed from Richard and Lydia Gutierrez to Enriquez was forged and therefore conveyed no interest. Sally Gutierrez alleges in this appeal that since legal title was never in Enriquez' name, Enriquez had no interest. FNB, realizing that no interest could be conveyed by the forged deed, claims that the court's finding that the deed was forged was not supported by substantial evidence. After reviewing the record we find that there was substantial evidence to support the trial court's findings and conclusions concerning the issue of whether the deed was forged.

> It is well settled in New Mexico that the appellate court will not substitute its judgment for that of the trial court in weighing the evidence. (Citation omitted.) If the trial court's findings are supported by substantial evidence, they must be affirmed. Substantial evidence means such relevant evidence as a reasonable mind might find adequate to support a conclusion. (Citation omitted.)

First National Bank of Santa Fe v. Wood, 86 N.M. 165, 167, 521 P.2d 127, 129 (1974), (quoting *Tome Land & Improvement Co. v. Silva*, 83 N.M. 549, 552, 494 P.2d 962, 965 (1972)).

It is also a well settled principle of law that a forged deed is a void deed and transfers no interest. *Williams v. Warren*, 214 Ark. 506, 216 S.W.2d 879, (1949); *Shurger v. Demmel*, 148 Cal.App.2d 307, 306 P.2d 497 (1957); *Leidel v. Ballbach*, 345 Mich. 201, 75 N.W.2d 860 (1956); *Whitney v. Whitney*, 114 Or. 102, 235 P. 293 (1925); *7 G. W. Thompson, Commentaries on the Modern Law of Real Property*, § 3233 (repl. 1962), *See Lotspeich v. Dean*, 53 N.M. 488, 211 P.2d 979 (1949). Therefore, Enriquez' forged deed gave him no interest in the property.

II. *Estoppel.*

Prior to the preparation of the alleged forged deed, Sally Gutierrez had delivered to Enriquez title documents relating to the property. He was to prepare documents for transfer of the property from Richard and Lydia Gutierrez to Sally Gutierrez. Instead, Enriquez forged a deed from Richard and Lydia Gutierrez to himself. He then assessed the property in his name, and used the property as security on two different bank loans over a period of three years. During this period of time, Sally Gutierrez never investigated whether the property had been transferred to her. FNB argues that by her conduct, Sally Gutierrez acquiesced and condoned the purported ownership by her brother and is therefore estopped from raising the effect of the forged deed. If FNB is to recover, it must be on an estoppel theory.

> If a deed has been forged, it is ineffective, ab initio, and there is no ground for implications, supplementary consent, waiver or estoppel, in order to give it operative force. . . .

7 G. W. Thompson, Commentaries on the Modern Law of Real Property, § 3233, (repl. 1962); *Neal v. Pickett*, 280 S.W. 748, (Tex. Comm'n.App.1926); *Estate of McWhorter v. Wooten*, 593 S.W.2d 366, (Tex.Civ.App. 1980).

The trial court found that FNB justifiably relied on Enriquez' alleged ownership of Sally Gutierrez' land in bringing the suit to set aside the conveyance. However, Enriquez' interest in Sally Gutierrez' land was based on a forged deed, thus creating no interest in Enriquez. Enriquez never had any interest in Sally Gutierrez' land on which FNB could rely.

The decision of the district court is reversed.

IT IS SO ORDERED.

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

634 P.2d 1269

Roy B. SANDOVAL,
Petitioner-Appellant,

v.

DEPARTMENT OF EMPLOYMENT SECURITY and Eric Serna,
Respondents-Appellees.

No. 13579.

Supreme Court of New Mexico.

Oct. 1, 1981.

Rehearing Denied Oct. 16, 1981.

Paul E. Frye, Window Rock, Ariz., for petitioner-appellant.

J. R. Baumgartner, Albuquerque, for respondents-appellees.

OPINION

FEDERICI, Justice.

This is an appeal from the denial of unemployment compensation benefits.

Appellant was employed by Duke City Lumber Company. Appellant was scheduled to work from 6:00 a. m. to 2:45 p. m.

on Friday, July 28, 1978; Monday, July 31, 1978; and Tuesday, August 1, 1978. Without notification to Duke City of his intended tardiness, appellant did not report to work on Friday until 1:00 p. m. His supervisor suspected him of being under the influence of alcohol and sent him home with instructions to return on Monday with a doctor's excuse. Appellant was subsequently involved in an automobile accident on Friday.

On Monday, July 31, 1978, appellant did not appear or notify Duke City of his intended absence. On Tuesday, he did not notify Duke City of his intended tardiness and did not appear for work until 11:30 a. m. He was then terminated for acts of alleged misconduct. Appellant applied for unemployment compensation benefits from the Department of Employment Security (Department).

The Department disqualified appellant from receipt of benefits on the ground that he had been discharged from his employment for misconduct in connection with his work pursuant to Section 51–1–7(B), N.M. S.A. 1978 (Repl.Pamp.1981). His appeals to the Appeal Tribunal, Board of Review and District Court for Sandoval County resulted in affirmances of the Department's decision.

Two main issues have been raised in this Court on appeal:

I. Whether appellant's actions constituted misconduct in connection with his employment sufficient to disqualify him from unemployment compensation benefits under Section 51–1–7(B), as that statute was construed in *Mitchell v. Lovington Good Samaritan Center, Inc.*, 89 N.M. 575, 555 P.2d 696 (1976); and

II. Whether a finding of misconduct violates the due process rights of the appellant.

I.

Section 51–1–7(B) of the Unemployment Compensation Law provides that an individual shall be disqualified for benefits if it is established that he was discharged for misconduct connected with the work. Misconduct was defined by this Court in *Mitchell* at 577, 555 P.2d at 698 (quoting *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 259–60, 296 N.W. 636, 640 (1941):

> . . . "misconduct" . . . is limited to conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

The function of an appellate court is to review the evidence considered by the lower court, not to weigh it. *Duke City Lumber Company v. Terrel*, 88 N.M. 299, 540 P.2d 229 (1975). If there is substantial evidence to support the findings of the trial court, they shall not be disturbed. *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 evidence which a reasonable mind accepts as adequate to support a conclusion. *Tapia v. Panhandle Steel Erectors Company*, 78 N.M. 86, 428 P.2d 625 (1967).

Appellant characterizes this case as a single incident of absenteeism, based upon his failure to come to work or notify his employer of his intended absence on Monday, July 31, 1978. However, evidence was presented at the hearing to show an unexcused absence on Monday, prior unexcused absences or tardiness, failure to notify the employer of his intended absences or tardiness, arrival at work on Friday and Tuesday when his shift was more than half over, and warnings from the employer regarding such infractions. Duke City's company policy states employees should call or notify the employer if he is to be absent or tardy so the employer can make some adjustments with the other employees. Accordingly, we hold that there is substantial evidence, adequate to support the finding and conclusion

of the trial court, that these actions constitute misconduct which justifies disqualification for unemployment compensation benefits.

II.

Appellant contends that his due process rights have been violated because the finding discussed above is based solely on hearsay and ex parte evidence.

When a substantial right, such as one's ability to earn a livelihood, is at stake, a reviewing court must set aside an administrative finding unless the finding is supported by evidence which would be admissible in a jury trial and which would support a verdict in a court of law. *Trujillo v. Employment Sec. Com'n. of N.M.*, 94 N.M. 343, 610 P.2d 747 (1980); *Young v. Board of Pharmacy*, 81 N.M. 5, 462 P.2d 139 (1969). Upon a review of the evidence presented, we find that the benefits in this case were not denied solely on the basis of hearsay or ex parte evidence, but upon such other competent evidence as would have been admissible and which would have supported a verdict in a court of law.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

EASLEY, C. J., and SOSA, Senior Justice, concur.

634 P.2d 1271

In the Matter of Harold E. MOTT, Attorney at Law.

No. 13477.

Supreme Court of New Mexico.

Oct. 8, 1981.

Disciplinary Proceeding.

This matter coming on for consideration by the Court upon Petition for automatic reinstatement of Harold E. Mott, and the Court having considered said petition and having been advised by the Disciplinary Board that the petition should be granted;

NOW, THEREFORE, IT IS ORDERED that the Petition for Reinstatement of Harold E. Mott be and the same is hereby granted, and the said Harold E. Mott be and he hereby is reinstated to membership in the State Bar of New Mexico on inactive status.

634 P.2d 1271

Aurora L. HUGHES, Petitioner-Appellee and Cross-Appellant,

v.

Warren HUGHES, Respondent-Appellant and Cross-Appellee.

No. 13297.

Supreme Court of New Mexico.

Oct. 19, 1981.

Lorenzo A. Chavez, Martin J. Chavez, Albuquerque, for petitioner-appellee and cross-appellant.

Louis J. Vener, Albuquerque, for respondent-appellant and cross-appellee.

OPINION

FEDERICI, Justice.

This is an appeal from the District Court of Bernalillo County. The suit was for divorce and property settlement. Appellant (Husband) appeals and appellee (Wife)

cross-appeals the issues involved in the property settlement.

The trial court found that Husband's future disability benefits are partially community property; Wife did not unduly influence Husband to transfer ownership in the family residence to joint tenancy; Husband intended the family residence become community property at the time the joint tenancy deed to the residence was executed; Wife was entitled to receive the entire community portion of Husband's future disability benefits; and Husband was entitled to half the community interest in Wife's future retirement benefits even though Wife had withdrawn a portion of her contribution to the retirement fund during the marriage.

We affirm the trial court in part and reverse and remand in part.

The issues on appeal are:

I. Whether Husband's future Federal Civil Service disability benefits are community property;

II. Whether Wife unduly influenced Husband to transfer the family residence from Husband's separate property to joint tenancy in Husband and Wife;

III. Whether ownership in the residence at issue was transmuted as to become community property;

IV. Whether the trial court was in error in allocating the community property.

The pertinent facts show that Husband was a federal employee for eighteen years and four months. During this period he made contributions to the Civil Service Retirement and Disability Fund pursuant to 5 U.S.C. § 8334 (1970 & Supp. III 1973).

The parties were married in January 1964. Husband was granted permanent disability by the Civil Service Commission in 1973. Husband was a federal employee at the time he married Wife. Judgment for divorce was entered on June 18, 1980.

The residence of the parties was acquired by Husband as an inheritance from his mother. In 1977, Husband executed a deed which transferred the residence to himself and Wife as joint tenants.

The record shows that there was much discord between the parties during the period of their marriage.

I. Whether Husband's future Federal Civil Service disability benefits are community property.

Husband argues that the Federal Civil Service disability benefits which he receives are his separate property. He claims that these disability benefits are different from strictly retirement benefits in that they are analogous to a personal injury recovery or a workmen's compensation recovery. He points out that in New Mexico personal injury recoveries and recoveries under workmen's compensation are treated as separate property because they are in lieu of wages and the divorced spouse can have no interest in the future wages of the other spouse. Husband also argues that his disability benefits are separate property because his right to receive those benefits vested five years after he began making contributions to the retirement fund, and before his marriage to Wife.

Wife argues that the disability benefits received by Husband should be considered community property, at least to the extent community funds were contributed to the Retirement and Disability Fund.

While the issue of whether disability benefits are community property has never been before an appellate court in New Mexico, the issue has been addressed in other jurisdictions. Various rationales have been employed depending on the type of disability benefits involved. Military disability benefits have been held to be separate property because they are compensation for personal injury rather than an earned property right. *Ramsey v. Ramsey*, 474 S.W.2d 939 (Tex.Civ.App.1971). Where the disability benefits have been earned either through community labor or through monetary contributions of the community, the benefits have been held to be community property. *Guy v. Guy*, 98 Idaho 205, 560 P.2d 876 (1977).

The case of *LeClert v. LeClert*, 80 N.M. 235, 453 P.2d 755 (1969), is cited by Wife. It should be noted that following *McCarty*

v. McCarty, —— U.S. ——, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), cases such as *LeClert* are overruled to the extent they hold that United States military retirement pay is community property. *Espinda v. Espinda*, 96 N.M. 712, 634 P.2d 1264 (1981).

The implications of *McCarty* for the case at bar are limited in that *McCarty* appears to be a narrow holding. The effect of *McCarty* is restricted to Congressional intent as expressed in federal statutes. Although the Court in *McCarty* did hold that Congress intended to preempt the field as to the treatment of United States military retirement pay as either separate or community property, it is clear that where no such Congressional intent is found, there is no federal preemption. *See, e. g., Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1944). Indeed, dicta in *McCarty* shows that other federal benefits are to be treated as community property to the extent Congress has indicated they should be. Specifically mentioned in *McCarty* are Federal Civil Service retirement benefits and Foreign Service retirement benefits, with regard to which Justice Blackmun stated:

> Indeed, Congress recently enacted legislation that requires that Civil Service retirement benefits be paid to an ex-spouse to the extent provided for in "the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation." Pub.L. 95–366, § 1(a), 92 Stat. 600, 5 U.S.C. § 8345(j)(1) (1976 ed., Supp.III). In an even more extreme recent step, Congress amended the Foreign Service retirement legislation to provide that, as a matter of federal law, an ex-spouse is entitled to a pro rata share of Foreign Service retirement benefits. Thus, the Civil Service amendments require the United States to recognize the community property division of Civil Service retirement benefits by a state court, while the Foreign Service amendments establish a limited federal community property concept.

Id. —— U.S. at ——, 101 S.Ct. at 2740.

The case at bar involves Federal Civil Service disability benefits. There is no indication that Congress intended that the federal benefits involved in this case be treated as separate property. If there is to be any change in philosophy and result in military retirement benefits as compared to Federal Civil Service disability benefits, the change must be made by the United States Congress. In the absence of such Congressional Act or intent, an analysis of applicable case law becomes necessary.

Guy v. Guy, supra, is of particular interest. Although *Guy* did not involve Federal Civil Service disability benefits, it is analogous to the case at bar to the extent it holds that the portion of an ex-spouse's disability benefits earned during coverture are community property.

Here, the record shows that a portion of Husband's disability benefits were earned during coverture. Husband became entitled to disability benefits because he contributed to the retirement and disability fund. This case involves an asset acquired during coverture where the presumption is that the asset is community property. Section 40–3–12(A), N.M.S.A.1978. The presumption is overcome only if the method of acquisition shows, by a preponderance of the evidence, that the asset is separate property. *Thaxton v. Thaxton*, 75 N.M. 450, 405 P.2d 932 (1965). In this case, we see that the right to Federal Civil Service disability benefits was acquired through community financial contribution as well as by Husband's labor, which represented community labor when exercised during coverture. We hold that the trial court was correct in its determination that to the extent the community contributed, Husband's Federal Civil Service disability benefits are community property.

Husband claims that his right to receive disability benefits vested before his marriage to Wife, and therefore, his disability benefits are his separate property. This claim is without merit.

In New Mexico, time of vesting has not been considered significant in the analysis of whether retirement benefits are separate or community property. In the analo-

gous case of *Copeland v. Copeland*, 91 N.M. 409, 575 P.2d 99 (1978), the court differentiated between the terms "vested" and "matured," holding that retirement benefits earned by a state employee were divisible as community property upon dissolution of marriage. The Court in *Copeland* reasoned that the right to receive the retirement benefits had "vested" at the time of the divorce even though the right to receive the benefits had not yet "matured." The significance of *Copeland* for this case is that the Court was willing to divide the husband's future retirement benefits at the time of the divorce even though the right to receive them had not yet actually vested completely. The possibility existed in *Copeland* that the husband would never actually receive his full retirement benefits, yet the Court included those benefits among the community assets divisible upon dissolution of marriage. The conclusion in *Copeland* is consistent with the rule stated above that the community share in the future retirement and disability benefits of a spouse depends upon contributions made by the community during coverture. Husband's claim that he had a vested right to receive disability benefits at the time he married Wife does not deprive Wife of her community interest acquired during the marriage. We hold that Wife's interest in Husband's future Federal Civil Service disability benefits is based on contributions made by the community during coverture which is in no way related to when Husband's right to the disability benefits vested.

II. Whether Wife unduly influenced Husband to transfer the family residence from Husband's separate property to joint tenancy in Husband and Wife.

In New Mexico, transactions between husbands and wives are governed by Section 40–2–2, N.M.S.A.1978, which provides:

> Either husband or wife may enter into any engagement or transaction with the other, or with any other person respecting property, which either might, if unmarried; subject, in transactions between themselves, to the general rules of common law which control the actions of persons occupying confidential relations with each other.

A claim of undue influence within a confidential relationship appeals to the conscience of the court of equity. The general rule as to what constitutes undue influence within a confidential relationship in New Mexico was stated in *Trigg v. Trigg*, 37 N.M. 296, 302, 22 P.2d 119, 123 (1933), as "a moral, social, or domestic force exerted upon [a party] so as to control the free action of his will." The standard set forth in *Trigg* provides the general parameters for the court of equity.

The analysis begins with the presumption of undue influence when plaintiff establishes: (1) a certain kind of relationship between parties giving rise to the presumption, such as the relationship between husband and wife; (2) one party is benefited at the expense of the other. *See Walters v. Walters*, 26 N.M. 22, 188 P. 1105 (1920). Although there is a presumption of undue influence in certain types of confidential relationships such as that between husband and wife, most courts consider the circumstances of each particular case. *See, e. g., Cardenas v. Ortiz*, 29 N.M. 633, 226 P. 418 (1924). The analysis which employs a presumption of undue influence on the one hand, and consideration of particular circumstances on the other, is consistent with the "bursting bubble" theory of presumptions. The "bursting bubble" theory is simply that "[t]he trial judge need only determine that the evidence introduced in rebuttal [of the presumption] is sufficient to support a finding contrary to the presumed fact." McCormick on Evidence § 345 at 821 (2d ed. 1972) (footnote omitted). The presumption of undue influence in a confidential relationship will be applied unless it is determined that defendant's evidence presented in rebuttal is sufficient to overcome the presumption. *See Walters v. Walters, supra* (defendant failed to present any evidence to rebut the presumption). If the parties present conflicting evidence, the court of equity will consider the circumstances of the case in arriving at a determination. *See Curtis v. Curtis*, 56 N.M. 695, 248 P.2d 683 (1952).

In the case at bar, Husband has shown that the parties were married and that Wife benefited. The evidence presented by Wife to rebut Husband's prima facie case consists of the testimony of the attorney who assisted the parties in preparing the deed in issue, and Wife's testimony as to why the residence was placed in joint tenancy.

The testimony of the attorney was that Husband appeared to be of sound mind when he signed the deed. If this were the only evidence presented by Wife to rebut the presumption of undue influence, it would not be sufficient. Husband's mental competence is not at issue on appeal. What is at issue is whether Husband acted sufficiently of his own free will when he created the joint tenancy.

Wife's testimony was that Husband executed the new deed because he "wanted to be sure to protect his family," as the parties believed that Husband's brother would inherit the house if Husband died before the residence was placed in joint ownership. Although Wife's evidence is lean, it is adequate to rebut the presumption of undue influence. As the evidence is conflicting, this Court will now consider the circumstances of this case.

The record shows that in 1977, Husband executed a deed which served to place the family residence in joint tenancy between Husband and Wife. The Husband had acquired the house in 1968, following probate of his mother's estate. The house had been purchased by Husband's mother before her death. Husband's three brothers and sisters agreed with Husband to convey their interest in the house to Husband after Husband paid each one a thousand dollars. These payments were made with Husband's funds received by way of inheritance from his mother. The agreement was pursuant to his mother's wishes that the house remain Husband's separate property. Husband acquired the house subject to a mortgage of some thirteen thousand dollars. Monthly payments were made on the home for about three years from community funds. The house was paid for in full in 1971 with funds later received by Husband from his mother's estate.

Husband bases his claim of undue influence on his alleged vulnerable mental and physical state at the time he executed the deed, and on Wife's alleged aggressive temperament as contrasted to his more timid character. Husband claims his wife constantly pressured him to make the transfer at a time when he was dependent on the use of tranquilizers and alcohol, and at a time when he was suffering from assorted maladies related to his disability. His disability is due to peptic ulcers which necessitated removal of part of Husband's stomach.

Wife admits that she was very interested in having the house placed in joint tenancy. She claims that she wanted the house transferred to joint tenancy because it was only right that Husband and Wife share their property in case something should happen to Husband.

Undue influence classically involves a situation where a victim's loss is directly related to the trust that the victim had in the wrongdoer. *See* D.B. Dobbs, *Remedies* § 10.3 (1973). While the case at bar is a close one, it is not clear that Wife is a wrongdoer or that Husband completely trusted Wife. It was certainly a legitimate concern of Wife that she have an interest in the home, particularly in the light of Husband's poor health. The preoccupation with joint ownership does not make Wife a wrongdoer. In the light of the evidence presented as to how poorly Husband and Wife got along during their marriage, it cannot be inferred that there was a complete trusting relationship between them. When Husband decided to change the deed, he did so despite the poor relationship he had with Wife. While it might be inferred that Husband's will finally succumbed to Wife's pressure at a time when Husband was mentally and physically vulnerable, it might also be inferred that Husband came to realize that his health was fragile and it was time he did something regarding his Wife's future well-being in case he should die.

■ In view of the particular facts of this case, we hold that there was substantial

evidence to support the trial court's conclusion that Husband was not unduly influenced at the time he executed the joint tenancy deed in issue.

III. Whether ownership in the residence at issue was transmuted as to become community property.

The trial court found that since Husband intended to give part of the residence at issue to Wife, the residence was transmuted from separate to community property. There is no substantial evidence in the record to support this finding.

The relevant statute is Section 47–1–16, N.M.S.A.1978, which states:

> An instrument conveying or transferring title to real or personal property to two or more persons as joint tenants, to two or more persons and to the survivors of them and the heirs and assigns of the survivor, or to two or more persons with right of survivorship, shall be prima facie evidence that such property is held in joint tenancy . . . .

A joint tenancy deed creates a presumption that a joint tenancy is created unless there is evidence showing the contrary. Here, the record shows that the residence at issue was acquired as separate property, but there is nothing in the record to indicate that its present ownership is other than by joint tenancy. The record shows that the parties were concerned with what would happen to Wife "if something would happen" to Husband. This evidence shows that the intent of Husband in executing the joint tenancy deed was to create a right of survivorship.

Although a joint tenancy can be destroyed by agreement of the parties upon dissolution of marriage, this is an event different from dividing community property. We hold that the residence at issue is held by the parties in joint tenancy.

IV. Whether the trial court was in error in allocating the community property.

The trial court awarded the entire community interest in Husband's future disability benefits to Wife. This was error. There is no substantial evidence in the record to support the determination made by the trial court. The proper award to Wife is one-half of the community property.

In his brief, Husband claims that he contributed to the retirement and disability fund for eighteen years and four months and that he was married to Wife for eleven years and one month of that period. This is inconsistent with the finding of the trial court that the parties were married in January 1964 and that Husband became permanently disabled in 1973, when community contributions to the retirement fund ceased. The calculation of the community share by the trial court was based on an eleven year, one month period of community contribution. The trial court's calculations must be based on the actual period of community contributions.

The trial court also found that the community interest in Wife's retirement benefits, when she gets them, to be sixty percent, and that Husband's interest was one-half of that, or thirty percent. This is incorrect. The record shows that Wife left her job and withdrew her retirement contribution at one point of her career, while married to Husband, and spent them for community purposes. This sum has never been redeposited to the fund. Wife returned to work for the same employer after a number of years and is presently so employed. The trial court incorrectly included in the Wife's future annuity, those years for which she had previously withdrawn her contributions to the fund. Even if Wife should replace the amount withdrawn at some time in the future as permitted by her retirement plan, this would not be accomplished with funds of the community and Husband would have no interest therein.

The trial court is affirmed on Points I and II and reversed on Points III and IV. On all other matters raised in this appeal, the trial court is affirmed. The case is remanded to the trial court for proceedings consistent with this opinion.

IT IS SO ORDERED.

EASLEY, C. J., and PAYNE, J., concur.

634 P.2d 1278

PEERLESS INSURANCE COMPANY, Plaintiff-Appellant,

v.

Charles R. DAVIS, aka C. R. Davis, and Alice Jeanette Davis, his wife, Albuquerque Federal Savings & Loan Association, Henry Lewis, Trustees, Henry Lewis, Individually, United States of America, J. P. Financial Corporation and Fidelity National Bank, Defendants-Appellees.

No. 13126.

Supreme Court of New Mexico.

Oct. 19, 1981.

Rodey, Dickason, Sloan, Akin & Robb, Richard C. Minzner, David A. Grammer, Jr., William J. Arland, III, Albuquerque, for plaintiff-appellant.

Freedman, Boyd & Daniels, David A. Freedman, Albuquerque, for defendants-appellees.

OPINION

RIORDAN, Justice.

Plaintiff, Peerless Insurance Company (Peerless) obtained a money judgment against appellees, C. R. Davis and Alice Jeanette Davis (Davis) on November 22, 1966, in the District Court of Bernalillo County. The judgment was docketed on December 12, 1972, and a transcript of judgment was filed and recorded in the office of the Bernalillo County Clerk on December 14, 1972.

Peerless filed suit on December 27, 1977, to enforce the 1966 judgment by foreclosing on the Davis home. Davis claims the judgment is now unenforceable because after seven years it expires if not revived pursuant to statute. Peerless claims the foreclosure proceeding was valid since the 1972 recording served to revive the judgment and to create a judgment lien on the Davis real estate.

The trial court held that the original judgment was not properly revived and the foreclosure action was not timely commenced since the filing of the transcript of

judgment in 1972 was not shown to be *for the purpose* of revival.

The revival-of-judgment statute, § 39–1–19, N.M.S.A.1978, provides:

> It is not necessary to bring proceedings in any Court to revive a judgment obtained before Court of competent jurisdiction in this State. A judgment may be revived once only, by filing, for that purpose, a transcript of the judgment in the office of the county clerk in which the judgment was entered before the expiration of the limitation upon actions founded upon judgments as provided by Section 37–1–2 N.M.S.A.1978. The revival commences as of the first date when an action founded upon the judgment would, without the revival, be barred by the limitation of Section 37–1–2 N.M.S.A. 1978.

In interpreting the revival statute, the district court construed "by filing, for that purpose" to require a writing or other indication of the purpose for which the transcript of judgment was filed.

The disposition of this case depends on our application of statutory rules of construction. In applying these rules, we must consider the revival statute in context as it is a remedial statute. *Thompson v. Cook*, 61 Cal.App.2d 485, 143 P.2d 107 (1943). In *In re Gossets Estate*, 46 N.M. 344, 351, 129 P.2d 56, 60 (1942), we stated:

> Where a statute is both remedial and in derogation of the common law it is usual to construe strictly the question of whether it does modify the common law, but its application should be liberally construed.

It seems clear to us, even under the strictest interpretive constraints, that the legislative intent was to replace the common law methods of reviving judgments (i. e., suits on judgments or scire facias proceedings) with the more simple, less expensive act of filing a transcript of judgment with the county clerk.

After determining that the revival statute was intended to modify the common law, we must now liberally construe its application in favor of the remedy provided. *Id.; Albuquerque Hilton Inn v. Haley*, 90 N.M. 510, 565 P.2d 1027 (1977).

To rule that the statutory phrase "by filing, for that purpose" requires that the intent to revive appear on the face of the transcript or on an attached affidavit, would be contrary to the rule of construction outlined above and to the rule we announced in *State ex rel. Barela v. New Mexico State Bd. of Ed.*, 80 N.M. 220, 453 P.2d 583 (1969). We stated:

> We are not permitted to read into a statute language which is not there, particularly if it makes sense as written.

Id. at 222, 453 P.2d at 585. *Compare Burroughs v. Board of County Commissioners, County of Bernalillo*, 88 N.M. 303, 540 P.2d 233 (1975); *Sunset Package Store, Inc. v. City of Carlsbad*, 79 N.M. 260, 442 P.2d 572 (1968).

Appellee also argues that even if the 1972 filing is held sufficient to revive the judgment, there is no lien on the Davis property without a second filing. Applying the *Barela* rule to Section 39–1–6, N.M.S.A. 1978, we must hold to the contrary. The filing of a transcript of judgment for the purpose of revival is also sufficient to satisfy the filing requirements of the judgment lien statute.

The trial court is reversed, and this case is remanded with instructions to proceed in a manner not inconsistent with this opinion.

IT IS SO ORDERED.

EASLEY, C. J., and FEDERICI, J., concur.

634 P.2d 1280

Leroy VIGIL, Lorenzo Chavez, Joe Richard Chavez, Joe Garcia and Moises Sandoval, Petitioners,

v.

N. Randolph REESE, District Judge, and Dolores Lujan, Clerk of the District Court of the First Judicial District, Respondents.

No. 13845.

Supreme Court of New Mexico.

Oct. 22, 1981.

Mark Donatelli, Penitentiary Defense Director, Santa Fe, for petitioners.

Jeff Bingaman, Atty. Gen., Charlotte H. Roosen, Asst. Atty. Gen., Charles Baldonado, Asst. Dist. Atty., Santa Fe, for respondents.

OPINION

RIORDAN, Justice.

The defendants were indicted for first degree murder. The case was assigned for trial to District Judge Scarborough of the First Judicial District who was disqualified by the State of New Mexico. The case was then assigned for trial to District Judge Felter who was disqualified by petitioner Vigil. Both disqualifications were pursuant to Sections 38–3–9 and 38–3–10, N.M.S.A. 1978. Two days after the disqualification of Judge Felter, the case was "certified" to the Supreme Court by District Judge Kaufman for appointment of a judge to try the case. The Acting Chief Justice of the Supreme Court, Justice Sosa, then designated District Judge Reese of the fifth judicial district to preside over the case pursuant to the authority of the New Mexico Constitution, Art. VI, § 15(B), regarding assignment of judges. The petitioner Sandoval then attempted to disqualify Judge Reese under Sections 38–3–9 and 38–3–10. The court refused to honor the disqualification because he had been designated by the Chief Justice of the Supreme Court to preside over the case.

Petitioners sought a writ of prohibition against Judge Reese to prohibit him from proceeding further, alleging that he was not properly appointed because there was no showing that the public business required it, or in the alternative, because he was disqualified by petitioner. An alternative writ of prohibition was issued, which we now quash as being improvidently granted.

The issues raised in this proceeding are the authority of the chief justice to appoint the respondent district judge pursuant to N.M.Const., Art. VI, § 15(B), and whether the respondent once designated can be disqualified.

The applicable language in Article VI, Section 15(B) reads as follows:

> B. Whenever the public business may require, the chief justice of the supreme court shall designate any district judge of the state, or any justice of the supreme court when no district judge may be available within a reasonable time, to hold court in any district....

The only disqualification under the Constitution, N.M.Const., Art. VI, § 18, is very limited and petitioner does not claim that the respondent judge is constitutionally disqualified. Rather, he challenges the manner in which the designation was obtained and claims in the alternative that the respondent may be disqualified pursuant to statute.

Petitioner's assertion that the respondent was improperly designated arises from his assumption that his designation resulted from the application of rule 34(G) of the Rules of the First Judicial District. Rule 34(G) appears to be an attempt by the district court to deal with problems such as de facto severances and other problems brought about by disqualification in a multi-defendant case.[1]

While we have serious reservations as to the validity of Rule 34(G), that issue is not before us. We cannot assume that respondent judge was appointed pursuant to the application of Rule 34(G) merely because two judges had been disqualified. Rule 34(G) designations are governed by Section 38–3–9. The applicable portion reads:

> A. Whenever a party ... shall make and file an affidavit [of disqualification against either] ... the resident judge or a judge designated by the resident judge ... that judge shall proceed no further. Another judge shall be designated ... upon failure of counsel to agree ... the chief justice shall designate the judge of some other district to try the cause.

However, even if the respondent were appointed by the chief justice pursuant to this section, he could still not be disqualified because the statute is limited to resident judges or those appointed by resident judges. The legislature has not seen fit to extend the disqualification privilege to allow disqualification of non-resident judges designated under Section 38–3–9.

The chief justice has the constitutional duty and authority to designate a judge to try a case *for any reason* when he determines that the public business so requires. *See Holloman v. Lieb*, 17 N.M. 270, 274, 125 P. 601, 602 (1912), where we said;

> Again, the Chief Justice has power under this section to designate any District Judge to hold court in any District whenever the public business may require. It is not only when the public business may be too heavy for one Judge to attend to, but whenever, *for any reason*, the public business may require, that the Chief Justice has the power to designate another District Judge to hold court in any district. (Emphasis added.)

1. Rule 34(G) reads:

CRIMINAL CASES. In order to secure unto the State and unto each defendant a speedy trial in criminal cases involving multiple defendants, the following rules shall apply in all criminal cases involving multiple defendants that shall be docketed in the District Court of the First Judicial District after the effective date of this rule.

Section 1. An affidavit of disqualification by one defendant shall not effect a de facto severance of defendants, but shall be treated by the disqualified judge as a disqualification with respect to all defendants in the case, and the entire case thereupon shall be transferred and reassigned to another judge within the district.

Section 2. Whenever two (2) or more judges shall have been disqualified successively and twenty-five (25) days shall have elapsed from the date of arraignment of multiple defendants and there remain defendants in the case who have not exercised their right to disqualify a resident judge within that twenty-five (25) day period, then and upon concurrence of those events, the case shall be certified to the Chief Justice of the Supreme Court of New Mexico in accordance with § 38–3–9, N.M.S.A., for designation of a judge of some other district to try the cause in its entirety.

Petitioner also claims that he is entitled to disqualify the respondent because the designation, in effect, has deprived him of his right of disqualification. He cites no authority for this proposition. There is none. Indeed, the petitioner is entitled to disqualify only resident judges or those sitting at the request of resident judges. *See* § 38–3–9. He could still file a provisional disqualification to protect himself in the event that the chief justice's designation is withdrawn. *See Notargiacomo v. Hickman*, 55 N.M. 465, 235 P.2d 531 (1951).

We quash the alternative writ of prohibition that was previously issued as being improvidently granted.

PAYNE and FEDERICI, JJ., concur.

634 P.2d 1282

Gilbert V. SANTISTEVAN, Petitioner,

v.

CENTINEL BANK OF TAOS, Eliu E. Romero and Bert Quintana, Respondents,

and

CIT Financial Services Corporation, et al., Defendants.

No. 13397.

Supreme Court of New Mexico.

Sept. 4, 1981.

Robert Dale Morrison, Taos, for petitioner.

White, Koch, Kelly & McCarthy, John F. McCarthy, Santa Fe, Eliu E. Romero, Taos, Pickard & Singleton, Lynn Pickard, Santa Fe, for respondents.

OPINION

EASLEY, Chief Justice.

Santistevan brought an action for damages based on fraudulent deprivation of real property against Centinel Bank of Taos (Bank), Quintana and Romero. Defendants moved to dismiss the suit on the grounds that Santistevan was not a real party in interest since he did not own the land. The trial court dismissed the suit, and the Court of Appeals affirmed. We granted certiorari, and we affirm in part and reverse in part.

We discuss: (1) whether a motion to dismiss can be converted into a motion for summary judgment without affording the opposing party ten days notice before the hearing; (2) whether defendants may question Santistevan's standing as a real party in interest by motion after they have not raised the issue in their answer; and (3) whether Santistevan is the owner of the property and thus a real party in interest when he intentionally misstated the material facts about the property in his bankruptcy petition, although the property was subsequently abandoned by the trustee in bankruptcy.

On September 9, 1970, Santistevan filed a petition for bankruptcy. In the petition, he deliberately undervalued the land at $2,475.00. On October 23, 1970, he amended the bankruptcy petition stating that he conveyed the property to his brother for $1,500.00. Subsequently, the trustee in bankruptcy petitioned the referee in bankruptcy to abandon the property, and the referee in bankruptcy ordered the property abandoned. On November 24, 1970, Santistevan was discharged in bankruptcy.

The Bank obtained a deed to the property dated May 12, 1972, purportedly signed and delivered by Santistevan. Santistevan denied this transaction, claiming the deed was forged. The Bank conveyed the property to Quintana by a corrected warranty deed dated February 13, 1974.

Santistevan filed his complaint on September 27, 1977, seeking damages for fraudulent deprivation of his property. Santistevan was deposed on August 3, 1979, and admitted that he neither sold the land to his brother nor gave the land's correct value in the bankruptcy petition. Defendants filed a motion to dismiss on August 7, 1979, alleging that Santistevan was not a real party in interest. Defendants did not attach affidavits to the motion. On the day of the hearing, August 14, 1979, defendants filed in the trial court Santistevan's deposition and relied on it for their motion. The motion was heard on the same day as the trial on the merits. The trial court granted the motion.

1. *Whether a motion to dismiss may be converted into a motion for summary judgment without affording the opposing party ten days notice.*

A motion to dismiss will be treated as a motion for summary judgment when matters outside the pleadings are presented to the court. N.M.R. Civ. P. 12(b) N.M.S.A. 1978 (Repl. Pamp.1980); *Shriners Hosp. for Crippled Ch. v. Kirby Cattle Co.*, 89 N.M. 169, 548 P.2d 449 (1976). The trial court

considered Santistevan's deposition and bankruptcy petition; thus, the motion to dismiss was subject to being treated as a motion for summary judgment.

N.M.R.Civ.P. 56(c) N.M.S.A.1978 (Repl. Pamp.1980) states in part:

> The motion shall be served *at least 10 days before the time fixed for the hearing*. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. [Emphasis added]

Although the rule clearly states that a motion for summary judgment shall be served at least ten days before the hearing, this rule is not adamantine. New Mexico cases are silent on waiver of the ten-day notice requirement, and since our summary judgment rule is similar to the federal rule, we turn to federal case law for guidance. Under case law, notice provision will be waived when there is: (1) active participation, (2) no objection to the proceeding, (3) no pending discovery, and (4) no specific allegation of prejudice. *Spence v. Latting*, 512 F.2d 93 (10th Cir.), *cert. denied*, 423 U.S. 896, 96 S.Ct. 198, 46 L.Ed.2d 129 (1975).

In this case, Santistevan's counsel actively defended against defendants' motion. He rigorously argued that the inconsistent statements made at the bankruptcy proceeding had no effect on this case. Since the motion was heard on the same day as the trial on the merits, discovery was completed. Santistevan's counsel neither sought a continuance nor demonstrated a specific allegation of prejudice.

In *Hoopes v. Equifax, Inc.*, 611 F.2d 134 (6th Cir.1979), the Circuit Court of Appeals for the Sixth Circuit decided a case very similar to this one. Defendant orally moved for summary judgment on the day of the trial but before testimony had been taken. Before granting the motion, the trial court afforded plaintiff ample opportunity to show that a genuine issue of material fact existed. Plaintiff did not demonstrate that he could produce additional evidence even if ten days notice had been given. Also, he could not show that he was prejudiced in any way by the trial court's granting of summary judgment.

We agree with *Hoopes'* interpretation of the notice provision. We conclude that under the facts and circumstances of this case the ten-day notice provision for summary judgment was not required.

2. *Whether Defendants may raise the issue of Santistevan being a real party in interest by motion after they have not raised the issue in their answer.*

Santistevan's counsel contends defendants' assertion that Santistevan is not a real party in interest is an affirmative defense, which must be raised in the answer or it is waived. Since this was not done, it is claimed that defendants have waived the real party in interest defense.

While we agree affirmative defenses must be pled or they are waived, N.M.R. Civ.P. 8(c), N.M.S.A.1978 (Repl. Pamp.1980); *Fredenburgh v. Allied Van Lines, Inc.*, 79 N.M. 593, 446 P.2d 868 (1968); *McLean v. Paddock*, 78 N.M. 234, 430 P.2d 392 (1967), we do not agree that a real party in interest can only be raised as an affirmative defense. One commentator states:

> [A] real party in interest objection closely resembles the defense of failure to state a claim for relief because it presupposes that plaintiff does not have the substantive right to enforce the claim he is making. * * * It should be noted, however, that very few courts have discussed the relative merits of asserting the objection by motion or by answer. Nonetheless, the philosophy of Rule 1 indicates that the manner of raising it probably makes no difference.

6 C. Wright and A. Miller, Federal Practice and Procedure § 1554, at 701 (1971); *See also Klebanow v. New York Produce Exchange*, 344 F.2d 294, 296 n.1 (2d Cir.1965).

However, "the objection... should be done with *reasonable promptness*. Otherwise, the court may conclude that the point has been waived by the delay." [Emphasis

in original.] *Pace v. General Electric Company*, 55 F.R.D. 215 at 217 (W.D.Pa.1972), *quoting* 6 C. Wright and A. Miller, Federal Practice and Procedure § 1554 at 701 (1971). Thus, when the defendant knew for a long time that the plaintiff was not a real party in interest, he could not wait to the eleventh hour of the lawsuit to raise the objection. *Pace, supra.*

In this case, defendants discovered the real party in interest issue at Santistevan's deposition. Four days later, defendants filed their motion to dismiss. We conclude that defendants filed their objection with reasonable promptness and thus the objection was not waived.

3. *Whether Santistevan is a real party in interest when he intentionally misstated material facts about the property in his bankruptcy petition and that property was subsequently abandoned by the trustee in bankruptcy.*

This Court said in *Reagan v. Dougherty*, 40 N.M. 439, 441, 62 P.2d 810, 811 (1936):

> Tests to determine if one is "a real party in interest" is [sic] whether he is the owner of the right sought to be enforced [citation omitted], or whether he is in a position to release and discharge the defendant from the liability upon which the action is grounded.

To determine if Santistevan is a real party in interest, we must inquire whether Santistevan's acts precluded him from asserting title over the land under bankruptcy law.

The statute at the time Santistevan declared bankruptcy provided that the trustee in bankruptcy is "vested by operation of law with the title of the bankrupt as of the date of the filing of the petition. * * *" 11 U.S.C. § 110(a) (1970). Case law indicates that when the bankrupt has intentionally failed to disclose an asset on the petition, title to the asset, nevertheless, is in the trustee. *First National Bank v. Lasater*, 196 U.S. 115, 25 S.Ct. 206, 49 L.Ed. 408 (1905) (bankrupt failed to disclose a claim for usury); *Moore v. Slonim*, 426 F.Supp. 524 (D. Conn.), *aff'd without opinion*; 562 F.2d 38 (2d Cir.1977) (bankrupt did not disclose claim for back wages).

Defendants' counsel argues Santistevan's acts of not disclosing the true and honest value of land and of not telling the truth about conveying the land to his brother are tantamount to concealment of an asset. Consequently, under the analysis of *First National Bank v. Lasater*, and its progeny, Santistevan did not have title to the land; title was vested in the trustee in bankruptcy.

We disagree with defendants' analysis. The property was listed on the bankruptcy petition. Although the amended petition stated that Santistevan had conveyed the property to his brother, the trustee in bankruptcy had the duty to investigate the petition. 11 U.S.C. § 567 (1970); 9 Am.Jur.2d *Bankruptcy* § 940 (1963); *see In re Yalden*, 109 F.Supp. 603 (D. Mass.1953). The motion of the trustee in bankruptcy alleged that he investigated Santistevan's statements and decided that the property ought to be abandoned. The bankruptcy judge ordered the property abandoned. An order for abandonment reverts title to the bankrupt. *See Brown v. O'Keefe*, 300 U.S. 598, 57 S.Ct. 543, 81 L.Ed. 827 (1937); *Dallas Cabana, Inc. v. Hyatt Corporation*, 441 F.2d 865 (5th Cir.1971); Note, *Abandonment of Assets by a Trustee in Bankruptcy*, 53 Colum.L.Rev. 415 (1953). Once abandonment is granted, it is irrevocable. *See In re Yalden, supra.*

We hold that title to the property was revested in Santistevan and that he is a real party in interest. Summary judgment was improperly granted. The trial court and the Court of Appeals are reversed in part and the case is remanded for trial.

IT IS SO ORDERED.

SOSA, Senior Justice, and PAYNE and FEDERICI, JJ., concur.

634 P.2d 1286

Gilbert v. SANTISTEVAN, Plaintiff-Appellant,

v.

CENTINEL BANK OF TAOS, Eliu E. Romero and Bert Quintana, Defendants-Appellees,

and

CIT Financial Services Corporation, Rio Costilla Cooperative Livestock Association, State of New Mexico, and Gloria V. Santistevan Vigil, Defendants.

No. 4413.

Court of Appeals of New Mexico.

Nov. 6, 1980.

Robert Dale Morrison, Taos, for plaintiff-appellant.

John F. McCarthy, Jr., White, Koch, Kelly & McCarthy, Santa Fe, Eliu E. Romero,

Taos, pro se, Lynn Pickard, Pickard & Singleton, Santa Fe, for defendants-appellees.

OPINION

LOPEZ, Judge.

The district court dismissed plaintiff's suit for damages for fraud on the grounds that he was not the real party in interest in that he did not own the property of which he claimed defendants Centinel Bank of Taos (hereafter referred to as Bank), Quintana, and Romero had fraudulently deprived him. We affirm the dismissal.

While Santistevan asserts the dismissal was improper on various procedural and substantive grounds, the major issue he raises is whether a bankrupt who fraudulently conceals an asset from his creditors and from the trustee in bankruptcy may later, after his discharge in bankruptcy, maintain a cause of action against third parties concerning this property. A brief review of the pertinent facts is helpful.

Santistevan filed a petition in bankruptcy in the United States District Court in New Mexico on September 9, 1970. He originally listed the land in question, 75 acres in Costilla, New Mexico, as an asset which he valued at $2,475.00. Later he amended his petition to exclude the land, stating that he had deeded it to his brother, Abe Santistevan, eight months earlier. The court-appointed trustee in bankruptcy found that there were no assets over the exemptions claimed; consequently, no money was paid out of the estate. On November 24, 1970, the Court ordered Santistevan discharged in bankruptcy.

The instant case concerns the validity of a deed to the property in Costilla, purportedly signed by Santistevan, conveying the land to the Bank in 1972. Santistevan claims that his signature was forged. He filed suit on September 27, 1977, against the Bank and the other defendants seeking to quiet title, to set aside a fraudulent conveyance, to obtain ejectment, and damages for fraud. Later on his own motion, the causes of action, except for damages, were dismissed. At his deposition on August 3, 1979, Santistevan admitted that he had grossly undervalued the property in the bankruptcy court so that he would be able to keep it, that he realized that he was thereby attempting to defraud his creditors, and that he had never deeded the property to his brother.

The State of New Mexico acquired the land by a tax deed issued by Taos County in 1970, but it has disclaimed any interest in this suit. Santistevan alleges that the Bank, via Quintana, has conveyed the land to Romero.

Procedural issues.

On August 7, 1979, the defendants filed a motion to dismiss, alleging that the plaintiff had no title to the real estate which was the subject matter of the suit, and that the plaintiff was not the real party in interest. A hearing on the motion was held the morning on which the trial was scheduled. At the end of the hearing, the court stated it would grant the defendants' motion. An order to this effect was entered on September 25, 1979.

Santistevan asserts that the motion to dismiss was not timely filed, in general, because it was based on an affirmative defense which the defendants should have included in their Answer or be barred from asserting. We disagree. A court can determine as a matter of law whether to dismiss a case in light of additional facts which will not, or cannot, be disputed, although appearing for the first time in the motion. *See, Benson v. Export Equipment Corp.*, 49 N.M. 356, 164 P.2d 380 (1945). Defendants assert that, because of his previous conduct, Santistevan has no cause of action. A motion for dismissal for failure to state a claim upon which relief can be granted may be made before trial after the pleadings are closed, N.M.R.Civ.P. 12(c) and (h), N.M.S.A. 1978, and such a motion may be treated as a motion for summary judgment if matters outside the pleadings are considered by the court. N.M.R.Civ.P. 12(b)(6), N.M.S.A. 1978; *Shriners Hospital for Crippled Children v. Kirby Cattle Co.*, 89 N.M. 169, 548 P.2d 449 (1976). Since the court did consider matters outside the pleadings, the motion should be treated as one for summary judgment. A defendant

may move for summary judgment at any time. N.M.R.Civ.P. 56(b), N.M.S.A. 1978.

Santistevan next argues that the motion to dismiss should not have been granted because such dismissal is proper only when it appears that the plaintiff cannot recover under any state of facts provable under the claim being made. *C & H Construction & Paving, Inc. v. Foundation Reserve Insurance Co.*, 85 N.M. 374, 512 P.2d 947 (1973). As we understand his argument, he asserts that under one set of facts he could recover —namely, if he were innocent of any fraud in failing to disclose the property in bankruptcy court. This argument thus reduces to one we will discuss later of whether the question of intentional concealment on his part is a matter of fact for the jury.

The third procedural argument made by Santistevan is that the real party in interest could have been joined or substituted, if the court thought that Santistevan was not that party. The issue, however, is not whether there are other parties who should bring this suit, but whether what Santistevan did or said with regard to the land during the bankruptcy proceedings will bar *him* from maintaining this action.

Santistevan then argues that the defendants changed theories at the time of the hearing, thereby denying him procedural due process. The motion to dismiss gave as grounds therefor that Santistevan was not the real party in interest since he had either conveyed the land to his brother or defrauded his creditors in the bankruptcy proceedings. At the hearing, the question of the deed to the brother was barely mentioned. The argument concerned whether Santistevan was precluded from bringing suit on the land, having concealed it in the bankruptcy proceedings. The defendants did not change theories at the hearing.

In his reply brief, Santistevan raises the objection that he did not have adequate notice of the hearing on the motion to dismiss. We presume he means by this that he did not have proper procedural notice. The motion to dismiss was filed by defendants on August 7, 1979. Seven days later, on August 14, 1979, a hearing was held on this motion. At the hearing, the defendants produced papers from the bankruptcy proceedings in 1970, as well as several other documents. The court accepted these documents into evidence. The transcript of the hearing reveals that the court considered information contained in the bankruptcy papers, as well as Santistevan's admission under oath in his deposition that he had perjured himself in the bankruptcy proceedings, having stated in 1970 that he had deeded the land to his brother when, in fact, he had not done so. When matters outside the pleadings are considered by the court, the motion to dismiss is to be treated as one for summary judgment. N.M.R.Civ.P. 12(b), N.M.S.A. 1978 states in part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and *all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.* (Emphasis added.)

The rule governing summary judgment, Rule 56(c), requires that there be at least ten days between the time the motion for summary judgment is served and the hearing on it is held. N.M.R.Civ.P. 56 (c), N.M.S.A. 1978. The issue of whether the ten day notice requirement of Rule 56 applies to motions to dismiss made under Rule 12(b)(6) which, because of the matters considered, are treated as motions for summary judgment has not been decided in this state. Our rules are similar to the Federal Rules of Civil Procedure, however. *See*, Fed.R.Civ.P. Rules 12 and 56. The general interpretation of the Federal Rules seems to be that the strict ten day requirement of Rule 56 need not be applied to a Rule 12(b)(6) motion when it is treated as a motion for summary judgment, as long as care is taken that the party opposing the summary judgment has had a full and fair opportunity to submit all pertinent materials and to argue the propriety of summary judgment. *See*, 6 Moore's Federal Practice, ¶¶ 56.02[3], 56.-

14[1] (1976); *see generally*, 73 Am.Jur.2d *Summary Judgment* § 14 (1974). To treat a motion to dismiss as a motion for summary judgment without permitting the adverse party a reasonable opportunity to present pertinent material is error. *State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 585 F.2d 454 (10th Cir.1978); *Franklin v. Oklahoma City Abstract & Title Co.*, 584 F.2d 964 (10th Cir.1978); *Plante v. Shivar*, 540 F.2d 1233 (4th Cir.1976).

We need not decide the issue of whether Santistevan had adequate notice of the proceedings, however, since he did not raise this issue properly on appeal. N.M.R. Civ.App.P. 9, N.M.S.A. 1978 provides that the brief-in-chief shall present arguments and authorities for each point relied on by the appellant, and that the reply brief shall be directed "only to new arguments or authorities *presented in the answer brief* . . . ." (Emphasis added.) Id., Section o. The question of inadequate notice—by which Santistevan appears to mean that he did not know, until he arrived in court on the day of trial, that the motion to dismiss, served on him a week earlier, would be argued that day—is not raised in the brief-in-chief. Even if this argument could be gleaned from minute scrutiny of his brief-in-chief, we would not be obligated to consider it. An appellant's burden is to point out clearly the claimed error of the trial court. *See, Perez v. Gallegos*, 87 N.M. 161, 530 P.2d 1155 (1974). Santistevan has not done so. We are not required to surmise what error is claimed. The contention that plaintiff had inadequate notice first appears in the reply brief. Contrary to Rule 9, it is not raised in response to a new argument presented in the answer brief. An appellant must point out any alleged error to the reviewing court, and must demonstrate the error by argument and citation of authorities in support of his position. *Petty v. Williams*, 71 N.M. 338, 378 P.2d 376 (1963). An appellant who fails to include an argument in his brief-in-chief and then inserts it in his answer brief without clear formulation and the support of any authority cannot complain when the reviewing court fails to consider the argument. *See, Novak v. Dow*, 82 N.M. 30, 474 P.2d 712 (Ct.App. 1970). Santistevan's argument concerning inadequate notice is not mentioned until his reply brief, where its formulation is unclear, and no authority is given to support it. We cannot consider it.

Substantive issues.

Summary judgment shall be rendered when there is no genuine issue as to any 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. The party opposing the motion is to be given the benefit of all reasonable doubts in determining whether a genuine issue of material fact is in dispute. *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972). Since we have determined that defendants' motion for dismissal is to be treated as one for summary judgment, these rules apply.

Santistevan argues that the question of whether he intentionally concealed the real estate in the bankruptcy proceedings is a question of fact and should be decided by a jury. We agree that this is a question of fact and should be decided by a jury. We agree that this is a question of fact; but the record does not indicate that it is in dispute. Santistevan admitted in his deposition that he had concealed from his creditors, first, the true value of the property, and then, the fact that he owned it at all, for the express purpose of keeping the property. He said he knew he was defrauding his creditors, and that criminal charges could be brought against him for filing a false statement in federal court. At the hearing, his lawyer admitted that Santistevan had lied in the bankruptcy proceedings; and the record of the proceedings shows that Santistevan first listed the land as having a value of $2,475.00 and then amended his petition, claiming the land was not his. Santistevan does not deny that he intentionally concealed his land in Costilla from the bankruptcy court; but, he asserts, this activity does not affect the strength of his title to the land or have any bearing on the suit he now wishes to entertain against third parties in a dispute over this land.

The argument thus becomes whether, as a matter of law, Santistevan is barred from bringing this suit. We hold that he is.

On the issue of whether a bankrupt who fails to list property in bankruptcy proceedings can thereafter assert title to the property, the United States Supreme Court wrote:

> It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up . . . thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it. If the claim was of value . . . it was something to which the creditors were entitled, and this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts and still assert title to the property.

First National Bank of Jacksboro v. Lasater, 196 U.S. 115, 119, 25 S.Ct. 206, 208, 49 L.Ed. 408 (1905). Although there are some courts which have held that a bankrupt who is not guilty of fraud, but who fails to list an asset in his bankruptcy schedule is not thereafter precluded from maintaining a cause of action on the omitted property, *Watson v. Planters & Citizens Bank*, 110 Ga.App. 725, 140 S.E.2d 30 (1964); *McAulton v. Smart*, 54 Haw. 488, 510 P.2d 93 (1973); *Loose v. Brubacher*, 219 Kan. 727, 549 P.2d 991 (1976); *Stipe v. Jefferson*, 192 Minn. 504, 257 N.W. 99 (1934); *Philbrick v. Burbank*, 101 N.H. 311, 141 A.2d 888 (1958); *Suetter v. A.E. Kern & Co.*, 146 Or. 96, 29 P.2d 534 (1934); *see, Watson v. Motley*, 201 Ala. 25, 75 So. 147 (1917), there are other courts which have held the opposite. *Moore v. Slonim*, 426 F.Supp. 524 (D.Conn.1977); *Brangan v. United States*, 373 F.Supp. 1050 (E.D.Va.1973); *Hermsmeyer v. A.L.D., Inc.*, 239 F.Supp. 740 (D.Col.1964); *Scruby v. Norman*, 91 Mo.App. 517 (1902). We need not decide which rule we would adopt since the case before us clearly involves fraud on the part of the bankrupt. When fraud is involved, the cases that we have found all hold that the bankrupt later cannot lay claim in court to the previously fraudulently concealed asset. The rule is, as stated in *Suetter*, that, "[w]here the bankrupt fraudulently conceals any property from the creditors or the trustee until after his discharge, he may not thereafter assert any claim to or arising out of such concealed property." *Suetter* at 109, 29 P.2d at 539. *Accord, Taliaferro v. Lynn*, 190 Okl. 237, 123 P.2d 243 (1942); *Brown v. Medo Land Creamery Co.*, 240 Or. 625, 403 P.2d 383 (1965). In explaining this rule, the court in *Scruby* wrote:

> Can it be that . . . when by fraud and perjury [a bankrupt] is enabled to withhold [property] from the administration of his estate by the trustee, that his title and interest in such [property] survives in him and the bankruptcy proceeding and can be asserted by him in a judicated proceeding after his discharge in bankruptcy; or, if such title and interest does not survive the adjudication, is it *ipso facto* revived by the discharge? To answer these queries in the affirmative would be to invite the commission of the gravest fraud and perjury, which it is safe to assume was never intended by the bankrupt law.

Scruby at 521–22. Courts which have allowed the discharged bankrupt to pursue his claim on an asset that he failed to list in the bankruptcy schedule often have noted that the bankrupt was not guilty of fraudulent conduct. *Motely; McAulton; Stipe; Suetter; see, Loose, cf., Planter & Citizens Bank* (trustee in bankruptcy knew of the asset); *Philbrick* (plaintiff said he had forgotten about the asset when he filed in bankruptcy and thought it was worthless), *but cf., Smith v. Arkansas Fuel Oil Co.*, 219 La. 982, 54 So.2d 421 (1951) (court, without mentioning whether the bankrupt had been fraudulent or blameless in failing to list an asset in the bankruptcy proceedings, allowed his heirs to maintain a suit on that asset).

Santistevan's fraudulent concealment of his real property during the bankruptcy proceedings ten years ago precludes him from now maintaining a suit involving his claimed ownership of the land. The defendants were entitled to judgment as a matter of law; summary judgment was properly granted.

Santistevan's other arguments are without merit and may be discussed summarily. 1. It is immaterial that Santistevan disclosed the existence of the land to the trustee in bankruptcy, since he grossly undervalued it and then claimed that he didn't own it after all. The net effect of this behavior was the same as if he had never mentioned the land. 2. While this particular cause of action did not arise until after the discharge in bankruptcy, the property over which the dispute centered was owned by Santistevan at the time of the bankruptcy. It is Santistevan's right to maintain a suit involving this particular property which is barred, not his right to sue in general on a cause of action arising after the bankruptcy proceedings. *See*, 4A Collier on Bankruptcy ¶ 70.09 (14th ed.1978). 3. The fact that, under the current bankruptcy code, 11 U.S.C. § 541 (Supp. III 1979), the trustee in bankruptcy no longer takes title to the debtor's property may have some bearing on the effect of abandonment of an asset, *see*, 4 Collier on Bankruptcy ¶ 554.02[2] (15th ed.1980), but we are not concerned here with an asset that has been abandoned. An asset which was concealed from the trustee in bankruptcy cannot be considered abandoned by him. *Lasater, supra; Moore, supra; Hermsmeyer, supra; Planter & Citizens Bank, supra; Philbrick, supra.* 4. We need not decide whether Santistevan is the only party who could maintain this suit, or who the real party in interest is. The important point is that Santistevan cannot assert a cause of action arising out of the controverted property.

If a trial court's judgment can be sustained upon correct legal principles, it will not be reversed. *Albuquerque National Bank v. Johnson*, 74 N.M. 69, 390 P.2d 657 (1964). Santistevan's fraudulent concealment of the Costila property from the trustee in bankruptcy precludes him from now maintaining a suit arising out of his claimed ownership of this property.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

ANDREWS, J., concurs.

WALTERS, J., dissenting.

WALTERS, Judge (dissenting).

I respectfully dissent. The majority opinion approves a determination, made by the trial court upon defendants' motion to dismiss, that plaintiff "does not own the rights sought to be enforced." The defendants moved to dismiss, alleging that if the transfer to plaintiff's brother had not been made in 1970, "plaintiff defrauded his creditors in a subsequent bankruptcy proceedings and such creditors are the holders of the beneficial interest in said land." Plaintiff's deposition and some records of the 1970 bankruptcy case were accepted by the court in support of the motion at the hearing, and the motion was granted. This, of course converted the hearing to one for summary judgment. *Shriners Hosp. v. Kirby Cattle Co.*, 89 N.M. 169, 548, P.2d 449 (1976).

A motion to dismiss is an admission by defendants of all material facts well pleaded. *Runyan v. Jaramillo*, 90 N.M. 629, 567 P.2d 478 (1977). It may not be granted unless it appears that plaintiffs cannot recover under any state of facts provable under the claim being made. *Eldridge v. Sandoval County*, 92 N.M. 152, 584 P.2d 199 (Ct.App.1978). Plaintiff's complaint, alleging a fraudulent scheme by defendants and forgery of a conveyance from plaintiff, states a claim for relief. Obviously the motion was not considered as a motion to dismiss.

I cannot agree that questions of the real party in interest or whether fraud existed in plaintiff's prior conduct—both of which properly are affirmative defenses to be pleaded as such—are correctly decided by motion, whether termed a motion to dismiss or, as happened here, it becomes a motion for summary judgment, when the party moved against has not been afforded the period of notice mandated by Rule 56, N.M. R.Civ.P., N.M.S.A. 1978.

The majority opinion recognizes defendants' motion as one "to be treated as a motion for summary judgment," and the error of treating "a motion to dismiss as a

motion for summary judgment without permitting the adverse party a reasonable opportunity to present pertinent material" in opposition. Rule 12(b) says more: the motion shall also "be treated . . . and disposed of as provided in Rule 56." "Reasonable opportunity" need not be construed to be less than ten days, as the majority seems willing to suggest; Rule 56 is not at all ambiguous regarding the time limit of the "opportunity" to be afforded the one moved against. Plaintiff received "notice" that the motion would be treated as a summary judgment motion when matters outside the record were presented and relied on by the movant on the morning the motion was heard. He was entitled, therefore, "as provided in Rule 56," to ten days thereafter within which to meet the arguments raised and the evidence received.

The majority avoids discussing the error it allegedly recognizes, however, by holding that the first eight pages of plaintiff's argument in his Brief-in-Chief, all of which is directed to the procedural defects of the hearing and the trial court's decision immediately following the hearing, do not "properly" raise the issue of inadequate notice on appeal. It is apparent at page 3 of the Answer Brief, and contrary to the statement of the majority opinion, that appellees recognized one of plaintiff's grievances to be his dissatisfaction with conversion of a motion to dismiss on the morning of trial to one for summary judgment, and an immediate decision thereon. Plaintiff's brief unequivocally argues his surprise with, and the impropriety of, permitting defendants "to present their evidence in support of their affirmative defense [of lack of real party in interest] and we have been denied the opportunity to present any evidence to establish our prima facie case and to refute the defense [specified in the motion.]" This language clearly conveys to me a discernible argument that presentation of evidence outside the pleadings by the movant, on a factual question not raised in the motion, must be allowed only when the party moved against has been afforded the opportunity to anticipate the use of such evidence in order to be prepared to meet it with answering evidence of his own.

To say that the arguments in either the Brief-in-Chief or the Reply Brief do not clearly formulate a protest against inadequate notice of the nature of the motion is not accurate. Plaintiff again and again urges that the motion alleged failure to join the real party in interest. A resolution of *that* defense at the hearing should have resulted in allowing joinder or substitution under R.Civ.P. 17(a), N.M.S.A. 1978—not in a determination that because defendant had committed a bankruptcy fraud he had lost his right to bring suit. If the briefs of plaintiff were not written as precisely as the majority would prefer concerning notice, the protestations against receipt of outside evidence on a motion to dismiss, without opportunity given to rebut that evidence, is nevertheless pervasive throughout plaintiff's arguments. A consideration of the substance, not the form, of the matter brought for review, should always govern the duty of an appellate court in reaching a decision upon the merits of an appeal. *See Tomson v. County of Dona Ana*, 93 N.M. 173, 598 P.2d 216 (Ct.App.1979); *Westbrook v. Lea General Hospital*, 85 N.M. 191, 510 P.2d 515 (Ct.App.1973) (per Lopez, J., Wood, C. J., and Sutin, J. concurring).

The "facts" recited in the majority opinion are not complete, nor are they, in my opinion, completely accurate. The opinion refers persistently to "concealment" and "intentional concealment" and "fraudulent concealment" of an asset in the bankruptcy court. The documents from the bankruptcy records introduced by defendants include an original petition in bankruptcy filed by plaintiff. It discloses a claim of ownership in 75 acres of land at Costilla (the supposedly concealed asset), subject to a judgment lien for water rent. Subsequently, a first amended petition was filed alleging that the Costilla land had been transferred to petitioner's brother because petitioner had not been able to repay $1,500 advanced by his brother to pay off a mortgage on the land. The amended petition asked only that the question contained in the bankruptcy form, which inquired about transfer of property during the year immediately preceding the filing of the original petition,

be amended to reflect the transfer mentioned above. It did not request or suggest that the land be removed from Schedule B–1 of the original bankruptcy petition, where that asset was listed under "Real Estate . . . owned by debtor. . . ."

About three weeks later, the trustee in bankruptcy petitioned the Bankruptcy Court for authorization to abandon as an asset the Costilla land, stating in his petition that "[a]fter investigating, it is the trustee's opinion that any possible recovery from these assets [sic] would be more than offset by the expense involved in converting them [sic] into cash." The court not only "authorized," but "directed," the trustee to abandon the land as an asset of the bankruptcy estate.

These documents refute any characterization of plaintiff's conduct in the bankruptcy proceeding as a "concealment" of assets. The trustee, too, had an obligation to protect creditors and, "after investigating" the asset listed by plaintiff, he officially and on the record expressed his opinion that the land was not a distributable asset. Plaintiff should not have been foreclosed from presenting controverting evidence or affidavits on an issue determined by the court to be his ineligibility to pursue this suit because he had defrauded his creditors. To reach that conclusion, the trial court had to decide that creditors, had indeed been defrauded by plaintiff's conduct in the bankruptcy action. In order to make that decision, the court necessarily resolved conflicts in plaintiff's deposition testimony regarding his knowledge about false statements of valuation in the bankruptcy petition, advice from his attorney at that time to so evaluate it, the uncertain status of the land, and the trustee's signed pleadings regarding its value and his request for authority to abandon the very asset which defendants claim was not listed and the majority describes as "concealed."

Whether or not plaintiff defrauded his creditors so as to call into effect the rule cited by the majority opinion, of forfeiting the right to maintain a later claim to omitted property, is a factual question. Conflicts in the evidence on material issues which may have legal consequences may not be decided by summary judgment. *Young v. Thomas*, 93 N.M. 677, 604 P.2d 370 (1979); *see also, Gallegos v. Wallace*, 74 N.M. 760, 398 P.2d 982 (1964). None of the cases relied on by the majority determined that plaintiff was barred from maintaining his action because of fraud on his creditors, without a full-blown trial on the claim of fraud. Moreover, the rule is not uniformly applied. Several jurisdictions have reached an opposite result and permitted the bankrupt to assert a claim of ownership in an unadministered bankruptcy asset. *See Philbrick v. Burbank*, 101 N.H. 311, 141 A.2d 888 (1958); *Stripe v. Jefferson*, 192 Minn. 504, 257 N.W. 99 (1934); *In re Webb*, 54 F.2d 1065 (4th Cir. 1932). I do not approve the application of the rule espoused by my colleagues under the facts of this case, even if fraud were proven at trial, when it serves to benefit not the allegedly defrauded creditors but absolute strangers to the bankruptcy action.

The trial court abused its discretion in ruling on the motion at the conclusion of the hearing. *Georgia S. & F.R. Co. v. Atlantic C.L.R. Co.*, 373 F.2d 493 (5th Cir. 1967), *cert. den.* 389 U.S. 851, 88 S.Ct. 69, 19 L.Ed.2d 120 (1967).

The judgment should be reversed and remanded either for a proper hearing on defendants' motion and notice for summary judgment; or the defense of plaintiff's forfeiture of the right to maintain this action by reason of the bankruptcy proceedings should be fully litigated at trial and presented to a jury for decision. *See Suetter v. A. E. Kern & Co.*, 146 Or. 96, 29 P.2d 534 (1934); *Watson v. Motley*, 201 Ala. 25, 75 So. 147 (1917). Even the *Laster* decision, cited and quoted by the majority, was reached only after a full trial on the fraudulency of plaintiff's prior conduct in the bankruptcy proceeding.

634 P.2d 1294

STATE of New Mexico,
Plaintiff-Appellee,

v.

William Ruel GIBSON,
Defendant-Appellant.

No. 5312.

Court of Appeals of New Mexico.

Sept. 17, 1981.

Michael W. Lilley, Las Cruces, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

This appeal involves defendant's effort to be relieved of a provision of his plea bargain without giving up the benefits he obtained in that bargain.

Defendant was charged with a robbery in January, 1981 while armed with a deadly weapon. The plea and disposition agreement, signed by defendant and his counsel and approved by the trial court, gave defendant the benefit of pleading guilty to simple robbery, thereby reducing his crime from a second degree to a third degree felony. Another benefit was that sentence was to be deferred for four years and defendant was to be placed on probation. Specific conditions of probation were included in the agreement. One of the specific conditions, agreed to by defendant and his counsel, was:

> Defendant shall not live in Luna County, New Mexico, without the express permission of the Court and the Adult Probation Officer and the District Attorney.

Judgment was entered in accordance with the plea and disposition agreement. Subsequently, defendant sought to have the judgment modified by eliminating the probation condition that he not live in Luna County without permission. The trial court denied the motion to modify, pointing out that defendant had killed a policeman in Deming, Luna County, in July, 1979. The trial court ruled that the requirement against living in Luna County "is reasonably related to Gibson's rehabilitation and safety."

Defendant appealed the denial of the motion to modify. His docketing statement asserted that the trial court erred because the "condition * * * that he not live in Luna County without permission * * * amounts to an illegal and void sentence * * violates fundamental public policy, is in excess of the court's statutory authority because it is not reasonably related to Defend-

ant's rehabilitation, and violates Defendant's constitutional rights to privacy, travel and association."

Our calendar assignment proposed summary affirmance on the basis that defendant must keep his part of the plea bargain.

Defendant filed a timely memorandum opposing summary affirmance. The memorandum asserts:

> [A] court cannot banish a defendant from a state or locality, even when the defendant agrees to the banishment.
>
> * * * * * *
>
> Even if banishment in a particular case is reasonably related to rehabilitation, the public policy against allowing a political division to dump undersirables [sic] onto other divisions overrides any isolated rehabilitative benefit of banishment.
>
> * * * * * *
>
> Regardless of the individual circumstances of this case and Defendant's agreement to the banishment provision, public policy still renders banishment illegal and void as a condition of probation.

We assume, for the purposes of this appeal, that the trial court lacks authority to banish, even when a defendant agrees to it. See *People v. Baum*, 251 Mich. 187, 231 N.W. 95 (1930), which held that banishment "is not authorized by statute, and is impliedly prohibited by public policy." What, then, is the effect of this assumption on this appeal?

Defendant has not attacked the validity of his guilty plea or the validity of the plea and disposition agreement. He seeks to be relieved of one of his probation conditions, to which he agreed, while leaving the remainder of the agreement intact. Specifically, he seeks to welsh on his part of the bargain. *State v. Gallegos*, 91 N.M. 107, 570 P.2d 938 (Ct.App.1977); see *Baird v. State*, 90 N.M. 667, 568 P.2d 193 (1977). If a plea agreement is not followed in *all* its parts, the entire agreement is rejected. *Eller v. State*, 92 N.M. 52, 582 P.2d 824 (1978).

On the assumption made in this appeal that authority is lacking for the banishment provision, defendant may seek to have the entire plea and disposition agreement set aside, thus reinstating the charge of robbery while armed with a deadly weapon. This opinion does not foreclose such a motion in the trial court.

We hold only that a plea bargain stands or falls as a unit. Defendant may not be relieved of a part of his plea bargain without giving up benefits he received in the bargain.

The order denying the motion to modify is affirmed.

IT IS SO ORDERED.

LOPEZ and DONNELLY, JJ., concur.

634 P.2d 1295

Carolyn KLINDERA, Plaintiff-Appellant,

v.

WORLEY MILLS, INC., Employer and Employers National Insurance Company, Insurer, Defendants-Appellees.

No. 5065.

Court of Appeals of New Mexico.

Sept. 24, 1981.

William A. L'Esperance, Albuquerque, for plaintiff-appellant.

William G. W. Shoobridge, Richard W. Darnell, Neal & Neal, Hobbs, for defendants-appellees.

OPINION

SUTIN, Judge.

This is a workmen's compensation case in which the district court dismissed plaintiff's complaint with prejudice and plaintiff appeals. We affirm.

The first point is that the trial court erred in failing to render findings adequate to alert this Court to the standard used to measure plaintiff's disability.

The trial court found that plaintiff suffered a compensable injury on January 10, 1980, and received compensation benefits until May 5, 1980, when she was no longer disabled.

The primary test for disability is the capacity to perform work. *Perez v. Intern. Minerals & Chemical Corp.*, 95 N.M. 628, 624 P.2d 1025 (Ct.App.1981). A finding that plaintiff "was no longer disabled" is the finding of an ultimate fact. This finding means that plaintiff had the capacity to perform work in the sense that she was wholly *able* "to perform the usual tasks in the work she was performing at the time of her injury, and is wholly *able* to perform any work for which she is fitted by age, education, training, general physical and mental capacity and previous work experience." The court's finding is the converse of "total disability" as defined in § 52–1–24, N.M.S.A.1978.

The finding of "no longer disabled" adequately alerted this Court to the standard used to measure plaintiff's disability.

Plaintiff's second point is that the trial court ought to have recused itself. We disagree.

This issue of voluntary recusation was first raised in this Court. Subsequent to filing plaintiff's Notice of Appeal, trial counsel were permitted to withdraw, and substitution made.

The Skelton Transcript was filed in this Court on March 16, 1981. On May 20, 1981, plaintiff filed a Motion for Supplementation of the Record of Proceedings and for Summary Reversal. This motion was based upon the fact that trial counsel discovered a

prior patient-doctor relationship between Judge Hensley, the trial judge, and Dr. Fred R. Holzworth, an orthopedic surgeon, who examined plaintiff and testified on behalf of defendants; that this fact was not disclosed at the time of trial and was fundamentally prejudicial to plaintiff. The motion was accompanied by an affidavit of former trial counsel which stated the following facts:

The affiant was trial counsel in *Sanchez v. Johnson Wholesale*, Cause No. 81–CV–28,042, Curry County, which was heard on the merits before Judge Hensley in April, 1981. [Trial in the instant case was held November 10, 1980.] In the *Sanchez* case, before trial started, Judge Hensley announced to the parties present that he was a patient of Dr. Holzworth and that Dr. Holzworth had been treating him and his daughter for four years prior thereto. Inquiries were made of the parties whether they objected to his sitting as a judge. Both parties answered, including affiant, that they had no objection. The case was heard and decided by Judge Hensley.

In the instant case, no disclosure nor offer of recusal was made by Judge Hensley.

This Court denied summary reversal of plaintiff's motion but ordered Judge Hensley to file an affidavit describing the relationship between himself and Dr. Holzworth from 1979 through 1981. Judge Hensley filed an affidavit which showed that in 1979, Judge Hensley had Dr. Holzworth check him three times, twice for pain in the right foot and once for injury to his left shoulder. On June 11, 1981, seven months after trial was held, Judge Hensley saw Dr. Holzworth for a low back strain. (Judge Hensley was also an athlete who suffered injuries from playing handball, tennis and practicing karate.)

The affidavit also stated that Judge Hensley's wife and daughter visited Dr. Holzworth for pain and stiffness in the knee on December 5, 1980; that Dr. Holzworth was the only orthopedic surgeon in the area who specialized in athletic-related injuries, one in whom Judge Hensley had great confidence, but it did not occur to Judge Hensley to reveal the doctor-patient relationship; that this relationship had absolutely no bearing in his decision in the instant case. In fact, Judge Hensley did not follow Dr. Holzworth's testimony in the *Sanchez* case with reference to the date disability ended.

The record shows that on September 3, 1980, defendants filed a motion for continuance for failure of plaintiff to keep an appointment with Dr. Holzworth. On September 16, 1980, the trial setting was vacated. This appears to be the first time that Judge Hensley had knowledge that Dr. Holzworth might be a witness for defendants.

On October 6, 1980, defendants filed a motion to compel plaintiff to submit to an examination by Dr. Holzworth, she having failed to keep her appointments for evaluation on July 24 and September 18, 1980; that upon failure or refusal to do so, the court should order forfeiture of all workmen's compensation benefits which may become due. On October 20, 1980, defendants gave notice of a hearing to be held on November 5, 1980.

On October 21, 1980, plaintiff filed a pleading in opposition to defendants' motion in which it stated:

> That plaintiff has no objection to an independent medical examination by any orthopedic physician with the exception of Dr. Holzworth, as Dr. Holzworth has expressed disinterest in examining the plaintiff and his past examinations of her have been cursory and negative concerning all the plaintiff's complaints.

It does not appear that defendants' motion to compel plaintiff's examination by Dr. Holzworth was ever heard and decided by the court. The case came on for trial on November 10, 1980, five days after the date set for hearing the motion. Defendants announced that Dr. Holzworth would testify as a witness for defendants and was in fact the only witness for defendants.

Plaintiff claims "[t]he trial court ought to have recused itself," because, based upon the affidavits filed, "[t]he trial court knew it would be biased." Plaintiff has misread the affidavits. No such knowledge was

present. Reliance is had on *Gerety v. Demers*, 92 N.M. 396, 589 P.2d 180 (1978); *Doe v. State*, 91 N.M. 51, 570 P.2d 589 (1977); and *Martinez v. Carmona*, 95 N.M. 545, 624 P.2d 54 (Ct.App.1980), but plaintiff's brief does not discuss the application of these cases. None of them involve the bias and prejudice of a judge based upon some type of relationship with a witness.

Gerety said, omitting authorities cited:

> There are no constitutional or statutory provisions which specifically set forth the authority or the procedure for a judge to voluntarily recuse or disqualify himself. * * *
>
> * * * * * *
>
> We hold with the well-established principle that a judge has a duty to perform the judicial role mandated by the statutes, and he has no right to disqualify himself *unless there is a compelling* constitutional, statutory or *ethical cause for so doing. Recusal should be used only for the most compelling reasons.* * * *
>
> We approve of this statement * * * and hold that, except in those cases where a judge's impartiality might be reasonably questioned, he must exercise his judicial function [Emphasis added.] [Id., 92 N.M. at 400, 589 P.2d 180.]

Gerety stands for the proposition that if no compelling ethical cause exists, a district judge should not voluntarily recuse himself and as pointed out in *Martinez, supra*, whether a judge should recuse himself if his impartiality might reasonably be questioned, "places disqualification within the conscience of the judge and within his discretion." [624 P.2d 59.] Plaintiff did not claim that Judge Hensley abused his discretion. Plaintiff only relies upon this quotation from *Martinez*:

> In other words, *when a district judge believes* that his impartiality might reasonably be questioned with reference to bias and prejudice concerning a party, he must not exercise his judicial function. [Emphasis added.] [624 P.2d 59.]

This quotation must not be misunderstood. The determination of impartiality rests within the belief of the district judge, not the parties or lawyers. If the district judge believes that his impartiality might NOT be reasonably questioned, he must exercise his judicial function. Judge Hensley's belief falls within this category.

In the instant case as in *Martinez*, the record is free of any evidence, fact or inference to be drawn therefrom that Judge Hensley's impartiality might reasonably be questioned concerning plaintiff as a party.

In the instant case, the judge-doctor relationship was casual, medically unimportant and devoid of any other contact which might affect the partiality of the judge.

We hold that Judge Hensley ought not to have recused himself.

Affirmed.

IT IS SO ORDERED.

HENDLEY and WALTERS, JJ., concur.

634 P.2d 1298

STATE of New Mexico, Plaintiff-Appellee,

v.

Armando Calderon MARQUEZ, Defendant-Appellant.

No. 5054.

Court of Appeals of New Mexico.

Sept. 29, 1981.

John B. Bigelow, Chief Public Defender, Martha A. Daly, App. Defender, Santa Fe, Charles Driscoll, Trial Counsel, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Anthony Tupler, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

After breaking into the residence, defendant armed himself with a knife and then killed Jeanette King. Defendant appeals his convictions of aggravated burglary and second degree murder. See § 30–16–4(B), N.M.S.A.1978 and § 30–2–1, N.M.S.A. 1978 (Cum.Supp.1981). Issues listed in the docketing statement, but not briefed, were abandoned. *State v. Gallegos*, 92 N.M. 336, 587 P.2d 1347 (Ct.App.1978). We discuss the three issues that were briefed: (1) the trial court's refusal to instruct on voluntary manslaughter; (2) the trial court's refusal of defendant's requested instruction defining mental disease; and (3) the trial court's denial of a mistrial when a prosecution witness referred to defendant's prior indictment for rape.

Refusal to Instruct on Voluntary Manslaughter

Defendant was entitled to an instruction on voluntary manslaughter only if there was evidence to support this crime. *State v. Manus*, 93 N.M. 95, 597 P.2d 280

(1979). In this case, the question is whether there was evidence of adequate provocation. *State v. Robinson*, 94 N.M. 693, 616 P.2d 406 (1980); see *State v. Garcia*, 95 N.M. 260, 620 P.2d 1285 (1980).

There were two eyewitnesses to the killing—defendant and Margaret King, the mother of Jeanette. The claim of adequate provocation involves a vase that Jeanette threw at defendant.

Defendant's relationship with Jeanette had been turbulent for some time preceding the killing. On the day of the killing, defendant had attempted to contact Jeanette at her place of employment by subterfuge and had threatened Chadwick, who had dated Jeanette. Defendant believed Jeanette would press charges against him for violating an order which prohibited defendant from having contact with Jeanette.

In the evening, defendant went to Jeanette's home; no one was there. After waiting about fifteen minutes, defendant broke a window, unlocked the window and entered the house. Wandering from room to room, defendant picked up a knife from the kitchen and stuck it in his belt, then went upstairs.

Margaret returned to the house; so did Jeanette a short time later. The two were sitting in the den talking. As the two were discussing defendant, Margaret looked up and saw defendant standing in the doorway of the den. According to defendant, he decided to go downstairs and confront the two women. According to defendant, when Jeanette, who was sitting with her back to the doorway, saw the defendant she jumped up and screamed.

Defendant testified that he directed Jeanette to sit down; Jeanette responded by asking defendant if he knew it was illegal to break into a house. After further argument about Chadwick, defendant ordered Jeanette to come sit by him; she did not comply. Defendant then ordered Jeanette and Margaret to come over to him; they did not comply.

Defendant pulled out the knife and, exploding in anger, started stabbing at the wooden part of the chair. Jeanette screamed, ran to the middle of the room and continued screaming. Defendant ran to Jeanette, pushing Margaret out of the way to get to Jeanette. Defendant started stabbing Jeanette, who knocked the knife from defendant's hand and ran out of the room. Defendant retrieved the knife and caught up with Jeanette in the kitchen. According to defendant, it was at this point Jeanette threw the vase.

Defendant's testimony did not raise an issue as to adequate provocation.

Margaret testified that when Jeanette saw defendant in the doorway of the den Jeanette became very angry and accused defendant of committing "another offense" by breaking into the house. As defendant walked into the room, Jeanette threw a vase which hit defendant on the shoulder. Defendant continued into the room and sat down. Defendant then ordered Jeanette to come over to him. She did not go. Defendant then ordered Jeanette and Margaret to lie down in front of him. They did not comply. Jeanette ran behind Margaret. Defendant brought out the knife and the stabbing began. After killing Jeanette, defendant told Margaret that he had to kill her also; Margaret escaped.

Nothing in Margaret's testimony suggests, or permits an inference, that defendant reacted in any manner to the vase incident to which Margaret testified. Compare *State v. Najar*, 94 N.M. 193, 608 P.2d 169 (Ct.App.1980). Margaret's testimony is that defendant reacted when the women refused to comply with his orders. Compare *State v. Garcia*, supra, and *State v. Robinson*, supra. Margaret's testimony did not raise an issue as to adequate provocation.

In contending there was adequate provocation, defendant combines some of defendant's testimony with some of Margaret's testimony, with the result that the testimony relied on has been distorted. For example, in relying, in the appeal, on Margaret's version of the vase incident, defendant omits all reference to the orders he gave to the women and, in relying on defendant's version, defendant fails to mention that he testified that he did not know whether

Jeanette threw a vase at him while in the den. *State v. Manus*, supra, points out such distortions are improper.

Even if there were evidence that defendant reacted, and thus was provoked by the vase incident to which Margaret testified, the vase incident would not be adequate provocation in this case. *State v. Manus*, supra, points out that the exercise of a legal right, no matter how offensive, is not provocation adequate to reduce homicide from murder to manslaughter. Jeanette threw the vase at defendant, a burglar. Whether Jeanette threw the vase to protect herself or her home, she had a right to do so. *State v. Pollard*, 139 Mo. 220, 40 S.W. 949 (1897). See *State v. Couch*, 52 N.M. 127, 193 P.2d 405 (1946); U.J.I.Crim. 41.50 and 41.51. If there was any provocation, it was not brought about by Jeanette throwing a vase, but by defendant's illegal entry into Jeanette's home. Thus, if defendant had any provocation, that provocation would not reduce the homicide from murder to manslaughter. *State v. Martin*, 336 S.W.2d 394 (Mo.1960).

Refused Instruction Defining Mental Disease

The approved instruction on insanity, U.J.I. Crim. 41.00, was given. A part of the instruction given states: "A person is insane if, as a result of a mental disease, he could not prevent himself from committing the act."

Defendant requested an instruction defining mental disease. It read: "The mental disease comprehended by the insanity defense is any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls."

The defense theory was that defendant was insane at the time of the killing. No claim is made that the approved instruction on insanity was improperly given. Defendant contends that the instruction given was incomplete because mental disease is not defined. He claims the refusal of his requested instruction was error because the definition of mental disease was necessary to aid the jury in deciding the insanity issue.

There being no definition of mental disease in the approved instructions, an instruction defining that term would not have been error because the meaning of mental disease is not adequately covered in U.J.I. Crim. 41.00. *State v. Ruiz*, 94 N.M. 771, 617 P.2d 160 (Ct.App.1980); *State v. Griego*, 90 N.M. 463, 564 P.2d 1345 (Ct.App.1977). Because the meaning of mental disease is not adequately covered, it would have been error to refuse a requested instruction which correctly defined the term. *State v. Ruiz*, supra.

The refused instruction was taken from *State v. Nagel*, 87 N.M. 434, 535 P.2d 641 (Ct.App.1975). See also *State v. Gutierrez*, 88 N.M. 448, 541 P.2d 628 (Ct.App.1975). However, defendant is incorrect in asserting that the refused instruction was a correct definition.

For there to be mental disease there must be a true disease of the mind "normally extending over a considerable period of time, as distinguished from a sort of momentary insanity arising from the pressure of circumstances." *State v. White*, 58 N.M. 324, 270 P.2d 727 (1954). Mental disease "does not comprehend an insanity which occurs at a crisis and dissipates thereafter." *State v. White*, id. This time factor was discussed in *State v. Valenzuela*, 90 N.M. 25, 559 P.2d 402 (1976), in terms of a fixed mental disease as opposed to momentary insanity. See also *State v. Hartley*, 90 N.M. 488, 565 P.2d 658 (1977).

State v. Nagel, supra, on which defendant relies, discusses the time period; the required instruction does not. Because of the failure to include the requisite time period within the definition of mental disease, the requested instruction was not a correct definition of mental disease.

No instruction defined mental disease. There being a failure to instruct, defendant was required to tender a correct instruction. The instruction requested not being correct, the trial court did not err in refusing it. Rule of Crim.Proc. 41(e); *State v. Romero*, 86 N.M. 99, 519 P.2d 1180 (Ct.App.1974).

Reference to a Prior Indictment for Rape

In presenting defendant's psychiatric history, defense witnesses testified, on

direct examination, of instances of defendant's violence against women. One of the instances was that defendant had been arrested for a rape in 1973.

A prosecution witness, testifying on direct examination on rebuttal, was asked about the alleged rape in 1973. The answer: "What I know about that is that, uh, he was indicted by a grand jury . . . ."

Defendant moved for a mistrial arguing it was prejudicial evidence of a prior crime without proof of conviction. The trial court denied the motion for a mistrial, but instructed the jury to disregard the witness's non-responsive answer. Outside the presence of the jury, the trial court instructed the witness to stay away from legal matters and, in effect, to pay attention and give responsive answers to the questions asked.

To the extent defendant is arguing, on appeal, his trial court claim that prosecutor misconduct was involved, the answer is that the trial court considered the reference to an indictment as non-responsive to the question asked. See *State v. Baca*, 89 N.M. 204, 549 P.2d 282 (1976).

The claim that the trial court erred in denying a mistrial is without merit. Previous testimony had brought out the 1973 arrest, and that defendant had been referred to a sex offenders program. In light of this testimony, the trial court's instruction to the jury, to disregard the reference to an indictment, was sufficient to cure any prejudice. The appellate issue is whether the trial court abused its discretion in denying a mistrial. *State v. Perez*, 95 N.M. 262, 620 P.2d 1287 (1980). There was no abuse of discretion. *State v. Vialpando*, 93 N.M. 289, 599 P.2d 1086 (Ct.App.1979); *State v. McFerran*, 80 N.M. 622, 459 P.2d 148 (Ct. App.1969).

The judgment and sentences are affirmed.

IT IS SO ORDERED.

HENDLEY and WALTERS, JJ., concur.

635 P.2d 306

PEOPLES STATE BANK, a New Mexico banking corporation, Petitioner,

v.

OHIO CASUALTY INSURANCE COMPANY, Bob Ferguson, Bob Ferguson, Inc., and L. E. Walls, Respondents.

No. 13732.

Supreme Court of New Mexico.

Oct. 6, 1981.

Rehearing Denied Oct. 26, 1981.

Siegenthaler & Graham, George A. Graham, Jr., Artesia, Pickard & Singleton, Sarah M. Singleton, Santa Fe, for petitioner.

Farlow, Simone & Roberts, Shaffer, Butt, Thornton & Baehr, Albuquerque, Atwood, Malone, Mann & Cooter, Russell D. Mann, Roswell, for respondents.

OPINION

SOSA, Senior Justice.

This cause is before us on a writ of certiorari directed to the Court of Appeals of New Mexico, which affirmed a summary judgment by the trial court in favor of defendants, Ohio Casualty Insurance Company (Ohio), Bob Ferguson (Ferguson), Bob Ferguson Inc. (Ferguson Agency) and L. E. Walls (Walls). We reverse and remand.

On June 27, 1978, a heavy rainstorm hit Artesia, New Mexico, which caused damage in excess of $417,000.00 to the building of the Peoples State Bank (Bank). It is alleged that an accumulation of debris blocked the drainage system on the roof causing an overflow of water to leak into the building through air conditioning ducts.

A Special Multi-Peril Policy of Ohio Insurance was sold to the Bank by the Ferguson Agency and was in full force and effect at all times material to this suit. Whether the damage was covered by the policy is disputed.

The day following the storm, the Bank notified the Ferguson Agency of the ongoing damage to its building. An independent adjuster, Walls, was sent out by the agency to investigate the damage, and the Ferguson Agency assured the Bank that the damage was covered by the policy. However, in October, Ohio denied coverage with the exception of damage to drapes. Upon further negotiations, which also involved the Superintendent of Insurance, Ohio made three increasing settlement offers. The final written offer was to expire on July 2, 1979.

The Bank, having been dissatisfied with the offers, instituted this suit on September 19, 1979, approximately fourteen months after the damage had occurred. Ohio answered alleging as one affirmative defense that the suit was barred by the Bank's failure to institute this suit within one year from the date of loss, as required by the policy. Ohio then moved for a summary judgment on this ground. At the hearing, the Bank alleged that certain conduct of appellees constituted a waiver of the time-to-sue provision. The trial court found that the complaint was filed after the twelve-month period had expired, and that Ohio had not waived the time-to-sue provision and proceeded to grant summary judgment in favor of appellees.

The sole issue on certiorari is whether a genuine issue as to waiver of the time-to-sue provision existed so as to preclude the trial court from granting summary judgment.

Summary judgment is an extreme remedy which should yield to a trial on the merits if, after resolving all reasonable doubts in favor of the opponent of the motion, the evidence adduced at the hearing establishes the existence of a genuine issue as to any material fact. *Pharmaseal Laboratories, Inc. v. Goffe*, 90 N.M. 753, 568 P.2d 589 (1977).

Ohio, having filed the motion for summary judgment, had the burden to show the absence of a genuine issue as to the Bank's failure to file their claim within the one-year limitation. *Owens v. Eddie Lu's Fine Apparel*, 95 N.M. 176, 619 P.2d 852 (Ct.App.1980). To make its prima facie showing, Ohio need only have shown that the appellant breached the time-to-sue provision in the policy. *Sanchez v. Kemper*, 96 N.M. 466, 632 P.2d 343 (1981). The burden was then on the Bank to establish that a genuine issue did exist and that appellees were not entitled to a summary judgment as a matter of law. *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972).

To sustain its burden, the Bank introduced exhibits which raised the issue as to whether Ohio had waived the time-to-sue provision. Waiver may be accomplished by slight acts and circumstances, *Schafer v. Buckeye U. Ins. Co.*, 381 N.E.2d 519 (Ind. App.1978), and must be determined by the facts of the case. *See Bell v. Weinacker*, 88 N.M. 557, 543 P.2d 1185 (Ct.App.1975). The

acts and conduct generally held to constitute a waiver of a time-to-sue provision are those acts which would lull the insured into reasonably believing that its claim would be settled without suit, *Ciaccio v. North River Insurance Company*, 17 Ill.App.3d 940, 308 N.E.2d 860 (1974), or which would render enforcement of a limitations defense unjust, inequitable or unconscionable. *Lee v. Ohio Cas. Ins. Co.*, 58 Ill.App.3d 1, 15 Ill.Dec. 555, 373 N.E.2d 1027 (1978). Negotiations alone are insufficient to support a finding of waiver if the negotiations are terminated within adequate time for the insured to institute an action on the policy. *Shea North, Inc. v. Ohio Cas. Ins. Co.*, 115 Ariz. 296, 564 P.2d 1263 (Ct.App.1977).

In the case at bar, the trial court reviewed depositions and exhibits on Ohio's motion for summary judgment. An examination of the record indicates that, although Ohio denied its liability under the policy, Ferguson did assure the Bank that the damage was covered. Ferguson also continued to negotiate a settlement of the claim throughout the twelve-month limitation period. Whether an agent of the insurance company could waive the time-to-sue provision in the policy is disputed; however, his authority to do so should be left for determination by a jury. *Pribble v. Aetna Life Insurance Company*, 84 N.M. 211, 501 P.2d 255 (1972).

Furthermore, Ohio made three different offers of settlement, albeit at the request of the Superintendent of Insurance, each time increasing their offer. The final offer, in writing, was to expire on July 2, 1979, five days after the time-to-sue limitation had expired. In its letter, Ohio specified that its offer was on a disputed loss and that neither party was waiving its rights under the policy. Ohio argues that this was sufficient to establish that no reasonable doubt existed on the question of waiver. We disagree. Waiver may be accomplished either by express language or conduct on the part of the insurance company. *See* Annot., 29 A.L.R.2d 636 (1953). Appellees' conduct could lead a jury to infer that the time-to-sue provision had been waived. When reasonable inferences can also be drawn in favor of the party opposing summary judgment, summary judgment should be denied. *Goodman, supra.*

We hold that the issue of whether Ohio waived its time-to-sue provision in the policy sold to Peoples State Bank is an issue which should be left for determination by a jury. There exists in the record reasonable inferences which may be drawn in favor of either party.

It follows that the decision of the Court of Appeals must be reversed; the summary judgment of the trial court is reversed and this cause is remanded for proceedings consistent with this opinion.

EASLEY, C. J., and PAYNE, FEDERICI and RIORDAN, JJ., concur.

635 P.2d 308

STATE of New Mexico,
Plaintiff-Appellee,

v.

Willie James STEVENS,
Defendant-Appellant.

No. 4733.

Court of Appeals of New Mexico.

Jan. 29, 1981.

John B. Bigelow, Chief Public Defender, Melanie S. Kenton, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Charles F. Noble, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of murder in the second degree, defendant appeals. He contends that the successive reindictments on more serious charges arising out of the same incident violated his due process rights. We agree and reverse.

The chronology of events is as follows:

—April 20, 1978. Defendant was indicted in Criminal Cause No. 30551 for aggravated assault with firearm enhancement and voluntary manslaughter or, in the alternative, involuntary manslaughter with firearm enhancement.

—Defendant moved to suppress certain evidence upon which No. 30551 was based.

—June 22, 1978. While No. 30551 was pending, a second indictment, No. 30841, was filed which charged defendant with second degree murder, firearm enhancement.

—June 26, 1978. The district attorney filed a *nolle prosequi* in No. 30551.

—July 28, 1978. Defendant's motion to suppress evidence in No. 30551 was granted.

—Defendant's motion to quash No. 30841 was granted because that indictment was filed while No. 30551 was pending, and because the indictment did not reflect the grand jury's true bill.

—August 31, 1978. A third indictment, No. 31151, was filed, charging defendant with an open charge of murder.

—October 12, 1978. Defendant's motion to quash No. 31151 on the grounds that it was based on evidence suppressed as to No. 30551 was granted.

—After an appeal by the State, this Court reinstated the third indictment. *State v. Stevens*, 93 N.M. 434, 601 P.2d 67 (Ct.App.1979).

—January 14, 1980. Defendant's second motion to quash No. 31151 on evidentiary and due process grounds was denied by the trial court. This Court then denied defendant's interlocutory appeal.

—April 22, 1980. Prior to trial, but more than twenty days after arraignment, defendant moved to dismiss No. 31151, contending that reindictment on more serious charges denied him due process. The motion was denied because it was found to be untimely and because the trial court found no vindictiveness on the State's part.

Timeliness

We first address the State's contention that the issue may not be raised because of untimeliness under N.M.R. Crim.P. 33(e) N.M.S.A.1978. If the issue is jurisdictional or an invasion of a fundamental right, it may be raised for the first time on appeal. N.M.R.Crim.App. 308, N.M.S.A. 1978; *State v. Austin*, 80 N.M. 748, 461 P.2d 230 (Ct.App.1969); *State v. Lara*, 88 N.M. 233, 539 P.2d 623 (Ct.App.1975). In the instant case, the fundamental right invaded is the defendant's right to exercise a procedural right without fear of vindictiveness on the part of the prosecutor. *See, Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). Accordingly, we consider the issue of whether the successive indictments deprived defendant of due process of law.

Successive Indictments

Defendant, in his argument to the trial court, stated in part:

> I would state for the court that the grand jury proceedings will show that there were numerous attorneys involved in this case on the side of the prosecution during the course of these proceedings. But on the face of the papers involved in this case, it would appear that the prosecution, at least based on the paper work in elevating the charges in this case, raises the specter of vindictiveness and, under the case law which I have cited in the motion—paragraphs 7, 8, and 9 on pages 2 and 3, the indictment violates the due process clause unless the State can make some showing that there was a new or different witness or something along that line which would obviate the vindictive appearance in this situation.

The State argued that there were five different prosecuting attorneys involved in presenting the case to the grand jury on the successive occasions and that the attorney had no knowledge of why the earlier indictments were sought on lesser charges. The trial court ruled that there was no bad faith and the motion was not timely filed.

In *Blackledge v. Perry, supra*, the Supreme Court held that where the prosecutor reindicts because the defendant has exercised a procedural right and the circumstances show a likelihood of vindictiveness, the burden of proof is on the prosecution to show there was no vindictiveness. In that case, defendant was reindicted on a more serious charge after he had exercised a statutory right to appeal. A similar burden has been imposed in sentencing cases in which the record must reflect the reasons for a heavier sentence imposed by a judge after retrial. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). The Federal Circuit Courts have interpreted *Blackledge* in different ways. *See, Jackson*

v. Walker, 585 F.2d 139 (5th Cir. 1978); *United States v. Andrews*, 612 F.2d 235 (6th Cir. 1979); *United States v. Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976).

We hold that when a defendant exercises a procedural right that results in the need for reindictment and the prosecutor then seeks an indictment on more serious charges a presumption of vindictiveness is raised. The burden of proof is then upon the State to show the new indictment was not a result of vindictiveness. We base our holding on the following two grounds. First, the prosecutor's subjective motivations will almost always be impossible to prove and the only evidence the defendant will have is the fact of reindictment. Second, it is a simple matter for the prosecutor to rebut the presumption by showing that there was another reason for the reindictment, such as new evidence. The State's evidence that different prosecutors handled each case is insufficient. One prosecutor is considered to be aware of information in the hands of another. *State v. Barefield*, 92 N.M. 768, 595 P.2d 406 (Ct.App. 1979).

Here, defendant was indicted for the second time, two months after the first indictment was filed. The State offered no explanation of why the second indictment was on more serious charges. After defendant successfully challenged the second indictment, he was again reindicted on an even more serious charge. Accordingly, we hold there was a presumption of vindictiveness because of the following two factors: 1) exercise of procedural rights by the defendant that resulted in the need to reindict, and 2) a subsequent reindictment on more serious charges. The State has offered no evidence to show any reason for the enhanced successive indictments.

Since the case must be retried, we comment on one other point raised by defendant. It was error to admit testimony regarding defendant dragging another woman by her hair a year prior to the shooting incident involved in this case. The trial court admitted the evidence under N.M.R.Evid. 404(b), N.M.S.A.1978, as showing an absence of accident or mistake. This was error. The incident did not shed any light on defendant's relationship with the deceased, his experience with guns, or an unprovoked tendency toward aggression. This was character evidence and as such was not admissible. N.M.R.Evid. 404(b), *supra*.

Reversed and remanded to be tried under the charges of the first indictment, Criminal Cause No. 30551.

IT IS SO ORDERED.

WALTERS and ANDREWS, JJ., concur.

635 P.2d 311

Beatrice TENORIO, Plaintiff-Appellee,

v.

Elizabeth COHEN, Sanford Cohen and Julia Cohen, Defendants-Appellants.

No. 5177.

Court of Appeals of New Mexico.

Sept. 17, 1981.

Certiorari Denied by Supreme Court Oct. 22, 1981.

John M. Wells, Russell W. Ruud, Ruud & Wells, Albuquerque, for defendants-appellants.

Donald H. Brennan, Albuquerque, for plaintiff-appellee.

OPINION

WOOD, Judge.

We discuss: (1) the ruling that the limitation period was tolled; and (2) the propriety of the interlocutory appeal.

Tolling of Limitation Period

Plaintiff sued defendants for damages allegedly resulting from an automobile accident. The trial court's finding, that the accident occurred on October 13, 1975, is not contested. The complaint was filed October 18, 1978. Defendants claimed the suit was barred by the Statute of Limitations. The applicable limitation period is three years. Section 37–1–8, N.M.S.A.1978.

Plaintiff moved that the trial court determine the number of days that should not be counted in computing whether the limitation period had run.

Section 37–1–9, N.M.S.A.1978, provides that the time a person is absent from the state is not to be included in computing whether the limitation period had run. The trial court ruled that Sanford Cohen was absent from the state 118 days between October 13, 1975, and October 13, 1978, that for 98 of these days Sanford Cohen was in either Venezuela or Mexico and this 98-day presence in foreign countries shall not be included in computing the limitation period. Similarly, the trial court determined that a 52-day period, during which Elizabeth Cohen was in either Venezuela or Mexico, shall not be included in computing the limitation period. The trial court made no ruling as to Julia Cohen.

The issue is the propriety of the ruling tolling the limitation period for 98 days as to Sanford and 52 days as to Elizabeth.

Benally v. Pigman, 78 N.M. 189, 429 P.2d 648 (1967), states "the tolling statute should not be applied if a defendant could be served with process, either actual or substituted, in which event defendant's absence from the state does not toll the running of the Statute of Limitations." *Kennedy v. Lynch*, 85 N.M. 479, 513 P.2d 1261 (1973), states "the plaintiff must show that it is not possible to serve process on the defendant."

Plaintiff did not attempt to serve process on either Sanford or Elizabeth when they were in Venezuela or Mexico; the complaint had not been filed during these absences. As to whether process could have been served, the only showing is that during these absences, their home in Albuquerque was occupied by a non-rent paying house sitter, that the sitter was instructed to contact the Cohens as to anything requiring immediate attention. This showing suggests that the Cohens could have been served under N.M.R.Civ.P. 4(e)(1), N.M.S.A. 1978.

Plaintiff did not meet her burden of showing it was not possible to serve process.

The ruling of the trial court as to tolling the limitation period is erroneous.

Propriety of the Interlocutory Appeal

Defendants' application for an interlocutory appeal posed only the tolling question discussed above. The trial court's order stated that an immediate appeal of the tolling issue "may materially advance the ultimate termination of the litigation." The interlocutory appeal was granted on the basis of these representations, which were false because incomplete.

This Court requested the district court file. N.M.R.Civ.App. 8(c), N.M.S.A.1978. That file reveals two additional issues as to the limitation period—whether defendants had waived the limitation defense or whether defendants were estopped to assert the limitation defense. The file also reveals that these additional issues are matters of fact and that the trial court, expressly, had decided neither of them. If there was either a waiver or an estoppel, the tolling issue would not advance the ultimate termination of the litigation.

■ By failing to disclose that other limitation issues had not been decided, defendants' application presented the appeal in a false light. Similarly, the nondisclosure of these outstanding limitation issues in the trial court's order also resulted in a false perspective as to the appeal. The nondisclosure was a violation of N.M.R.Civ.App. 6(b)(1) and (3), N.M.S.A.1978.

■ Both the bench and bar are cautioned that good faith compliance with N.M.R.Civ.App. 6(b) is required.

The trial court's order, as to tolling, is reversed. The cause is remanded for further proceedings. Defendants are to bear the appellate costs.

IT IS SO ORDERED.

HERNANDEZ, C. J., concurs.

SUTIN, J., dissents.

SUTIN, Judge (dissenting).

I dissent.

This case is a matter of first impression. It involves an application for appeal from an interlocutory order which was filed in this Court pursuant to § 39–3–4, N.M.S.A. 1978.

The majority opinion decided the issue of tolling the limitation period raised in the application absent an order allowing the appeal. I disagree. The application for appeal should have been dismissed. The majority opinion attacked defendants for presenting this appeal in "a false light." I disagree. The trial judge stated that he wanted to prepare this case for appeal, requesting findings of fact and conclusions of law. Defendants submitted requested findings which included one in the form of an interlocutory appeal. The judge adopted it in the interlocutory order.

The chronological events below follow:

On *October 18, 1978*, plaintiff filed a complaint against defendants. It involved an automobile collision alleged to have occurred on *October 22, 1975*, within a statutory 3 year limitation period.

On November 2, 1979, defendants filed a motion for summary judgment. It was based upon the fact that the accident actually occurred on *October 13, 1975*, and was barred. Before the motion was decided, plaintiff filed an amended complaint. It re-alleged the *October 22, 1975*, occurrence, but if not, (1) the statute should be tolled; (2) defendants waived their right to protection; or (3) defendants were estopped from asserting the statutory limitation.

On April 22, 1980, defendants filed an answer in denial and an affirmative defense of the statute of limitations.

On October 24, 1980, plaintiff submitted interrogatories with reference to defendants' residence and absence from the State. On November 25, 1980, answers were filed.

On January 27, 1981, plaintiff filed a motion for an order which would set forth the exact number of days which should not be included in computing the period of limitation.

On February 13, 1981, the trial court entered an order which denied defendants

presentment of an order of dismissal and stated:

> IT IS FURTHER ORDERED that the parties shall be permitted to engage in discovery concerning questions of agreements between the parties, the issues of Waiver of the Statute of Limitations, estoppel as it applies to the Statute of Limitations, and the questions of the tolling of the Statute of Limitations for the purpose of a subsequent evidentiary hearing on this matter.

On March 4, 1981, the court requested findings to prepare this case for an appeal. These findings were presented. Defendants submitted a supplemental finding in the form required for an interlocutory appeal. The trial court made its findings, and on May 15, 1981, entered its order and allowed defendants to file an application for an interlocutory appeal.

On May 22, 1981, defendants filed an application for appeal to this Court. The application erroneously stated that it was an appeal "from an order denying defendants' motion to dismiss plaintiff's complaint on the ground that her action was barred by the three-year statute of limitation." Reference, however, was made to the order of May 15, 1981. The application presented the question whether the applicable statute of limitation should be tolled.

On May 25, 1981, three days after the application had been filed, this Court entered a *conditional* order. It stated that the application had been received and filed. It then stated:

> IT IS ORDERED that permission for an interlocutory appeal is GRANTED *on the following terms and conditions*:
>
> 1. Plaintiff shall file, on or before June 15, 1981, a written memorandum showing cause why this Court should not summarily reverse the district court's order of May 15, 1981.

On June 15, 1981, plaintiff filed a written memorandum. This Court sent for the transcript of the record and discovered that, apart from tolling the limitation period, issues of waiver and estoppel were present. The limitation period was not a controlling question of law. In any event, the interlocutory appeal was not allowed.

Section 39–3–4 provides for an appeal from the district court of an interlocutory order.

Subsection (A) provides that the trial judge state in the interlocutory order that it involved "a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order or decision may materially advance the ultimate termination of the litigation." The trial court complied with this provision.

Subsection (B) provides that "The * * * court of appeals has jurisdiction over an appeal from such an interlocutory order * * *. [A]ny party aggrieved may file with the clerk of the * * * court of appeals *an application for an order allowing an appeal* * * *. *If an application has not been acted upon within twenty days, it shall be deemed denied.*" [Emphasis added.]

When an application is filed in the clerk's office, the aggrieved party seeks an order allowing the appeal and this Court has jurisdiction to make that determination. This Court must act within twenty days to determine whether it will enter "an order allowing * * * [the] appeal." It failed to do so. Before it made the determination, it granted plaintiff 20 days in which to file a written memorandum. No order has yet been entered "allowing an appeal." It may be inferred that this Court allowed the appeal when the opinion was rendered, but more than 20 days having passed, "it shall be deemed denied."

Reversal of the trial court's order did "materially advance the ultimate termination of the litigation" in the sense that "tolling" is no longer an issue in the trial of the case. It is questionable, however, whether this Court retains jurisdiction to decide the appeal when it delays allowance beyond 20 days.

Passing over jurisdiction, Comment, *New Mexico's Analogue to 28 U.S.C. § 1292(b): Interlocutory Appeals come to the State Courts*, 2 N.M.L.Rev. 113, 120 (1972) stated in closing:

> The statute appears to be designed to allow review of those interlocutory district court decisions which might be reversed on appeal, and if reversed, would either terminate litigation or settle a matter which could prolong litigation either by unnecessarily complicating issues to be tried or requiring litigation based on issues that lack legal merit. *Careful application of the statute should minimize the dangers inherent in permitting appellate review of interlocutory orders.* [Emphasis added.]

By making provision for an "order allowing an appeal," § 39–3–4 intended this Court to exercise care in scrutinizing each application. Piecemeal disposition and separate review of the component elements of civil cases do not conserve judicial time and prevent delaying tactics.

It would appear that § 39–3–4 was taken from 28 U.S.C. § 1292(b). It reads in pertinent part:

> When a district judge, in making in a civil action an order * * * shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order * * *.

For a history and review of the application of this rule, see, Comment, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b)*, 88 Harv.L.Rev. 607 (1975); Holtzoff, *Interlocutory Appeals in the Federal Courts*, 47 Georgetown L.J. 474 (1959); Comment, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 Yale L.J. 333 (1959).

No provision is made for allowance of an appeal. This rule "should be sparingly applied. It is to be used only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation and is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation." *Milbert v. Bison Laboratories*, 260 F.2d 431, 433 (3rd Cir. 1958); *Plunkett v. Gill*, 287 A.2d 543 (D.C.Ct.App.1972). "This statute was not intended to authorize interlocutory appeals in ordinary suits for personal injuries or wrongful death that can be tried and disposed of on their merits in a few days." *Kraus v. Board of County Road Commissioners*, 364 F.2d 919, 922 (6th Cir. 1966). *Cardwell v. Chesapeake & Ohio Railway Co.*, 504 F.2d 444 (6th Cir. 1974). "It was neither the intention of Congress, nor has it been the practice of courts, that the statute would apply in those situations where a trial on the merits would be shorter than the time required by this court to determine whether to allow the appeal—much less resolve the issue raised." *Plunkett, supra*, Id. 545.

This Court should not favor interlocutory appeals unless they are "exceptional cases." To do otherwise can cause a flood of such appeals. Presently, issues of waiver and estoppel are before the trial court. It should not enter an interlocutory order unless there are trying circumstances caused by unnecessary and excessive delays. The purpose of the statute is to expedite the disposition of pending cases in the district court. In the exercise of its discretion, the trial court should seek either approval of the order by the parties, or, if not approved, written objections to the order. If the order is entered despite the objections, the objections should accompany the order in an application for appeal filed in this Court. We could then "minimize the dangers inherent in permitting appellate review of interlocutory orders."

The application for an appeal not having been allowed, it should be denied.

635 P.2d 316

Henry V. JOJOLA, Plaintiff-Appellant,

v.

BALDRIDGE LUMBER COMPANY and Ivan Saiz, Defendants-Appellees.

No. 5095.

Court of Appeals of New Mexico.

Sept. 29, 1981.

James A. Thompson, Chris Lucero, Jr., Albuquerque, for plaintiff-appellant.

Leroi Farlow, Stephen M. Simone, Farlow & Bradley, P. A., Albuquerque, for defendants-appellees.

OPINION

SUTIN, Judge.

Plaintiff appeals from a judgment in favor of defendants based upon a jury verdict arising out of a motor vehicle collision on East Menaul Boulevard in Albuquerque. We affirm.

A. *The law of comparative negligence was not applicable.*

This case came on for trial on the morning of December 9, 1980. On the same day, the doctrine of comparative negligence was adopted in New Mexico. *Claymore v. City of Albuquerque* [96 N.M. 682, 634 P.2d 1234 (App.1981)]. The opinion stated that the rule adopted was applicable to "cases in which trial commences after the date on which this opinion becomes final * * *." Certiorari was granted and on February 12, 1981, the Supreme Court adopted *Claymore* in toto. *Scott v. Rizzo* [96 N.M. 682, 634 P.2d 1234 (1981)]. The *Claymore* opinion did not become final until mandate was issued by Supreme Court Rule 20 of the Rules of Appellate Procedure for Civil Cases; *Matter of Miller*, 89 N.M. 547, 555 P.2d 142 (1976); *Woodson v. Lee*, 74 N.M. 227, 392 P.2d 419 (1964).

Claymore was not final on December 9, 1980 and the doctrine of comparative negligence was not applicable that morning.

B. *Permitting defendants' lawyer to ask leading questions when defendant is called as an adverse witness by plaintiff was not abuse of discretion.*

Defendant Saiz, employed by defendant Baldridge Lumber Co., drove the truck that collided with plaintiff. At trial plaintiff called Saiz as an adverse witness and examined him. On cross-examination, over plaintiff's objection, the trial court permitted defendants' lawyer to examine Saiz with some leading questions. Plaintiff claims prejudicial error. We disagree.

The subject of our review is a claimed abuse of discretion. The best definitions of the "exercise of discretion" and "abuse of discretion" were quoted by Chief Judge Spiess in *State v. Hargrove*, 81 N.M. 145, 464 P.2d 564 (Ct.App.1970). An "abuse of discretion" was defined as follows:

> "[A]n abuse of discretion is an erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn from such facts and circumstances. While it may amount to an axiom to say that difference in judicial opinion is not synonymous with abuse of judicial discretion, it yet remains true that the latter signifies that a ruling or decision has been made that is clearly untenable. * * * It is really a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence."

We cannot say that the rulings of the court upon the cross-examination of Saiz by his attorney were clearly untenable and clearly against reason and our rules of evidence.

Rule 611(c) of the Rules of Evidence reads:

> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. *Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse* party or a *witness identified with an adverse party, interrogation may be by leading questions.* [Emphasis added.]

The last sentence emphasized allowed plaintiff to call Saiz as an adverse party and to cross-examine him with leading questions. It omits any reference to defendants' subsequent examination of Saiz. The first sentence emphasized permits parties "ordinarily" to cross-examine witnesses with leading questions.

> 3 Weinstein's Evidence, 611–10, 11 says: The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the "cross-examination" of a party by his own counsel after being called by the opponent (savoring more of re-direct) * *.

By this statement is meant that the trial court may, in its discretion, sustain objections to leading questions asked by a lawyer on cross-examination of a hostile witness or his client called as a hostile witness or adverse party by the opponent. This rule falls within the ambit of Rule 611(a) which provides that:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence * * *.

3 Weinstein's Evidence, 611–57 closes the door on reversal in the instant case. It says:

> Although not explicitly stated, the rule implies what has in fact long been the case—that the matter falls within the area of trial court discretion, and that reversals on the basis of non-compliance with Rule 611(c) will be exceedingly rare.

Morvant v. Const. Aggregates Corp., 570 F.2d 626, 635 (6th Cir. 1978) says:

It was not error for the trial court to permit the defense to use leading questions when cross-examining its own employees, who had been called by plaintiff on direct examination as part of her case-in-chief. While Federal Rule of Evidence 611(c) permits the use of leading questions when a party calls a witness identified with an adverse party, there is no complementary provision requiring such a witness to be cross-examined without the use of leading questions by the party to whom that witness is friendly. This matter is within the court's traditional discretion to control the mode of interrogation. We find no abuse in this case.

Under Rule 611(c), whether to permit counsel to interrogate witnesses with leading questions is wholly within the district court's discretion. *Morvant, supra; Riverside Ins. Co. of America v. Smith*, 628 F.2d 1002 (7th Cir. 1980); *Mitchell v. United States*, 213 F.2d 951 (9th Cir. 1954).

It is important to note that if the trial court is incorrect in its ruling, the record must demonstrate that the party was so prejudiced by the district court's ruling as to justify reversal. *United States v. O'Brien*, 618 F.2d 1234 (7th Cir. 1980); *Perkins v. Volkswagen of America, Inc.*, 596 F.2d 681 (5th Cir. 1979); *Nottingham Village, Inc. v. Baltimore County*, 266 Md. 339, 292 A.2d 680 (1972); *In re Rogan's Estate*, 404 Pa. 205, 171 A.2d 177 (1961); *McClard v. United States*, 386 F.2d 495 (8th Cir. 1967).

For definitions of what are "leading questions," see *State v. Weese*, 424 A.2d 705 (Me.1981); *Porter v. State*, 386 So.2d 1209 (Fla.Dist.Ct.App.1980). To arrive at a conclusion that the question asked was leading, variable factors must be considered. For this reason, we turn to *Mitchell, supra*, which explains why we should respect the rulings of the trial court. *Mitchell* said:

> The object of examination is to get the facts. Whether direct or cross-questions best serve that end depends upon circumstances. The trial judge is in a better position than is this Court to determine

the precise point at which the asking of leading questions should be brought to a halt. He sees the witness and hears the testimony, and thus has a better opportunity to assess the true situation existing at any given posture of the case, than can we from the cold record. The discretion of an experienced trial judge in this, as in other respects, should not be lightly disregarded. [Id. 956.]

Plaintiff relies on *In re Rogan's Estate, supra.* In this case, the Supreme Court of Pennsylvania held a prejudicial abuse of discretion by the trial judge in permitting a lawyer to introduce his client's defense through leading questions directed to one of the defendants who had been called as a witness by the estate of decedent. If we correctly read this opinion, it held that, in cross-examination, the lawyer for defendant went beyond the perimeter of the Estate's cross-examination in order to establish a defense. Omitting the citation of authorities, the court said:

The question follows, if a party is called by his opponent as for cross-examination, what further examination of such witness may his own counsel then pursue? The cases hold that, as a general rule, the witness may be examined as to anything legitimately growing out of or related to matters inquired about in his cross-examination by the other party. He may be re-examined as to all matters tending to explain or qualify the testimony already given. However, it has been held that it is proper for the trial court to deny the witness' counsel permission to examine him at this stage *as to matters designed to introduce his main defense.* In fact, it is well established that a defendant should never be permitted to put in his defense under cover of cross-examination * * *. *"[T]o permit a party to lead out new matter, constituting his own case, under the guise of a cross-examination, is disorderly and often unfair to the* opposite party * * *." [Emphasis added.] [Id., 171 A.2d 180–181.]

Analyzation shows that, on subsequent cross-examination of a client, the court should not permit a lawyer to put "yes" answers in the mouth of a client, to establish her right to a gift *inter-vivos* when prior cross-examination by an opposing lawyer did not introduce testimony to the contrary. This type of cross-examination constitutes prejudicial abuse of discretion. Whether this rule is applicable in tort claims as distinguished from estate claims is a matter of conjecture. In vehicular collision cases, cross-examination of parties and hostile witnesses by opposing lawyers involve crucial issues of negligence and contributory negligence, principles of broad connotation. It may be difficult for a trial judge to determine whether subsequent cross-examination by the party's lawyer overstepped the bounds of propriety. This occurs when the lawyer presents new matter constituting his party's own case.

■ On appeal, the cross-examination of opposing lawyers must be carefully scanned and every doubt resolved in favor of the ruling made by the trial court. Prejudicial error should not be declared unless doubt disappears and the ruling of the court is clearly untenable.

Any benefits received by calling hostile witnesses to the stand in tort claims, especially so after they are deposed, are balanced by the risks taken when cross-examined by the witnesses' lawyer and subject to the broad discretion granted the trial judge.

■ A discussion of abuse of discretion for allowance of some leading questions asked by Saiz' lawyer and answered by Saiz is needless. Plaintiff does not point to any series of questions asked which put the "yes" answers in Saiz' mouth pertaining to negligence or contributory negligence. They pertained to introductory matters and matters on which there was no controversy. Nevertheless, we have scanned the cross-examinations of Saiz by opposing lawyers, the objections made by plaintiff's lawyers and the rulings of the court. We hold that the trial court did not act beyond the bounds of reason.

C. *The trial court's instructions were not erroneous.*

Plaintiff objected to two U.J.I. instructions, one on "proper lookout" and the other on a statutory violation. These instructions were applicable and not erroneous.

D. *Use of "collateral source" was not erroneous.*

Plaintiff claims the trial court erred in allowing defendants to bring to the attention of the jury that plaintiff had received workmen's compensation benefits.

During the direct examination of plaintiff, it was determined that plaintiff was destitute; that he "didn't have no money and didn't have no food at the house, no lights and no nothing in the house"; that the doctors who treated him were not officed close to his home. Over objection the trial court allowed defendants to inquire to the extent of the medical bills paid. On cross-examination, plaintiff testified that his doctor bills were paid by his "employer's workmen's compensation."

The "collateral source" doctrine is a general law of damages. Under the "collateral source" rule, as applied here a wrongdoer may not set up in mitigation or reduction of damages that the party seeking damages has been wholly or partially compensated by insurance, where such insurance was not procured by the wrongdoer. *Martinez v. Knowlton*, 88 N.M. 42, 536 P.2d 1098 (Ct.App.1975); *Selgado v. Commercial Warehouse Company*, 86 N.M. 633, 526 P.2d 430 (Ct.App.1974); *Trujillo v. Chavez*, 76 N.M. 703, 417 P.2d 893 (1966).

The evidence allowed was not erroneous for several reasons: (1) no amount of compensation was named that was paid plaintiff for doctor bills; (2) the jury did not get to the issue of damages because it rendered a verdict for defendants, *Rice v. Shenk*, 293 Pa. 524, 143 A. 231 (1928); (3) it is not erroneous when used to test the credibility of a plaintiff who claims that he had fallen behind in his bills and wanted to catch up on them and support his family, *Gladden v. P. Henderson & Co.*, 385 F.2d 480 (3d Cir. 1967); *Garfield v. Russell*, 251 Cal.App.2d 275, 59 Cal.Rptr. 379 (1967); or (4) where defendant seeks to impeach plaintiff who testified that he went back to work because he needed money for support of his family, *Hack v. State Farm Mutual Automobile Ins. Co.*, 37 Wis.2d 1, 154 N.W.2d 320 (1967).

We find no error in admission of the "collateral source" evidence.

Affirmed. Plaintiff shall pay the costs of this appeal.

IT IS SO ORDERED.

DONNELLY, J., concurs.

HENDLEY, J., concurs in result on Issue B.

635 P.2d 320

Felix R. ROMO, Plaintiff-Appellant,

v.

RATON COCA COLA COMPANY, Employer, and Mountain States Mutual Casualty Company, Insurer, Defendants-Appellees.

No. 5078.

Court of Appeals of New Mexico.

Oct. 22, 1981.

Bruce P. Moore, Santa Fe, for plaintiff-appellant.

James E. Snead, James G. Whitley, Jones, Gallegos, Snead & Wertheim, P. A., Santa Fe, for defendants-appellees.

OPINION

SUTIN, Judge.

This is a workmen's compensation case. Plaintiff appeals from a judgment that awarded plaintiff weekly benefits based upon 20% permanent partial disability. We affirm with a minor modification.

In its decision, the trial court concluded:

* * * * * *

3. The Plaintiff should be awarded weekly benefits under the Workmen's Compensation Act for a 20% permanent partial disability entitling him to $19.59 per week from March 23, 1976.

The parties treat this conclusion as a finding of fact. Plaintiff argues that, insofar as it is based on physical factors, this finding is supported by substantial evidence. But based upon psychological factors, or a combination of physical and psychological factors, plaintiff claims he suffered total, permanent disability.

Plaintiff sets forth many pages of facts most favorable to his position. We have stated innumerable times that, to determine whether a trial court's findings are sustained by substantial evidence, an appellant must set forth all of the evidence, including that most favorable to appellee. Rarely do we find "all of the evidence" rule complied with.

We repeat again what was said in *Perez v. Intern. Minerals & Chemical Corp.*, 95 N.M. 628, 624 P.2d 1025 (Ct.App.1981). The trial court, not this Court, has the final say about the facts presented by the parties. The facts are determined by what the court sees and hears, from the gestures and other conduct of the testifying witnesses as well as their words. What the court thinks about the facts is all that matters. Rarely should an appeal be taken based upon a lack of substantial evidence to support the findings. We reiterate and emphasize what has been said, to avoid useless appeals in workmen's compensation cases based upon the substantial evidence rule. A workman or employer must convince the trial court, not this Court, that the evidence presented supports the claim or defense. We read from a cold record.

It is unnecessary to recite any of the testimony of plaintiff or that of the medical witnesses. We agree with defendants that plaintiff's credibility was so suspect as to cast considerable doubt as to the cause of his disability with reference to each alleged injury and the extent of his disability; that none of the medical witnesses could apportion the disability of plaintiff between the first and second injuries allegedly sustained by him and that expert medical testimony was contradictory in many important respects.

It has often been said that medical testimony, like other expert testimony, is intended to aid but not to conclude the trier of facts in determining the extent of disability. The trial court may properly reject all percentage opinions and arrive at a different percentage as long as it is supported by substantial evidence. *Lucero v. Los Alamos Constructors, Inc.*, 79 N.M. 789, 450 P.2d 198 (Ct.App.1969).

We affirm the finding that plaintiff suffered a 20% permanent partial disability.

However, the trial court mistakenly fixed the weekly payment at $19.59 per week instead of $20.00, a difference of $0.41. Neither of the parties called this error to the attention of the trial court. The difference of $0.41 per week appears to be de minimus to the employer, but it is not to the workman. By concluding that the error was that of the court and not the parties, plaintiff is entitled to the additional payment without interest. The First Amended Judgment is amended again to increase plaintiff's weekly award from $19.59 to $20.00, effective as of February 18, 1981, the date of entry of the First Amended Judgment.

The next point raised by plaintiff claims error on the part of the district court in not awarding plaintiff temporary total disability benefits in its First Amended Judgment. Plaintiff is mistaken.

On November 29, 1979, an original judgment was entered in this case. A portion of the judgment awarded plaintiff weekly benefits "for temporary total disability for a period of ninety (90) days, beginning March 23, 1976 * * *." Plaintiff appealed. This Court filed a Memorandum Opinion in which the appeal was dismissed and the case remanded to the trial court. It was done because of two inconsistent findings—one of total disability and one of 20% disability—and this Court was unable to re-

solve the inconsistency. This cause was remanded to the district court to resolve the inconsistency "as to plaintiff's disability" without taking additional evidence.

On remand, the district court filed a First Amended Decision and First Amended Judgment in which all reference to temporary total disability for a period of 90 days was omitted and plaintiff was awarded 20% permanent partial disability. Since the record discloses substantial evidence to support the trial court's findings, we affirm.

"The district court has only such jurisdiction as the opinion and mandate of the appellate court specifies." *Genuine Parts Co. v. Garcia*, 92 N.M. 57, 60, 582 P.2d 1270 (1978). Plaintiff argues that "the Memorandum Opinion and mandate did not authorize, even by implication, the district court to remove the award of 90 days total disability benefits from its First Amended Judgment." We disagree. This Court's opinion and mandate which authorized the district court to resolve the inconsistencies "as to plaintiff's disability" was broad enough to include the trial court's deletion of the award of temporary total disability benefits.

Plaintiff also argues that the award of temporary total disability benefits is the law of the case and may not be deleted on subsequent remand proceedings. Reliance is had on *Royal Intern. Optical v. Texas State Optical*, 92 N.M. 237, 586 P.2d 318 (Ct.App.1978). Plaintiff is mistaken. The "law of the case" doctrine applies when the prior judgment is affirmed on appeal. In the instant case the prior judgment was not affirmed on appeal. It was remanded to the district court to resolve the inconsistency as to plaintiff's disability. The "law of the case" had not been finally determined and the doctrine is not applicable.

Finally, plaintiff complains of attorney fees allowed in the trial of the case. The claim has no merit.

Subsequent to the appeal, plaintiff instituted proceedings in this Court which were resolved in favor of plaintiff. The chronology of events leading up to these proceedings are as follows:

(1) On March 21, 1980, the trial court quashed a writ of execution issued on behalf of plaintiff and stayed execution during the pendency of a prior appeal to this Court. We refused to overturn the order in our August 26, 1981 decision in Cause No. 4629.

(2) On February 18, 1981, the First Amended Judgment was filed.

(3) On March 9, 1981, plaintiff's Notice of Appeal was filed.

(4) On July 8, 1981, plaintiff again filed a motion to vacate the stay of execution.

(5) On August 14, 1981, an erroneous Order was entered by the trial court. It intended to order "that the motion to [vacate] stay [of] execution filed herein by plaintiff be, and it hereby is, denied in its entirety."

(6) On August 17, 1981, plaintiff filed a motion in this Court to review the Order which denied plaintiff's motion to vacate the stay of execution.

(7) On August 24, 1981, this Court entered an Order that each stay of execution heretofore issued by the district court be vacated. The reasons were that plaintiff had received no payment of compensation for about 5½ years; that regardless of the outcome of this appeal, plaintiff was entitled to payment from March 23, 1976, as per Order of the court, together with an attorney fee, both sums to include payment of interest in the amount fixed by law. Defendants were allowed 5 days after receipt of this Order in which to make such payments, failing which, execution should issue.

(8) On August 26, 1981, plaintiff filed a motion for an allowance of attorney fees for services rendered in this Court for securing the vacation of the stays of execution with a brief in support thereof.

(9) On August 28, 1981, defendants filed a response and brief in support thereof that plaintiff's motion for attorney's fee be denied.

(10) On August 31, 1981, plaintiff filed a motion for clarification of this Court's Order of August 24, 1981, with reference to

when the interest on both sums would begin. A dispute existed between the parties.

(11) On September 4, 1981, defendants filed a response, and

(12) On September 4, 1981, an Order of this Court was entered fixing the date that interest would begin and end, and also ordered that plaintiff's motion for allowance of an attorney fee would await disposition of plaintiff's appeal on the merits.

An allowance of attorney fees for this type of additional services rendered in an appeal is a matter of first impression. If by conduct prior to an appeal, an employer causes additional legal services to be rendered in an appeal, separate and apart from the appeal itself, and the additional services rendered benefit the workman, the workman is entitled to an attorney fee for additional services rendered.

Mann v. Board of County Commissioners, 58 N.M. 626, 274 P.2d 145 (1954) was an appeal by plaintiff from an award in a workmen's compensation case. The Supreme Court found the judgment erroneous in one particular against defendants and in another against plaintiff. Each gained and each lost in certain particulars. *Mann* held that the trial court erred in directing payments of $30.00 per week for 160 weeks instead of providing that plaintiff should receive $8.70 per week not to exceed 550 weeks. Plaintiff requested an attorney fee in the appeal. The court said:

> Then what is the proper solution in an application for attorney's fees under the circumstances? It is our view that the statute controlling the matter * * * does not confine us in awarding a plaintiff additional attorney's fees for services of his attorneys in this court to instances where those services produce increased compensation. *Other rights, sometimes of equal importance, may be determined in his favor by virtue of the appeal. For services in securing these rights to him, we may allow an additional attorney's fee * * * under the peculiar circumstances here present * * *.* [Id. 633, 274 P.2d 145.]

In other words, in an appeal, a workman has the right to seek an increase in compensation payments and if successful, he is entitled to payment of a reasonable attorney fee. This is not a workman's only right. Of equal importance, a workman has the right to seek a determination of payment by the employer of past compensation benefits ordered to be paid by the trial court but withheld by the employer without just cause and excuse. No explanation appears of record to explain why payment was withheld when plaintiff's appeal could not effect a reduction in the amount due and owing. An employer is not entitled to the retention of the funds for its own benefit and use to the detriment of a workman and his family. This concept reflects, in an additional way, the spirit of the Workmen's Compensation Act. For legal services rendered in the appeal which affirmatively determined plaintiff's right to payment of past compensation benefits and attorney fees, plaintiff is entitled to an additional attorney fee.

Defendants did not seek to meet the challenge of *Mann, supra.* They claim plaintiff *must* obtain an increase of benefits and cite *Genuine Parts Co., supra; Escobedo v. Agriculture Products Co., Inc.*, 86 N.M. 466, 525 P.2d 393 (Ct.App.1974), and *Willcox v. United Nuclear Homestake Sapin Co.*, 83 N.M. 73, 488 P.2d 123 (Ct.App.1971). None of these cases are "must" cases.

Genuine Parts Co. said that recovery of compensation was a prerequisite to allowance of attorney fees. This simply means that one requirement necessary to receive an attorney fee is recovery of compensation. It is not the sole requirement.

Escobedo denied plaintiff an attorney fee because his success on appeal did not increase his compensation, but plaintiff was awarded an attorney fee in matters that resulted in a "financial benefit." Here, again, increase in compensation was not the only right a workman had to warrant an attorney fee. Plaintiff successfully upset the requirement that he pay for a second deposition and upset the limitation upon payment of the attorney fees awarded by

the trial court. For this "financial benefit," plaintiff was awarded a $1,500.00 attorney fee. The "financial benefit" principle is related in an equitable fashion with recovery from an employer of past compensation benefits.

Willcox also established the principle stated in *Mann* that a workman has a basis other than those of increased compensation to obtain an attorney fee. Plaintiff who received no additional compensation on appeal was not entitled to an attorney fee for the appeal but was entitled to an attorney fee for successfully defending a cross-appeal.

The amounts paid by the employer for past compensation and attorney fees with interest, together with work performed in securing a favorable determination, mandates payment by the employer to plaintiff of an additional attorney fee of $1,000.00, together with interest thereon at the rate of 10% per annum from August 24, 1981, the date the Order was entered in which stays of execution were vacated.

The judgment of the trial court is affirmed. Plaintiff is awarded an attorney fee of $1,000.00 for services performed in proceedings initiated in this Court on the execution issue but is denied an attorney fee for the appeal taken. This case is remanded to the district court to modify its judgment by substituting $20.00 per week for $19.59.

IT IS SO ORDERED.

HENDLEY and WALTERS, JJ., concur.

635 P.2d 580

James E. LUJAN and Terri Lynn Lujan, his wife, Plaintiffs-Appellees and Cross-Appellants,

v.

PENDARIES PROPERTIES, INC., a New Mexico Corporation, et al., Defendants-Appellees and Cross-Appellees.

PPI, INC., formerly known as Pendaries Properties, Inc., a New Mexico Corporation, Plaintiff-Appellee and Cross-Appellee,

v.

FIRST NATIONAL BANK OF SANTA FE, and C. D. Leon and Donna Leon, Defendants-Appellants and Cross-Appellees.

No. 12995.

Supreme Court of New Mexico.

Oct. 7, 1981.

Rehearing Denied Nov. 2, 1981.

Sommer, Lawler, Scheuer & Simons, Joseph A. Sommer, Santa Fe, for defendants-appellants and cross-appellees.

Solomon, Roth & VanAmberg, F. Joel Roth, Santa Fe, for plaintiffs-appellees and cross-appellants.

Michael L. Gregory, Las Vegas, Robert P. Beckham, Los Angeles, Cal., for plaintiff-appellees and cross-appellee.

OPINION

RIORDAN, Justice.

Plaintiffs, James and Terri Lynn Lujan (Lujan), filed an action for specific performance of a real estate contract, damages for loss of benefit of bargain, failure of consideration, loss of income, mental anguish, and punitive damages against defendants, PPI, Inc., formerly known as Pendaries Properties, Inc., (PPI), C.D. and Donna Leon (Leon), Ten Rociada Corporation (Rociada), and Diversified Mortgage Investors Inc. (DMI). Lujan also sought to rescind the portion of the real estate contract concerning reconveyance of certain water rights. Prior to the trial on the merits, defendants Rociada and DMI were dismissed by way of summary judgment. This case was consolidated for trial with PPI's action seeking damages and specific performance of obligations from defendants First National Bank of Santa Fe, and Leon.

The trial court entered judgment in favor of First National Bank of Santa Fe, awarded Lujan $4,160.00 against PPI and Leon for loss of the benefit of the bargain, and ordered PPI to convey the property in question to Lujan subject to certain covenants, conditions and restrictions upon payment by Lujan of the sum owing under the contract. The court also awarded Lujan $10,000.00 punitive damages against Leon.

Lujan appeals from that portion of the judgment which subjects the property to covenants, conditions and restrictions. Leon appeals the award of $4,160.00 compensatory damages and $10,000.00 punitive damages. We reverse as to punitive damages and affirm as to all other issues.

The issues on appeal are:

I. Whether the trial court erred in awarding $4,160.00 for loss of benefit of bargain;

II. Whether the evidence warranted the award of $10,000.00 punitive damages; and

III. Whether the trial court erred in finding the January 14, 1975 purchase agreement and supplement with its covenants, conditions and restrictions to be the operative agreement between PPI and Lujan.

In June 1972, PPI purchased a sub-division known as Pendaries Village from Leon to develop a recreational community.

The court found that PPI assured Leon that it would continue to develop Pendaries Village and construct certain amenities for the project, including the creation of an equestrian area offering both boarding and riding privileges to potential lot buyers and current property owners at Pendaries Village. PPI intended to develop and revitalize an approximately five-acre parcel, containing then run-down and poorly maintained barns, shed, and corrals, to create the equestrian unit.

On December 27, 1972, Lujan, then a salesman for PPI at Pendaries Village, purchased from PPI the five-acre equestrian area under an installment land sales contract. The agreement provided for the delivery of a deed to Lujan upon payment of the entire contract price. To insure that an adequate equestrian unit was developed on the five acres, PPI agreed to construct and did construct $23,000.00 of improvements on the property. Lujan agreed to restrict the property's future use to the operation of an equestrian unit for the benefit of prospective buyers and property owners at Pendaries Village, and agreed to provide horses for that purpose.

On September 26, 1973, PPI granted Lujan an option to purchase a 14.45 acre parcel adjacent to the five-acre equestrian area for $27,500.00.

On July 10, 1974, Lujan and PPI agreed through correspondence that Lujan would

sell the equity in 19 lots in Pendaries Village, which he was purchasing, to PPI for, the following considerations, among others;

(a) A thirty-acre parcel of land at Pendaries Village known as the "alfalfa patch", and

(b) Water rights to the "alfalfa patch".

On July 18, 1974, PPI and Lujan, by supplement to the July 10, 1974 letter agreement, agreed to substitute a four-inch water line to the "alfalfa patch" to be constructed by PPI in lieu of PPI's conveying the water rights to said parcel. Lujan received all consideration promised in the July 10, 1974 agreement, as amended on July 18, 1974, except the four-inch water line.

On December 19, 1974, PPI and Lujan executed a memorandum of understanding. In return for a release by Lujan of PPI's obligation to construct the four-inch water line, PPI agreed to pay Lujan $1,500.00 for the purpose of drilling a well on the "alfalfa patch". PPI further agreed to sell Lujan the 14.45 acre parcel adjacent to the equestrian area, on which he had an option, for $1,000 per acre rather than the option price of $27,500.00. The parties agreed that PPI would prepare and forward a more definitive agreement to cover the memorandum of understanding.

Lujan and PPI met again on January 14, 1975. Lujan then requested further consideration for his release of PPI's obligation to provide water for the "alfalfa patch". PPI agreed to sell Lujan the five-acre equestrian area and the 14.45 acres for a total of $41,742.72, the previous price for the equestrian area alone. Lujan and PPI executed a real estate purchase agreement, together with supplement, superceding the parties' memorandum of understanding. PPI also delivered to Lujan the $1,500.00 check for the purpose of drilling a well on the "alfalfa patch" as previously agreed. To effect the agreement, Lujan executed a separate release relieving PPI of its obligation to construct the four-inch water line to the "alfalfa patch", and releasing Lujan's claims for water rights.

PPI assigned its interest in the real estate purchase agreement to DMI. In May 1976, the balance due DMI for the land in question was $41,600.20. DMI agreed to give Lujan a 10% discount if he paid the contract off in full. The trial court found that in reliance upon DMI's offer, Lujan, on or about May 27, 1976, tendered to DMI the discounted price whereupon DMI forwarded a warranty deed to the escrow agent. Demand was then made on the trustee, First National Bank of Santa Fe, under the Leon-PPI deed of trust to release the property from the lien imposed by the deed of trust. Upon instructions from Leon, the trustee refused to grant a release and as a result Lujan was unable to take advantage of the 10% discount ($4,160.00) offered by DMI.

I. *Loss of Benefit of Bargain*

Whether the trial court erred in awarding Lujan compensatory damages against Leon and PPI depends in part upon the interpretation of the deed of trust between Leon and PPI. Paragraph four of the deed of trust limits the property PPI may subdivide and sell until substantially all of certain lots are developed and sold. Paragraph six, however, allows PPI to obtain a release from the lien on property in order to construct amenities or other improvements.

Leon claims his refusal to release the property to Lujan was justified under paragraph four of the deed to protect his security and prevent the premature development of the more desirable land. He also asserts that he was not required to grant a release under the exception of paragraph six. Leon argues that the release was not being sought for the purpose of the construction of an equestrian amenity since such facilities already existed when he sold the property.

As evidence of this, Leon points out that when the property was sold, an agreement of purchase and sale was signed which required PPI to complete certain amenities within a period of three years from the date of closing. The equestrian unit was not one of the amenities listed in the agreement.

However, the trial court found that when PPI purchased the property from Leon, it assured Leon that it would continue to develop Pendaries Village and construct amenities for the project, including an equestrian area offering both boarding and riding privileges to potential lot buyers and current property owners at Pendaries Village. To insure that an equestrian unit was developed, PPI constructed improvements worth $23,000. The court further found that the 19.45 acres had been used to create an amenity and should have been released from the deed of trust.

On appeal, this Court will view the evidence in a light most favorable to support the findings and conclusions of the trial court. We will not reverse unless convinced that the findings and conclusions cannot be sustained either by evidence or permissable inferences therefrom. *Lewis v. Barber's Super Markets, Inc.*, 72 N.M. 402, 384 P.2d 470, (1963). We do not weigh conflicting evidence nor determine the credibility of witnesses. *Worthey v. Sedillo Title Guaranty Inc.*, 85 N.M. 339, 512 P.2d 667 (1973).

After reviewing the transcript, we find substantial evidence to support the findings and conclusions of the trial court that Leon was required to grant a release under the provisions of the deed of trust. Neither the purchase and sale agreement nor the deed of trust limit the amenities which PPI could construct. Although the equestrian unit was not one of the amenities required to be completed by the agreement and although some facilities at the equestrian area were in existence at the time Leon originally sold the property, there is evidence to show that the expansion, construction and improvements were necessary to develop the equestrian unit into the type of amenity needed at Pendaries Village. PPI complied with the provisions of the deed of trust and was therefore entitled to a release.

Leon and PPI also claim that Lujan was not entitled to compensatory damages because he could not have taken advantage of the discount for early payment even if he had obtained the release. When Lujan demanded performance under the January 14, 1975 agreement, he submitted a conditional loan commitment letter from the First Federal Savings and Loan Association of Las Vegas, New Mexico (First Federal) for $50,000.00. Both Leon and PPI point out that when the loan commitment letter was issued, First Federal was unaware of the subdivision and use restrictions on the property. First Federal's president testified that he would not have committed the loan had he known of the restrictions. Therefore, Leon and PPI argue, the loan would ultimately not have been made, and Lujan could not have taken advantage of the discount. We find this argument to be irrelevant in light of the fact that the loan commitment was made.

The loan commitment letter conditioned the loan payment upon Lujan's satisfying the requirements of a title binder which accompanied the commitment letter. The title binder required a release of the property from the lien of the original deed of trust and required that a warranty deed be provided. The title binder does not require the warranty deed to be free of restrictions. The court found, and it is substantiated by the evidence, that a warranty deed was provided. The requirements of the loan commitment letter were met except for the release from the deed of trust. Therefore, Leon and PPI are liable for compensatory damages.

II. *Punitive Damage*

Punitive damages may be awarded only when the conduct of the wrongdoer may be said to be maliciously intentional, fraudulent or oppressive, or committed recklessly or with a wanton disregard of the rights of the plaintiff. *Loucks v. Albuquerque National Bank*, 76 N.M. 735, 418 P.2d 191 (1966).

Although we do not agree with Leon's interpretation of the interrelationship of paragraphs four and six of the deed of trust, or that adequate equestrian facilities existed at the time of sale, we hold that

Leon's conduct does not justify the award of punitive damages.

It is uncontradicted that Leon acted on advice of counsel. The position which Leon took was not without some justification. It is clear that he believed the equestrian amenity was in existence at the time he sold the property. He was also of the belief that he was not required by the deed of trust to grant the release. Moreover, Leon showed that he was of this belief prior to the time that PPI sought a release of lien on the 19.45 acres. The other evidence cited to support the trial court's award of punitive damages is insufficient to show that Leon's actions were done "arbitrarily, willfully, and capriciously" as found by the trial court. Therefore, the award of punitive damages must be reversed.

III. *Covenants and Restrictions*

Lujan claims that the evidence presented at trial does not support the court's conclusion that the property was conveyed subject to the conditions and covenants of record. We do not agree.

The covenants and restrictions were part of the supplement to the January 14, 1975 real estate purchase agreement. Lujan claims that he never agreed to the restrictions, as evidenced by his refusal to sign the supplement. Although Lujan's signature does not appear on the copy of the supplement presented to the court, Lujan did sign the real estate purchase agreement which stated: "See Supplement attached hereto for additional provisions." Lujan also initialed various parts of the supplement where changes were made. The memorandum of understanding which Lujan executed previously set forth substantially the same provisions contained in the supplement to which Lujan now objects. On June 9, 1976, Lujan, through his attorney, demanded that PPI perform under the January 14, 1975 agreement.

We hold that the evidence supports the finding that on January 14, 1975, Lujan and PPI executed the real estate purchase agreement, together with supplement, and that the agreement superceded all previous agreements. Therefore, the conclusion that the land should be conveyed subject to the conditions and covenants of record is affirmed.

This cause is remanded to the trial court for entry of an appropriate judgment consistent with this opinion.

IT IS SO ORDERED.

EASLEY, C. J., and PAYNE, J., concur.

635 P.2d 584

James MATSU, Adolph Sanchez, Arturo Cordova and Roland R. Sanchez, Plaintiffs-Appellees,

v.

Pablo CHAVEZ, Manuelita Chavez, husband and wife, and Ramon Chavez, Defendants-Appellants,

and

Raoul Cordova and Dolores Cordova, husband and wife, Third Party Defendants-Appellees.

No. 13487.

Supreme Court of New Mexico.

Oct. 27, 1981.

Robert N. Singer, Deborah S. Seligman, Albuquerque, for defendants-appellants.

Reggie C. Chavez, Belen, for plaintiffs-appellees.

OPINION

RIORDAN, Justice.

The plaintiffs are surrounding landowners to the defendant's (Chavez) property who travel on a road (Enrique Road) located on Chavez' land. As a result of Chavez closing the road, this action was brought by the plaintiffs who claim they have a prescriptive easement over Enrique Road.

The issues on appeal are:

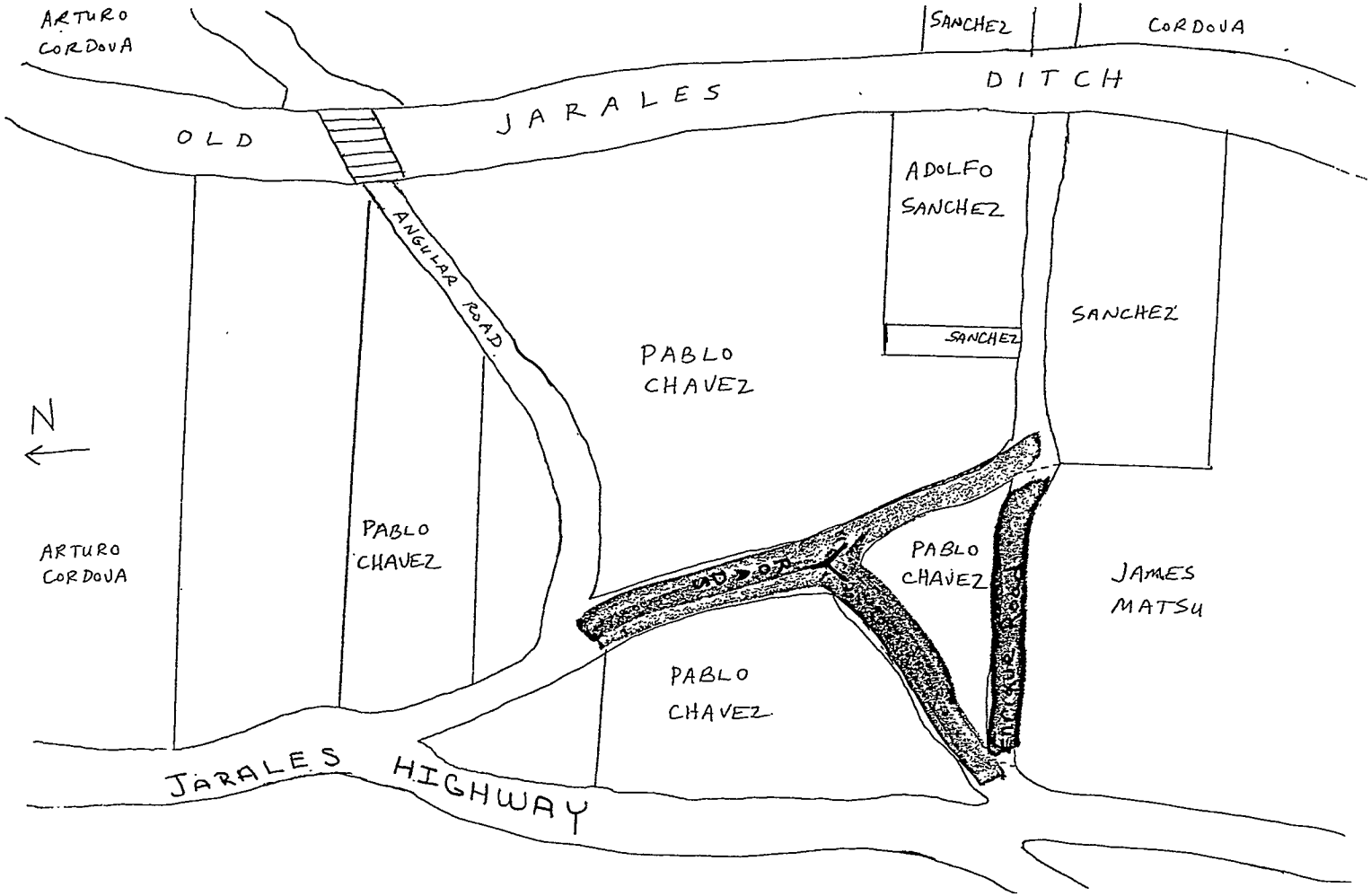
1. Whether the plaintiffs are collaterally estopped from asserting that Enrique Road is subject to a prescriptive easement.

2. Whether the trial court erred in determining that a prescriptive easement existed upon Enrique Road.

3. Whether the trial court erred in determining the extent of the prescriptive easement.

We affirm in part and reverse in part.

Chavez owns 28.37 acres in Valencia County. Along the southern border of his property is a 500 foot strip of land, known as Enrique Road. It runs east and west between two county roads, known as the "Y" roads. The location of the various properties and roads are shown in the following diagram.


ARTURO CORDOVA
SANCHEZ
CORDOVA
OLD
JARALES
DITCH
ADOLFO SANCHEZ
SANCHEZ
SANCHEZ
ANGULAR ROAD
PABLO CHAVEZ
N
ARTURO CORDOVA
PABLO CHAVEZ
PABLO CHAVEZ
JAMES MATSU
PABLO CHAVEZ
JARALES HIGHWAY

[redacted]

COLLATERAL ESTOPPEL

In 1969, Chavez sued to quiet title to the "Y" roads. The trial court declared that the "Y" roads were the private property of Chavez and could be closed by him. However, the court conditioned its closing of the county roads upon Chavez establishing two right-of-way easements, Enrique and Angular Roads. The defendants appealed the decision to this Supreme Court. In *Chavez v. County of Valencia*, 86 N.M. 205, 521 P.2d 1154 (1974), we held that the trial court lacked subject matter jurisdiction to determine whether the "Y" roads could become private roads, because jurisdiction to declare a county road vacated, was in the County Commission. Therefore, the trial court's decision was void.

Chavez asserts that because the plaintiffs in this suit were the defendants in the 1969 suit, they are now collaterally estopped from asserting a prescriptive easement over Enrique Road. Chavez argues that since the trial court conditioned its judgment on the establishment of an easement over Enrique Road, the trial court must have determined that there was no prescriptive easement over Enrique Road. Therefore, the plaintiffs are collaterally estopped from asserting the prescriptive easement theory in this present case because the issue had been previously decided. The plaintiffs claim that there is no collateral estoppel because the judgment in the 1969 case was void, and because no issue was raised in that case about an easement over Enrique Road until the trial court raised it.

Collateral estoppel applies when the facts are material, relevant and necessary to the decision of the case. *Paulos v. Janetakos*, 46 N.M. 390, 394, 129 P.2d 636, 638 (1942). Whether Enrique Road was an easement was never at issue in the 1969 case, nor did the trial court make a finding on whether an easement existed prior to the court's requiring it to be created. Therefore, collateral estoppel does not apply.

The Supreme Court also ruled that the trial court's judgment was void for lack of subject matter jurisdiction. Therefore, the judgment is void on its face and has no legal effect. *See Jackson v. Vance*, 179 F.2d 154, 158 (10th Cir. 1949).

The issue in the 1969 case was whether the "Y" roads were abandoned. In ruling that the "Y" roads were abandoned, the trial court apparently tried to reach a compromise which involved the dedication of alternative roadways as a condition to the judgment. Chavez relies on *Heckathorn v. Heckathorn*, 77 N.M. 369, 423 P.2d 410 (1967), for the proposition that lack of subject matter jurisdiction of part of a judgment does not prevent the judgment from being conclusive as to the remainder of the subject matter. However, *Heckathorn* involved divorce and child support issues. The Supreme Court found that the trial court lacked jurisdiction to enter judgment for the divorce, but the trial court's decision on the child support matters were valid. The *Heckathorn* case involved two separate issues for the court to determine, and the lack of jurisdiction to rule on one issue does not automatically deprive the court of jurisdiction over the other. The 1969 case only dealt with the issue of closing the "Y" roads; therefore since the judgment was void, collateral estoppel does not apply.

PRESCRIPTIVE EASEMENT

A prescriptive easement is acquired when the use is "open, uninterrupted, peaceable, notorious, adverse, under a claim of right, and continue[d] for a period of ten years with the knowledge or imputed knowledge of the owner." *Hester v. Sawyers*, 41 N.M. 497, 504, 71 P.2d 646, 651 (1937).

The trial court's relevant findings of fact were:

[a] . . . Enrique Road, has been used *continuously* by the people living upon the farms in the immediate vicinity, and by the general public as well, *for 50 years prior* to the institution of this suit. (Emphasis added.)

[b] None of the plaintiffs or testifying witnesses were ever given permission by an owner . . . to use Enrique Road.

[c] None of the plaintiffs or testifying witnesses ever asked any of the owners . . . for permission to use Enrique Road.

[d] There is no evidence of gates or natural obstacles existing on Enrique Road prior to the arrival of the defendants in 1960.

[e] There is no evidence that plaintiffs have ever used Enrique Road under any claim of right during any period of time.

Chavez argues that finding [e] is inconsistent with the trial court's conclusion that there is a prescriptive easement over Enrique Road.

In *Hester v. Sawyers, supra*, 41 N.M. at 504, 71 P.2d at 651, we stated that "[i]n this state, where large bodies of privately owned land are open and uninclosed [sic], it is a matter of common knowledge that the owners do not object to persons passing over them for their accommodation . . . ." Therefore, a claim of right is not acquired unless intentions to acquire a permanent right are known to the owner. However, *Maestas v. Maestas*, 50 N.M. 276, 175 P.2d 1003 (1946) limited the *Sawyers* decision to, "large bodies of unenclosed land . . . where the owners thereof could not reasonably know of passings over said lands." *Maestas, supra*, 50 N.M. at 279, 175 P.2d at 1006. Where there is proof of an open, notorious, continuous and uninterrupted use for the prescriptive period, without evidence of how it began, the presumption is that the use was adverse and under a claim of right. *Sanchez v. Dale Bellamah Homes of New Mexico, Inc.*, 76 N.M. 526, 529, 417 P.2d 25, 27 (1966).

There is no evidence in this case to rebut the "claim of right" presumption. Therefore, it is presumed there is a claim of right. The fact that there were no findings is immaterial. The findings of fact, overall, are consistent with the conclusions of law; and Enrique Road is a prescriptive easement.

LOCATION AND EXTENT OF EASEMENT

In reliance on the validity of the judgment in the 1969 case before the appeal, Chavez graded, widened and straightened the "trial" which is now Enrique Road. The trial court in its judgment in this case apparently determined that the widened boundaries constituted the location of the prescriptive easement.

The burden of establishing the location and dimensions of a prescriptive easement is upon the one asserting its existence. *See 2 G. W. Thompson, Commentaries on the Modern Law of Real Property*, § 350 at 281 (repl. 1980). The prescriptive easement is over the "trial", not the straightened and widened part.

Because no evidence was presented on the location and dimensions of the prescriptive easement, we remand this issue back to the trial court to correctly determine the location and dimensions of the easement.

PAYNE and FEDERICI, JJ., concur.

635 P.2d 588

STATE of New Mexico, ex rel., DEPARTMENT OF HUMAN SERVICES, Petitioner-Appellee,

v.

Wanda Sue PERLMAN, Respondent-Appellant.

No. 4862.

Court of Appeals of New Mexico.

June 30, 1981.

Rehearing Denied July 13, 1981.

Fred J. Waltz, Northern New Mexico Legal Services, Inc., Taos, for respondent-appellant.

James W. Catron, Asst. Atty. Gen., Santa Fe, for petitioner-appellee.

OPINION

WALTERS, Judge.

Wanda Perlman presents four points for reversal. The first point is conclusive, and we reverse the judgment of the trial court which terminated her parental rights.

On September 11, 1978 a petition alleging neglect was filed against respondent. At the hearing on September 14, Wanda's child was adjudged neglected and she was placed in the custody of the Department of Human Services for six months. Custody was subsequently extended, with Wanda's consent, for two additional six-month periods. In April 1980, the Department applied for termination of Wanda's parental rights, relying upon the 1978 judgment of neglect as the sole statutory ground for bringing the termination petition. *See* § 40–7–4 B, N.M.S.A.1978. Wanda appeals the order of termination which followed a full hearing on the Department's application.

Prior to receiving any evidence in the 1980 termination proceeding, counsel for Wanda asked for a ruling as a matter of law on Wanda's contention that the decree of neglect, upon which the termination petition rested, was obtained through unconstitutional procedures. It is her basic argument that at the time of the neglect hear-

ing in 1978 she was denied due process and equal protection because her right to an attorney had never been explained to her.

Wanda relies on Rule 55 of the Rules of Procedure for the Children's Court, and the Department is correct in pointing out that Rule 55, requiring the court to advise respondent of her right to an attorney if a petition alleging neglect has been filed, became effective November 1, 1978 after the petition had been filed and the hearing held. However, the forerunner of the current Rule 55 adopted in 1978 was Rule 15, and it required the court to inform "the respondent" at his (her) first appearance before the court of the right to an attorney. The Committee Commentary of the new Rule 55 indicates it was drafted because it was felt that Rule 15 was not "adequate" or correct in two other provisions when applied to neglect proceedings. Notwithstanding any deficiency in Rule 15, however, § 13–14–28 A, N.M.S.A.1953 [now § 32–1–31 A, N.M.S.A.1978], explicitly provided that "[t]he court shall advise persons before the court of their basic rights under the Children's Code... and other laws at each separate appearance." One of the basic rights outlined in the Code existing then and now is that, in a neglect proceeding, a parent "shall be informed that [she has] the right to be represented by counsel and, upon request, counsel shall be appointed if the person is unable to obtain counsel...." Section 13–14–25 F, N.M.S.A.1953 [now § 32–1–37 F, N.M.S.A.1978].

Additionally Rule 41(d) then in effect was identical to the present Rule 53(d), which imposed on the Department the obligation to advise Wanda of her right to an attorney. The Department did not do so and she appeared at the neglect proceeding without counsel.

Thus, the requirements of both Rules 15 and 41 that respondent be informed by the petitioner and by the court of the right to an attorney, in existence at the time of the September 1978 hearing, were not observed. The neglect hearing was not conducted in accordance with the procedures established by Supreme Court rule.

When this issue of non-compliance was raised at the termination hearing, both the court and the Department's attorney expressed the belief that Wanda Perlman had been advised of her rights at the 1978 proceeding. The record shows otherwise.

By the time the termination petition was filed and heard in 1980, Wanda was represented by Northern New Mexico Legal Services, Inc. The time, however, for appealing the judgment in the neglect hearing had long passed. Nevertheless, her attorney raised her claim of deprivation of due process at the neglect proceeding, which judgment underlay the petition for and decree of termination, at the earliest possible moment after learning of the Department's intention to rely on the neglect decree to relieve Wanda of her parental rights. *See Territory v. Lobato*, 17 N.M. 666, 134 P. 222 (1913).

[redacted] Whereas constitutional rights may be waived, *In re Investigation No. 2, etc.*, 93 N.M. 525, 602 P.2d 622 (1979), New Mexico has consistently defined "waiver" as the intentional abandonment of a known right. *Wells Fargo Bank v. Dax*, 93 N.M. 738, 605 P.2d 245 (Ct.App.1979), and cases there cited. Our courts have repeatedly said that waiver of a right must be knowingly and intelligently made to be effective. *See, e. g., State v. Rascon*, 89 N.M. 254, 550 P.2d 266 (1976). The Sixth Amendment right to counsel was discussed in *Rascon*; the analysis centered on the statutory scheme for providing counsel and the stage of proceedings when the right applied. Unlike the situation in *Rascon*, this is not a criminal proceeding and we are not concerned with the claimed right to consult with an attorney prior to the institution of criminal proceedings for which counsel is provided by the statute. We read *Rascon* to hold, however, that waiver of a right created by the constitution or a statute must be done intelligently and knowingly if the right is to be denied the one claiming it. The right which Respondent claims was denied to her was one provided by court-promulgated rules and by statutes in a special statutory proceeding, and she was to be advised of that right "at each appearance."

Since Wanda Perlman was not informed that she was entitled to an attorney and that one might be obtained for her if she could not afford to pay for one, she hardly could intelligently waive rights of which she was not aware. *State v. Jamison*, 251 Or. 114, 444 P.2d 15 (1968). The record belies any "knowing," "intelligent" waiver in this case. The subsequent agreement of Respondent to extend custody in the Department is not sufficient to constitute estoppel to raise this constitutional claim. *Compare Vickers v. North American Land Dev. Inc.*, 94 N.M. 65, 607 P.2d 603 (1980).

The nature of the parental right has been characterized as a "liberty" protected by the due process clause of the Fourteenth Amendment. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975); *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed.2d 1042 (1923). *See also In re David B.*, 154 Cal.Rptr. 63, 91 Cal.App.3d 184 (1979), and *In re Welfare of Luscier*, 84 Wash.2d 135, 524 P.2d 906 (1974). The procedural protections for adjudications of neglect, implemented by the New Mexico Supreme Court in its rules, are responsive to the safeguards guaranteed by the due process clause. *Matter of Paul X.*, 393 N.Y.S.2d 1005, 57 A.D.2d 216 (1977). Disregard of the rules requiring notification to Respondent of her right to counsel at the initial hearing was a denial of due process. The subsequent decree of neglect which deprived appellant of custody of her child was therefore void. *Compare In re Downs*, 82 N.M. 319, 481 P.2d 107 (1971) (non-compliance with statutory procedure in Delinquent Children article was reversible error).

A decree thereafter terminating Wanda's parental rights, based upon findings and conclusions related to the void neglect decree, cannot stand. The court's findings and conclusions, indicative of past neglect and projected personality disorders in the future on Wanda's part, include the language of § 40–7–4 B(3), (1979 Supp.), but none of the findings indicate that a new or current finding of neglect was considered, requested, or made in the termination proceeding. The petition to terminate, itself, was grounded on the allegations that the child "has been adjudicated a neglected child" and that the termination request was "ancillary" to the neglect proceeding. The termination decree, therefore, resting upon an invalid neglect adjudication, must be set aside.

The Department did not respond to Respondent-Appellant's claim that she was denied constitutionally guaranteed equal protection of the laws but, in view of our holding that there was a failure of due process, we need not decide that issue.

The other two points raised by Respondent-Appellant are not meritorious. Evidence of the child's statements to witnesses were admissible as exceptions to the hearsay rule, N.M.R.Evid. 803(1), (3), and (24), and there was no error committed in allowing them. Wanda's attack on Finding 15 did not set forth the substance of *all* of the timely evidence going to the finding. Thus we do not discuss that point on appeal, N.M.R.App.P. (Civil) 9(d), N.M.S.A.1978, beyond noting that the other findings referred to in the court's Finding 15, and Finding 15 itself, are insufficient to fully establish the facts required by § 40–7–4 B(3) or (4) to support termination, absent a timely and valid neglect hearing.

The judgment terminating Respondent's parental rights is reversed. The matter is remanded for proceedings consistent with this opinion. Respondent shall recover her costs on appeal.

It is so ordered.

HERNANDEZ, C. J., and LOPEZ, J., concur.

635 P.2d 986

Mark CHOUINARD, Appellant,

v.

STATE of New Mexico, Appellee.

No. 4361.

Court of Appeals of New Mexico.

Nov. 25, 1980.

James Blackmer, Asst. Atty. Gen., Santa Fe, Sasha Siemel, Asst. Dist. Atty., Albuquerque, for appellant.

Nancy Hollander, Asst. Public Defender, Albuquerque, for appellee.

OPINION

ANDREWS, Judge.

The defendant in this action was indicted on a variety of counts charging trafficking of a substance which was alleged to be cocaine during the period of May to August, 1977. After promising to appear in October, 1977, the defendant absconded for some twenty months and was re-arrested in May, 1979. During the pendency of his abscondence, the State negligently destroyed the substance underlying all but Count VII of the indictment. Because the prosecution only had a sample of the substance which formed the basis of the criminal complaint as to Count VII, that count was tried first and was separated from a second trial held on the other counts—those in which the underlying evidence had been destroyed. In our view, the destruction of the underlying evidence by the State is dispositive. Therefore, we will deal with the reversal as to all counts in the second trial first and will then address the issues raised as to the trial on Count VII.

Trial Two

Although the State argues that no prejudice results from the use of tests for which the underlying substance was destroyed in this matter, this is incorrect. First, the defense in this action was that the substance transferred was not coca leaf cocaine, but a manufactured substance which had to be the chemical equivalent of coca leaf cocaine, § 30–31–7 A(1)(d), N.M.S.A. (1978 Comp.) and second, that the destruction of the substance prevented testing in connection with that defense. *See People v. Nation*, 26 Cal.3d 169, 161 Cal.Rptr. 299, 604 P.2d 1051 (1980).

The questions presented in regard to the second trial reduce to one simple issue: Under *State v. Lovato*, 94 N.M. 780, 617 P.2d 169 (1980), where material evidence is destroyed by the State and where that destruction of evidence prejudiced the defendant, does the fact that the defendant had escaped before the evidence was destroyed alter the necessity "that if the State is going to use as evidence the results of a * * * test, it must make provisions for its preservation so that if a timely request is made for retesting by the defendant, the sample taken is available." *State v. Lova-*

to, id.; cf. People v. Audi, 73 Ill.App.3d 568, 29 Ill.Dec. 691, 392 N.E.2d 248 (1979).[1] It is clear that if the defendant requests any information which is material to him in his preparation for presenting the merits of his defense or innocence at trial, such a request "falls within the constitutional due process standard announced in *Chacon* and *Trimble v. State*, 75 N.M. 183, 402 P.2d 162 (1965)." *State v. Lovato, supra.* This constitutional right adheres regardless of the intent of the State in the destruction of the evidence. *See also State v. Stephens*, 93 N.M. 368, 600 P.2d 820 (1979). Thus, a report based on destroyed evidence must be suppressed notwithstanding the lack of deliberation on the part of the State—"[n]o different standard applies because the nondisclosure is negligent rather than deliberate." *State v. Lovato, id., citing, Trimble v. State*, 75 N.M. 183, 402 P.2d 162 (1965).

The State destroyed evidence, the substance which was the basis of the charges being tried. The destruction of this evidence was the result of negligence on the part of the State. The State argues that defendant cannot, after he "absconded for at least 20 months—all in violation of his promises to appear. * * *" complain of the "negligent, good-faith, court-ordered destruction of these exhibits 7 months and 13 months after he became a fugitive." This conclusion, argues the State, is based on the fact that, "nowhere in the record did he or his counsel move to test any exhibits until June, 1979." June, 1979, was the month after defendant was re-arrested, and three months before the first trial which began on September 12, 1979.

What the State suggests, therefore, is that either defendant should not benefit from the destruction of evidence while he has absconded after promising to appear; or, even if the State did negligently destroy the substance, defendant did not ask to see it until after the "timely" period in which the State should have retained the substance.

These arguments are incorrect for two reasons. First, we will consider the abscondence and the possible effect it had in the destruction of the substance. We need not reach the question of what would happen if it could be shown that defendant's conduct resulted in the destruction of evidence. There is simply no evidence that suggests the two events are causally related, nor would it be reasonable to suggest that any time a defendant absconds the State may destroy evidence that would be used if he were recaptured. However, since there is no relationship between the abscondence and the destruction of the evidence, the first argument fails. Second, the State suggests that under *State v. Lovato, supra*, the request was not timely. Although that case does not expressly address the question of timeliness, the constitutional principle which underlies *Lovato*, recognized in *State v. Trimble, supra*, is the right of a defendant to confront the evidence against him. The timeliness argument does not involve R.Crim.Proc. 27 but defendant's delay in seeking to have the substance analyzed. The only timeliness issue is whether the analysis would delay the trial. In this case, the request was made in June, 1979, a full three months before the first trial. To hold that such request was untimely, would deprive the defendant of a re-inspection of the evidence should some new point arise in preparation for trial. The State cannot be given the advantage of either keeping or disposing of the evidence as it feels strategically necessary, nor can its acts of negligence prejudice the defendant's rights. *State v. Lovato, supra*, makes it patently clear that even where the defendant only asks for the report of testing on physical evidence initially, he has the right, as the action develops, to make subsequent requests for the actual evidence. In this case, the defendant was denied this right. Thus, the convictions in the second trial are reversed and remanded, with instructions that

1. Here, there is no issue as to the substance being used up during testing, nor does the State suggest that the evidence was destroyed by the defendant. *See Jamison v. State Racing Commission*, 84 N.M. 679, 507 P.2d 426 (1973); *State v. Myers*, 88 N.M. 16, 536 P.2d 280 (N.M. App.1975).

the charges be dismissed. *See State v. Trimble, supra.*

Trial One

We now turn to the first trial in which the defendant was convicted on Count VII of the Indictment. In this trial, several things occurred which defendant raises as error.

At trial, the prosecution's expert chemist made clear errors in his statements concerning the alleged cocaine. He testified that he was unable to state with any certainty whether the substance was l-cocaine, a derivative or the coca leaf which is an anesthetic and a stimulant, or d-cocaine which is man-made, and may have little or no effect as either a stimulant or anesthetic. In addition, the chemist stated d-cocaine is a derivative of the coca leaf. Although another expert who was sitting at the prosecution's table informed the State's attorney that the chemist was giving incorrect testimony, the State continued in the questioning and made no effort to rectify the error. Later, the defense expert did, however, draw the correct distinction between the two substances. It should also be noted that the State's expert testified that he did not know how to tell l-cocaine and d-cocaine apart, and that uncontroverted defense testimony demonstrates that the tests actually performed would not have distinguished the two substances.

During the trial, testimony was allowed over defense objections as to matters which were relevant to the counts which were to be handled in the second trial, but which were totally irrelevant to Count VII. A police officer testified concerning observations dealing with the incidents surrounding Count VI of the Indictment. These incidents did not relate in any way to the incidents surrounding Count VII.

To further exacerbate this situation, the State's attorney in his closing rebuttal stated:

> If for some reason * * * you find that it isn't cocaine he still attempted to transfer it, the only reason he failed is because somehow or other chemically he failed but he attempted the transfer. * * * it was cocaine, it is cocaine, but in addition to that with that Attempt, it doesn't have to be.

Finally, defendant asserts error because of certain instructions given by the trial court, and a comment by the prosecutor in regard to the instructions.

Based on the foregoing, the defendant alleges numerous points of error, which we summarize as follows:

I. The classification of l-cocaine (cocaine derived from the coca leaf) as a narcotic is irrational.

II. The trial court erred when it refused to strike the testimony of the State's chemist when the defendant objected that the chemist's testimony was not competent.

III. The prosecution failed to prove beyond a reasonable doubt that the substance was l-cocaine and not some other substance.

IV. The trial court erred when it failed to correctly instruct the jury as to the elements of the offense of Attempt, and when it did not indicate that the prosecutor mis-stated the law when he stated that it made no difference whether the substance was or was not cocaine.

V. That testimony as to incidents related to other counts was improperly admitted over defense objections.

Although we do not find the classification of cocaine irrational, we reverse the conviction as to Count VII on the first and second points of error. Because of the reversal, we do not reach issues IV and V.

I. *Irrational Classification of Cocaine as a Narcotic*

Defendant argues that cocaine is not a narcotic, nor does it share similar properties with any other drugs on the applicable schedule, Schedule II of the Controlled Substance Act [§§ 30–31–1 to 30–31–40, N.M.S.A.1978]. Therefore, he argues its classification is irrational.

This Constitutional challenge to the Controlled Substance Act presents a question of first impression in this State. However, the federal statute, 21 U.S.C. § 812(c) Schedule II(a)(4), which is similar to the New Mexico provision, § 30–31–7A(1)(d), has repeatedly been challenged on the same basis with no appellate court recognizing that challenge.

Section 30–31–5(B), N.M.S.A.1978, sets the criteria for controlled substance in Schedule II: (1) the substance has a high potential for abuse; (2) the substance has a currently accepted medical use in treatment in the United States or currently accepted medical use with severe restrictions. According to defendant, the record supports a conclusion that cocaine is not a narcotic drug and does not meet the characteristics for a Class II controlled substance as required by § 30–31–5(B). While the record does contain testimony that cocaine does not lead to a physical dependency, defendant produces no support for the proposition that the drug is not psychologically addicting.

In *United States v. Brookins*, 383 F.Supp. 1212 (D.C.N.J.1974) the court responded to a similar argument. In that case, defendant alleged that "no reputable physician in the country would testify that cocaine is a narcotic drug" and "cocaine (does not) carry with it the potential for social harm which is inherent in the true narcotic drug." 383 F.Supp. at 1214. At the same time, the government conceded that cocaine is not a true narcotic in the strict medical or pharmacological sense of the term but argued that the classification was rational because of the similarity between cocaine and other drugs in that classification in terms of "cocaine's potential for societal harm." 383 F.Supp. at 1214. In narrowing the issue, the court sought to answer whether Congress can rationally classify cocaine, a non-narcotic central nervous system stimulant, as a narcotic for penalty and regulatory purposes. It held that Congress can, and we hold that the New Mexico State Legislature can do the same.

The appropriate standard to be applied in determining the issue is succinctly set forth in *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938), wherein it stated (304 U.S. at 153, 154, 58 S.Ct. at 784):

> Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. * * *
>
> But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either shown or which could reasonably be assumed affords support for it.

Accord, see United States v. Smaldone, 484 F.2d 311 (10th Cir. 1973), *cert. denied*, 415 U.S. 915, 94 S.Ct. 1411, 39 L.Ed. 469 (1974). In *Smaldone*, the district court had denied without an evidentiary hearing defendant's motion to dismiss the indictment on the ground that the statutory classification of cocaine as a narcotic was arbitrary, capricious and lacking in reason. Affirming, the Court of Appeals stated on the issue of congressional classification: "The judicial approach to this kind of question is that the classification will be upheld if any facts justify it." 484 F.2d at 320.

Numerous other federal and state courts have been presented with the question and have concluded that the classification is not "irrational." *See generally, United States v. Vila*, 599 F.2d 21 (2nd Cir. 1979), *cert. denied*, 444 U.S. 837, 100 S.Ct. 73, 62 L.Ed.2d 48 (1979); *United States v. Smaldone*, 484 F.2d 311 (10th Cir. 1973), *cert. denied*, 415 U.S. 915, 94 S.Ct. 1411, 39 L.Ed.2d 469 (1974); *United States v. Hobbs*, 392 F.Supp. 444 (D.C.Mass.1975); *United States v. Castro*, 401 F.Supp. 120 (E.D.Ill. 1975); *State v. Erickson*, 574 P.2d 1 (Alaska 1978); *People v. Davis*, 92 Cal.App.3d 250, 154 Cal.Rptr. 817 (1979); *People v. Portano-*

va, 392 N.Y.S.2d 123, 56 A.D.2d 265 (N.Y. App.1977); *People v. Piccoli*, 403 N.Y.S.2d 820, 62 A.D.2d 1078 (N.Y.App.1978).

II. *The Expert Testimony*

If a witness bases his opinion on an assumption which is later in the trial shown to be false and if that false assumption is critical to the entire nature of proof in the case, the conviction cannot stand. *State v. Bell*, 90 N.M. 134, 560 P.2d 925 (1977).

In this trial, the testimony of the State's chemist was material to one of the elements of the crime—that the substance in question was, in fact, cocaine. The New Mexico Controlled Substance Act makes a distinction between those substances which are derivatives of coca leaves and those substances which are not so derived. If a substance is not a derivative of coca leaves, it is not a controlled substance unless shown to be chemically equivalent with a substance that is derived from coca leaves. Section 30–31–7, N.M.S.A.1978. In the crime of transfer of a controlled substance—in this case cocaine—the State must show that the substance transferred was cocaine. *State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (N.M.App.1976).

Defendant's expert testified that the State had not shown through its analysis of the substance that it was in fact a form of cocaine (l-cocaine) which is a derivative of coca leaves nor a substance chemically equivalent to l-cocaine. This was defendant's theory of his defense. If the jury believed the State's chemist when he testified both l-cocaine and d-cocaine were derivatives of coca leaves, defendant was deprived of the very essense of that defense.

This particular witness based his testimony on a false assumption that both d-cocaine and l-cocaine are derived from coca leaves. No satisfactory explanation has been given for his conclusion. Without such an explanation the chemist's conclusion was not competent evidence and should have been stricken. *See State v. Brionez*, 91 N.M. 290, 573 P.2d 224 (N.M.App.1977). The court's failure to strike this testimony was error. Thus, absent sufficient additional evidence as to what the substance was, it is clear that the State failed to prove by this expert's testimony, the element of this crime which requires the substance to be cocaine. Though this testimony may have been sufficiently prejudicial to require reversal, we need not reach that issue in light of our discussion of failure of proof in Section III below.

III. *Failure of Proof*

In a criminal prosecution, the State has the burden of proving each of the elements of a crime beyond reasonable doubt. *State v. Carter*, 93 N.M. 500, 601 P.2d 733 (N.M. App.1979), *citing Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In its attempt to do so, the State presented evidence to the effect that a police detective drove defendant to his (Chouinard's) residence where defendant invited the detective in to "show him something." Defendant then went to a refrigerator and pulled out a plastic bag with white powder (suspected cocaine), put it on a table in front of the detective and invited the detective to "roll up the biggest bill you have." [2] The detective inspected the cocaine as defendant went into an adjoining room. At that time the detective heard a noise he identified as the sound of Chouinard pumping the slide of a slide-action shotgun. When the detective feigned outrage about the presence of the gun Chouinard advised him that the shotgun was for "our protection" in case anyone came through the door while the cocaine was there. Such evidence may have been relevant and material to the issue of defendant's guilt. Rule 401 N.M.R. Evid. However, since we have determined that the chemist's testimony should have been stricken, the only proof as to what the substance actually was is the inference created by the shotgun, the defendant's statements, and the chlorax test which was performed.

2. The detective understood this to mean that defendant wanted him to use the rolled-up bill to "snort" some of the suspected cocaine.

The chlorax test does not prove that the substance was cocaine as unrefuted evidence shows that it would have been positive even if the substance was the isomer. The actions and statements of the defendant show only that he believed the substance to be cocaine. Thus, in the absence of a definitive chemical analysis, or any competent expert testimony on the identification of the substance, the State has failed to meet its burden of showing the substance to be within the definition of the statute.

Conclusion

All convictions resulting from defendant's first and second trials are reversed. The defendant is discharged.

IT IS SO ORDERED.

LOPEZ, J., concurs.

WOOD, C. J., concurs in part and dissents in part.

WOOD, Chief Judge (concurring in part and dissenting in part).

I concur in the discussion and result as to trial two. I concur in the discussion and result concerning the classification of cocaine. I concur in the reversal of the trial one conviction solely on the basis that the trial court erred when it denied defendant's motion to strike the testimony of the State's chemist. I do not agree that there was a failure of proof as to the nature of the substance involved in trial one; under the evidence the jury could properly draw the inference that the controlled substance, cocaine, was involved. In holding otherwise, the majority are playing fact finder; that was the jury's function. Accordingly, I dissent from the result as to trial one.

635 P.2d 992

John BOTTIJLISO, Plaintiff-Appellant,

v.

HUTCHISON FRUIT COMPANY, a New Mexico Corporation, Defendant-Appellee,

No. 5070.

Court of Appeals of New Mexico.

Sept. 22, 1981.

Rehearing Denied Oct. 1, 1981.

David H. Pearlman, Pearlman & Diamond, P.A., Albuquerque, for plaintiff-appellant.

Rebecca Houston, Keleher & McLeod, P. A., Albuquerque, for defendant-appellee.

OPINION

DONNELLY, Judge.

The plaintiff appeals from an order of the trial court granting defendant's motion to dismiss for failure to state a claim upon which relief can be granted.

Plaintiff was employed by defendant and suffered a compensable, job-related injury within the scope of his employment. He filed a claim under the Workmen's Compensation Act and obtained a judgment for benefits. Thereafter, the defendant terminated the plaintiff's employment.

Claiming a retaliatory, wrongful discharge by defendant due to his assertion of his rights to recover workmen's compensation, the plaintiff filed a separate law suit against his former employer.

Defendant moved to dismiss because the complaint failed to state a claim for relief, and following a hearing, the trial court granted the motion.

The question for decision is then: Does a cause of action exist in tort against a prior employer for discharge due to the exercise of one's rights under the Workmen's Compensation Act? This precise question has not been previously determined in New Mexico.

Appellee has denied plaintiff's allegations as to the factual basis for plaintiff's dismissal from employment, and the

merits of such contentions have not been adjudicated. It is well settled that where a trial court grants a motion to dismiss for failure to state a claim, the allegations of the complaint must be taken as true for the purposes of an appeal. *Jernigan v. New Amsterdam Casualty Co.*, 69 N.M. 336, 367 P.2d 519 (1961); *Buhler v. Marrujo*, 86 N.M. 399, 524 P.2d 1015 (Ct.App.1974). A motion dismissing a complaint under N.M.R.Civ.P. 12(b)(6) is proper only when it appears that plaintiff cannot recover or obtain relief under any state of facts provable under the claim. *Pattison v. Ford*, 82 N.M. 605, 485 P.2d 361 (Ct.App.1971).

New Mexico has not squarely addressed the question of whether an employee who applies for workmen's compensation benefits may be dismissed by an employer without cause and whether a complaint alleging such conduct states an actionable remedy in tort. Our courts have long adhered to the rule that an employee is terminable by an employer "at will," either without cause or for a specific reason, in the absence of a contract of employment for a definite term, or in the absence of a showing that the discharge is predicated upon a fraudulent basis. *Gonzales v. United Southwest National Bank*, 93 N.M. 522, 602 P.2d 619 (1979); *Garza v. United Child Care, Inc.*, 88 N.M. 30, 536 P.2d 1086 (1975); *Odell v. Humble Oil & Refining Co.* 201 F.2d 123 (10th Cir., 1953), cert. denied 345 U.S. 941, 73 S.Ct. 833, 97 L.Ed. 1367. Similarly, under a contract of employment "at will," it has been recognized that an employee may sever his employment at any time voluntarily. See, *Aranda v. Mississippi Chemical Corp.*, 93 N.M. 412, 600 P.2d 1202 (Ct.App.1979), cert. denied, 93 N.M. 683, 604 P.2d 821. Even under a contract for a definite term, an employer may discharge an employee where he is dissatisfied in good faith with services of the employee and the contract does not otherwise restrict grounds of discharge. *Clem v. Bowman Lumber Co.*, 83 N.M. 659, 495 P.2d 1106 (Ct.App.1972); *Odell v. Humble Oil & Refining Co.*, supra.

The right to employ and discharge at will has been recognized as one of the indicia of employment status in workmen's compensation cases. *American Employers' Insurance Co. v. Grabert*, 39 N.M. 173, 42 P.2d 1116 (1935); *Burruss v. B.M.C. Logging Co.*, 38 N.M. 254, 31 P.2d 263 (1934); *Burton v. Crawford & Co.*, 89 N.M. 436, 553 P.2d 716 (Ct.App.1976); *Abbott v. Donathon*, 86 N.M. 477, 525 P.2d 404 (Ct.App. 1974).

In *Odell v. Humble Oil and Refining Co.*, supra, the Federal Court first addressed the issue of whether a cause of action exists in tort against an employer who has dismissed employees hired at will in this jurisdiction. In that case, suit was brought by several employees alleging that they had been subpoenaed to appear as witnesses before a federal grand jury investigating their employer. Following the return of a criminal indictment, plaintiffs asserted that they were wrongfully discharged from their employment in retaliation for their appearance and testimony before the grand jury. In discussing such claim the court held:

> It is the universally recognized rule that in the absence of a contract or statutory provisions an employer may discharge an employee without cause or reason or for any cause or reason. So also it has been held by the overwhelming weight of authority that the discharge of an employee in violation of his contract irrespective of the motive therefor constitutes only a breach of contract and not a tort and that the recoverable damages are limited to those flowing from the contractual breach and that no punitive damages are recoverable no matter what the motive that prompted the discharge. The only exception to the rule is where the wrongful discharge is tinctured with fraud. But for obvious reasons motive for discharge alone does not partake of any of the elements necessary to constitute fraud.

201 F.2d at 128.

In *Jones v. International Union of Operating Engineers*, 72 N.M. 322, 383 P.2d 571 (1963), a suit founded upon contract, the

Supreme Court reiterated an employer's right to discharge an employee at any time, whether for just cause or not, unless that right is restricted by a contractual limitation or other valid basis. In *Jones*, however, the court noted an exception, observing that an individual employee may enforce a collective labor agreement between the union as bargaining representative and the employer, where such agreement is found to have created a third-party beneficiary status in favor of the employee.

More recently, the court recognized that, although an employee could be discharged for no reason, a statutory cause of action arises under 42 U.S.C. § 1983 (1976) if the discharge was due to the employee's exercise of constitutionally protected rights. *Jacobs v. Stratton*, 94 N.M. 665, 615 P.2d 982 (1980).

Another exception recognized by the courts, limiting an employer's right to discharge an employee hired "at will," is where the discharge is for a reason prohibited by the National Labor Relations Act. *N.L.R.B. v. Standard Coil Productions Co.*, 224 F.2d 465, (1st Cir. 1955) cert. denied 350 U.S. 902, 76 S.Ct. 180, 100 L.Ed. 792, 51 A.L.R.2d 1268. The Federal Equal Employment Opportunity Act, 42 U.S.C. § 2000e (1976), also offers protection to an employee against retaliatory acts, including termination, following an employee's assertion of discriminatory practices exercised by an employer in violation of the act, 42 U.S.C. § 2000e–3.

Appellant concedes that New Mexico has not previously recognized the existence of a cause of action in tort for wrongful discharge of an employee at will. He argues that such action should be judicially sanctioned on grounds of public policy. A similar argument was dealt with in *Chin v. American Telephone and Telegraph Co.*, 96 Misc.2d 1070, 410 N.Y.S.2d 737 (Sup.Ct. 1978). The employee was allegedly discharged in retaliation for his political beliefs and associations. There the court observed:

> The last theory upon which plaintiff seeks relief is the doctrine of abusive discharge. Although it does not appear that this doctrine has been recognized in this state, it is appropriate, on a motion of this nature, to examine the elements of the cause of action to determine whether the complaint alleges sufficient facts upon which relief may be granted at trial. Since plaintiff is proceeding on a cause of action not presently recognized in this state, he bears a heavy burden of demonstrating that this new cause of action should be adopted.
>
> The doctrine of abusive discharge, where it has been advocated in law review articles or adopted, limits the right of an employer to discharge an employee at will. This doctrine is implied by operation of law as an additional condition of the contract similar to the restrictions imposed by the Equal Employment Opportunity provisions of the Civil Rights Act of 1964 [42 U.S.C. § 2000e et seq.]. See generally, Note, A Common Law Action For The Abusively Discharged Employee, 26 Hastings L.J. 1435 (1975); *Sventko v. Kroger Co.*, 69 Mich.App. 644, 245 N.W.2d 151 (1965). Under this theory the interest of the employer in the exercise of his unfettered right to terminate the employee under a contract at will is balanced against the interest of the community in upholding its laws in public policy. *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973).
>
> At the threshold, the doctrine of abusive discharge places upon the plaintiff the burden of pursuading this court that (1) there is a public policy of this state that (2) was violated by the defendant. Plaintiff herein *has not sufficiently demonstrated that public policy, derived from or borrowed on New York constitutional, statutory or decisional law, exists that would restrict the right of the private employer to discharge an employee at will*. . .
>
> This is not to say that such public policy does not exist; it merely is to say that plaintiff herein has not sustained his bur-

den of persuasion. While this court is not adverse to recognizing new causes of action or defenses where clearly warranted. (*Parkwood Realty Co. v. Marcano*, 77 Misc.2d 690, 353 N.Y.S.2d 623 (1974)), such recognition should be given upon substantial showing which has not been made here. (Emphasis added).

410 N.Y.S.2d at 740–742.

The courts of other jurisdictions which have addressed this same issue in workmen's compensation cases have reached diverse results. The courts of Indiana, Michigan, Illinois, Oregon, and New Jersey have expressly recognized the existence of a cause of action in tort in such cases.[1] Contrary decisions have been handed down by courts in Alabama, Louisiana, Mississippi, South Carolina, Florida, North Carolina, and Missouri.[2] An annotation of cases on this subject is set forth at 63 A.L.R.3d 979 (1975).

The states of North Carolina and Missouri have predicated their rejection of the existence of tort claims in workmen's compensation cases for retaliatory discharge on the ground that such courts felt the issue was more appropriately a matter within the legislative prerogative rather than the judiciary. *Dockery v. Lampart Table Co.*, 36 N.C.App. 293, 244 S.E.2d 272 (1978), cert. denied 295 N.C. 465, 246 N.E.2d 215; *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956). California and Texas, although recognizing the validity of such tort claims, expressly support such actions upon the existence of specific statutory authority found in those jurisdictions. *Raden v. City of Azusa*, 97 Cal.App.3d 336, 158 Cal.Rptr. 689 (1979); *Texas Steel Co. v. Douglas*, 533 S.W.2d 111 (Tex.Civ.App.1978); *Smith v. Coffee's Shop for Boys & Men, Inc.*, 536 S.W.2d 83 (Tex.Civ.App.1976).

Tracing the history of the New Mexico workmen's compensation laws, it is apparent that this state joined the ranks of other jurisdictions that enacted workmen's compensation legislation in 1917. (Laws 1917, Ch. 83, §§ 1–24). This legislation has undergone periodic extensive revision and recodification.

Our review of the New Mexico workmen's compensation law indicates that the legislature has not expressly adopted any statutory provisions touching upon the issue presented here. The legislature, however, has in the Human Rights Act (§ 28–1–1, N.M.S.A. 1978 et seq.), adopted legislation expressly prohibiting certain unlawful discriminatory practices on the part of employers against their employees.

Section 28–1–7 of the Human Rights Act provides in part as follows:

It is unlawful discriminatory practice for:

A. An employer, unless based on a bonafide occupational qualification, to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation against any person otherwise qualified because of race, age, religion, color, national origin, ancestry, sex or physical or mental handicap:

. . . .

I. any person or employer to: (1) aid, abet, insight, compel, or coerce the doing of any unlawful discriminatory practice, or to attempt to do so; (2) *engage in any form* of threats, reprisal or discrimination against any person who has opposed any unlawful discriminatory practice or who has filed a complaint, testified or participated in any proceeding under the Human Rights Act; or (3) willfully obstruct or prevent any person from complying

1. *Frampton v. Central Indiana Gas*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Sventko v. Kroger Co.*, 69 Mich.App. 644, 245 N.W.2d 151 (1976); *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 23 Ill. Dec. 559, 384 N.E.2d 353 (1978); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978); *Lally v. Copygraphics*, 173 N.J.Super. 162, 413 A.2d 960 (1980).

2. *Martin v. Tapley*, 360 So.2d 708 (Ala.1978); *Stephens v. Justiss-Mears Oil Co.*, 300 So.2d 510 (La.App.1974); *Green v. Amerada-Hess*, 612 F.2d 212 (5th Cir. 1980); *Raley v. Darling Shop*, 216 S.C. 536, 59 S.E.2d 148 (1950); *Segal v. Arrow Indus.*, 364 So.2d 89 (Fla.App.1978); *Dockery v. Lampart Table Co.*, 36 N.C.App. 293, 244 S.E.2d 272 (1978), cert. denied 295 N.C. 465, 246 S.E.2d 215; *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956).

with the provisions of the Human Rights Act, or to resist, prevent, impede or interfere with the commission of any of its members, staff, or representatives in the performance of their duties under the Human Rights Act. (Citations omitted, emphasis supplied).

Under the above act an employee who has been terminated from his employment for any of the reasons proscribed therein, has been provided an avenue for relief for such wrongful dismissal.

Our court has noted with approval the practice of New Mexico employers in providing injured employees with light duty work following incurrence of injuries, and the sympathetic manner with which some employees, despite their inability to perform certain tasks, have been retained on the payroll following their injuries. *Clymo v. United Nuclear Cor.*, 94 N.M. 214, 608 P.2d 526 (Ct.App.1980). While recognition has been given to commendable practices on the part of certain employers toward injured employees, the courts in New Mexico have not judicially restricted the right of an employer to terminate an employee hired "at will" except where the dismissal is predicated upon a fraudulent basis. *Odell v. Humble Oil and Refining Co.*, supra.

A growing number of state legislative bodies have examined this question. They have seen fit to enact legislation restricting the right of employers to terminate employees who have sought in good faith to seek redress under their workmen's compensation statutes and have been discharged. As noted in 2A A. Larson, Workmen's Compensation Law, § 68.36 (Cum.Supp.1981), "[S]pecific antiretaliation clauses are increasingly common in modern legislation such as civil rights and fair employments acts. . . ."

This state's legislature has enacted comprehensive statutory provisions declaring certain types of conduct to be against public policy; we think this evinces a desire upon the part of the legislature to restrict the right of termination by an employer of an employee only in those areas specifically covered by legislative declaration. See, *In Re Attorney General*, 2 N.M. 49 (1881); 2A C. Sands, Sutherland Statutory Construction §§ 47.23–47.24 (4th Ed. 1973). The wisdom of adopting the relief advocated by appellant is best evaluated by the legislative branch and the determination of the appropriate format for such proposed legislative change, if any, is best weighed by the legislature. *Hall v. Budagher*, 76 N.M. 591, 417 P.2d 71 (1966).

The sagacity of making changes in workmen's compensation statutes, or rights created thereunder, has been generally held to be outside the province of the courts. *Pedrazza v. Sid Fleming Contractor, Inc.*, 94 N.M. 59, 607 P.2d 597 (1980); *Sanchez v. Bernalillo County*, 57 N.M. 217, 257 P.2d 909 (1953). Moreover, our courts have held that the Workman's Compensation Act is sui generis. It creates exclusive rights, remedies and procedures. *Casias v. Zia Co.*, 94 N.M. 723, 616 P.2d 436 (1980). In at least one instance, the court refused to create a new cause of action for employer subrogation tangential to the act. *Security Insurance Co. of Hartford v. Chapman*, 88 N.M. 292, 540 P.2d 222 (1975).

The Courts in New Mexico have not hesitated to recognize the existence of new causes of action or to abolish certain common law defenses where public policy or statutory grounds are found to warrant such judicially sanctioned change. *F & T Co. v. Woods*, 92 N.M. 697, 597 P.2d 745 (1979), (recognizing as viable actions in tort, negligent hiring and negligent retention); *Hicks v. New Mexico Highway Comm.*, 88 N.M. 588, 544 P.2d 1153 (1976), (abolishing the doctrine of sovereign immunity); *Williamson v. Smith*, 83 N.M. 336, 491 P.2d 1147 (1972) (abolishing defense of assumption of risk); *Claymore v. City of Alb.*, 96 N.M. 682, 634 P.2d 1234 (20 N.M. Bar Bulletin 75 (1981) (abolishing defense of contributory negligence); *Stotlar v. Hester*, 92 N.M. 26, 582 P.2d 403 (Ct.App.1978) (recognizing tort of negligence by words). Nevertheless, in light of New Mexico's long standing recognition of the "at will" rule, the issue of whether a new cause of action should be recognized in this state for retali-

atory dismissal is more appropriately addressed to the state legislature than to the judiciary.

Based upon the foregoing, the ruling of the trial court is affirmed. Costs to appellant.

IT IS SO ORDERED.

LOPEZ and WALTERS, JJ., concur.

635 P.2d 998

STATE of New Mexico, Plaintiff-Appellee,

v.

Catherine Leslie ROMERO, Angel Martinez, and Loretta Ann Sanchez, Defendants-Appellants.

No. 5132.

Court of Appeals of New Mexico.

Oct. 1, 1981.

John B. Bigelow, Chief Public Defender, Lynne Corr, Asst. State Appellate Defender, Santa Fe, for defendants-appellants.

William Walker, Albuquerque, for Ms. Martinez.

A. J. Ferrara, Albuquerque, for Ms. Sanchez.

Deborah Lee Bohl, Albuquerque, for Ms. Romero.

Jeff Bingaman, Atty. Gen., Carol Vigil, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee; Stephen A. Slusher, Mark J. Riley, John E. DuBois, Asst. Dist. Attys., Albuquerque, of counsel.

OPINION

WOOD, Judge.

After being granted use immunity, defendants refused to testify, as witnesses, in a children's court proceeding. Defendants, at the time of their appearances before the children's court, were represented by counsel. Each defendant was held in contempt of court and sentenced to ninety days in jail. Each defendant appeals. The claim in the docketing statement, that summary contempt proceedings were improper, has not been briefed and, thus, was abandoned. *State v. Gallegos*, 92 N.M. 336, 587 P.2d 1347 (Ct.App.1978). We discuss: (1) the trial court's authority to grant use immunity; (2) use immunity and the privilege against self-incrimination; and (3) use immunity and the right to counsel.

Trial Court's Authority to Grant Use Immunity

A petition to revoke a child's probation alleged the child had committed several felonies in connection with the death of Joe Benta. The asserted felonies were aggravated burglary, armed robbery, murder and conspiracy. Defendants claim they have been indicted on the same charges; the State does not contest this claim.

Evidence Rule 412 provides for use immunity:

> Evidence compelled under an order requiring testimony . . . or any information directly or indirectly derived from such evidence, may not be used against the person compelled to testify . . . except a prosecution for perjury committed in the course of the testimony or in a contempt proceeding for failure to comply with the order.

Rule of Crim. Proc. 58 states the procedure for obtaining an order to compel testimony. No claim is made that this procedure was not followed. The prosecutor applied in writing for an order compelling these defendants to testify and the children's court, by written order, granted the application and directed the defendants to testify, under penalty of contempt of court. The order contained the findings required by R.Crim.Proc. 58(b), and recited that the State had stipulated to use immunity. See Evidence Rule 412. After entry of this order, each defendant was called to testify in the children's court proceeding; each defendant, advised by counsel, refused to testify; and each defendant was held in contempt.

The prosecutor's application for use immunity relied on Evidence Rule 412, R.Crim.Proc. 58 and § 31–3A–1, N.M.S.A. 1978 (1981 Cum.Supp.). In granting the application, the children's court did not identify the authority on which it relied. Defendants assert that § 31–3A–1 did not authorize the grant of use immunity in this case.

Laws 1979, ch. 337 contains thirteen sections; twelve of those sections refer to proceedings before the grand jury. The one section that does not refer to grand jury proceedings is § 10, on use immunity, compiled as § 31–3A–1. Because the title to Laws 1979, ch. 337 is, "*An Act Relating to Grand Juries; Providing Safeguards and Improving Procedures*", defendants assert the use immunity provided by § 31–3A–1 is limited to proceedings before a grand jury.

■ There is no ambiguity in § 31–3A–1; thus, we do not look to the title to determine legislative intent. As worded, § 31–3A–1 is not limited to grand jury proceedings. See *State v. Ellenberger*, 96 N.M. 287, 629 P.2d 1216 (1981). The question, in light of *Ellenberger*, is whether § 31–3A–1 must be limited to grand jury proceedings in order to meet the title requirements of N.M.Const., art. IV, § 16. It is unnecessary to answer this question.

■ If § 31–3A–1 is limited to grand jury proceedings, then that statute authorized the use immunity granted by the children's court.

If § 31–3A–1 is not limited to grand jury proceedings, then Evidence Rule 412 authorized the use immunity granted by the children's court. *Campos v. State*, 91 N.M. 745, 580 P.2d 966 (1978); *State v. Gabaldon*, 92 N.M. 230, 585 P.2d 1352 (Ct.App.1978); see *State v. McGee*, 95 N.M. 317, 621 P.2d 1129

(Ct.App.1980); *State v. Archunde*, 91 N.M. 682, 579 P.2d 808 (Ct.App.1978).

Use Immunity and the Privilege Against Self-Incrimination

Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), held that "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." *Kastigar* explains that the concern of the privilege against self-incrimination is to afford protection against being forced to give testimony leading to the infliction of penalties for criminal acts. "Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." (Emphasis in original.)

It was argued in *Kastigar* that use and derivative-use immunity subjected a witness to various possible incriminatory uses of compelled testimony, such as "leads, names of witnesses, or other information not otherwise available that might result in a prosecution"; that it would be difficult to identify "the subtle ways in which the compelled testimony may disadvantage a witness". The answer, in *Kastigar*, is that once a defendant demonstrates that he has testified under a grant of immunity, the prosecution has the burden of proof. This burden "imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."

Defendants contend that *Kastigar* is inapplicable because that case involved answering questions before a grand jury under a grant of immunity. Defendants assert that because they had been indicted, and were actual defendants rather than potential defendants, *Kastigar* somehow does not apply. This argument is specious. The privilege against self-incrimination does not turn upon the type of proceeding, but the exposure involved. *State v. Archunde*, supra. Inasmuch as their testimony in the children's court could not be used against them directly or indirectly, and because the compelled testimony could not be used against them in any respect, there was no exposure to self-incrimination from compelled testimony, whether or not they had been indicted.

The grant of use immunity did not violate the privilege against self-incrimination. Compare *State v. DeSantos*, 91 N.M. 428, 575 P.2d 612 (Ct.App.1978); *State v. Smith*, 88 N.M. 541, 543 P.2d 834 (Ct.App.1975).

Use Immunity and the Right to Counsel

Because of the grant of use immunity to indicted, but untried, defendants, they claim a due process violation in that the grant "interferes with 'the guiding hand of counsel' guaranteed to an accused by the Sixth and Fourteenth Amendments of the United States Constitution." Defendants assert that compelled testimony would disclose to the prosecution "any defense each may have" in advance of trial, that such disclosure would not occur absent the order to testify and, thus, disclosure deprives them of effective assistance of counsel which is asserted to be a violation of due process. Defendants contend that the disclosure order interferes with counsel's determination of trial strategy regarding whether defendants should or should not testify at their own trials. Just how this theoretical disclosure deprives defendants of the right to counsel is not shown; nevertheless, we answer this contention on the merits. See *State v. Smith*, supra.

In *Lakeside v. Oregon*, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978), the trial court instructed the jury that the failure of a defendant to testify gave rise to no inference against the defendant and was not to be considered in determining guilt or innocence. Defendant argued that giving the instruction, over defendant's objection, interfered with counsel's trial strategy and interfered with defendant's right to assistance of counsel. *Lakeside* states:

> The argument is an ingenious one, but, as a matter of federal constitutional law, it falls on its own weight once the petitioner's primary argument has been rejected. In sum, if the instruction was itself constitutionally accurate, and if the giving of it over counsel's objection did not violate the Fifth and Fourteenth Amendments, then the petitioner's right to the assistance of counsel was not denied when the judge gave the instruction.

The right to the assistance of counsel "has never been understood to confer upon defense counsel the power to veto the wholly permissible action of the trial judge." *Lakeside v. Oregon.*

In *State v. Allen*, 91 N.M. 759, 581 P.2d 22 (Ct.App.1978), we rejected the contention that the absence of a pretrial ruling on the admissibility of evidence impermissibly interfered with defendant's right to counsel, relying on *Lakeside v. Oregon.* We reject the contentions of defendants in these appeals. The grant of use immunity by the children's court was constitutionally accurate and did not violate the privilege against self-incrimination. Defendants' right to counsel was not denied by permissible action of the children's court in granting immunity. *Lakeside v. Oregon.*

The judgments and sentences for contempt are affirmed.

IT IS SO ORDERED.

WALTERS and DONNELLY, JJ., concur.

635 P.2d 1001

STATE of New Mexico, Plaintiff-Appellee,

v.

Mary Jane ELLIOTT, Defendant-Appellant.

No. 5162.

Court of Appeals of New Mexico.

Oct. 8, 1981.

John B. Bigelow, Chief Public Defender, David Stafford, Asst. State Appellate Defender, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Clare E. Mancini, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Acting Chief Judge.

Defendant was charged and convicted of voluntary manslaughter, which requires an intent to kill or do great bodily harm. U.J. I.Crim. 2.21, N.M.S.A.1978 (1981 Cum. Supp.). The trial court prohibited defendant from presenting testimony that she lacked this requisite intent. We agree with defendant that the trial court erred.

Defendant and decedent had been acquainted most of their lives. Defendant's husband of approximately thirty years died. After dating for a few months, defendant moved in with decedent at decedent's request; they did not marry, but lived together. At the time of the incident in question, defendant was approximately sixty years old.

Defendant and decedent had attended a baptismal celebration in Los Lunas, at which both drank intoxicating beverages and decedent became drunk. Decedent became angry upon leaving the celebration and pushed and hit defendant. On the drive toward Albuquerque an argument developed over several matters, including the speed at which decedent was driving. Defendant turned off the ignition; when the car stopped, decedent again hit defendant. Decedent got out of the car. Defendant made a U-turn and started back to Los Lunas. Deciding she should not leave decedent walking, defendant made another U-turn and headed north. While driving north, decedent was struck with the passenger side of the car.

In her opening statement, defendant admitted that she was driving the car that hit and killed decedent. The defense was that she lacked the requisite intent. In support of this defense she introduced testimony from the officer who arrested defendant, and defendant also testified. However, the trial court excluded the tendered testimony of a psychologist that she lacked the requisite intent.

There is no issue as to relevancy; the trial court recognized the psychologist's testimony would be relevant. The trial court also recognized that the psychologist, Dr. Salazar, was qualified.

The trial court excluded Dr. Salazar's testimony under Evidence Rule 403 on the basis that the testimony would be time-consuming, confusing and somewhat misleading to the jury. We fail to understand the trial court's reasoning. No delay was involved; Dr. Salazar was present and available to testify at the time of the ruling excluding his testimony. This testimony would not have been cumulative; no other expert witness had been called by the defense. See *State v. Brown*, 91 N.M. 320, 573 P.2d 675 (Ct.App.1977), cert. denied, 436 U.S. 928, 98 S.Ct. 2826, 56 L.Ed.2d 772 (1978). We do not know how much time would have been required for a full presentation of Dr. Salazar's testimony because the trial court only permitted a partial

tender. However, even if the presentation of this testimony would have taken some time, the trial court cannot permit the State to present its case and then deny the defendant an opportunity to present a defense on the basis that the defense would be time-consuming. See *State v. Brown*, id.

We do not understand how the opinion of an expert, that defendant lacked the requisite intent, and testimony from the expert as to the basis for that opinion, could be classified as confusing and misleading, and the State's brief does not demonstrate that this testimony would have been either confusing or misleading.

The trial court also excluded Dr. Salazar's testimony on the basis that there was no reason for expert testimony. On appeal, the State argues that Dr. Salazar's opinion was based on the same evidence as was before the jury. This is factually incorrect because the evidence before the jury, on the intent issue, was from nonexperts. The trial court cannot properly prevent a defendant from calling experts in support of the defense on the basis that nonexperts have testified about the same issue. *State v. Brown*, supra; compare *Chacon v. State*, 88 N.M. 198, 539 P.2d 218 (Ct.App.1975). See also *State v. Gallegos*, 92 N.M. 370, 588 P.2d 1045 (Ct.App.1978).

The trial court ruled that Dr. Salazar's opinion would be of no value to the jury; thus, that under Evidence Rule 702, the testimony would not assist the jury in determining the factual issue of the requisite intent. This may be the trial court's subjective evaluation of testimony by a psychologist, but it is not New Mexico law. The opinion of an expert, whose qualifications are not challenged, would assist the jury in deciding the intent issue, and the expert opinion was admissible. *State v. Ellis*, 89 N.M. 194, 548 P.2d 1212 (Ct.App. 1976).

The trial court ruled that if Dr. Salazar's testimony were admitted, that in future cases both sides of the case in a criminal prosecution would offer expert testimony on the issue of intent. The answer is that such testimony by a properly qualified expert, on sufficient foundational facts, is presently admissible if that testimony would assist the jury in determining an issue. Evidence Rule 702; *State v. Brown*, supra; *State v. Ellis*, id.

On appeal, the State seems to argue that Dr. Salazar's testimony, if admitted, would have invaded the province of the jury because the testimony would have gone to an ultimate issue to be decided by the jury. The State is referred to the New Mexico rule which permits such testimony. See Evidence Rule 704.

The conviction is reversed. The cause is remanded with instructions to grant defendant a new trial.

IT IS SO ORDERED.

HENDLEY and WALTERS, JJ., concur.

635 P.2d 1003

PUBLIC SERVICE COMPANY OF NEW MEXICO, Plaintiff-Appellee,

v.

Candido JASSO, III, Defendant-Appellant.

No. 5018.

Court of Appeals of New Mexico.

Oct. 8, 1981.

Stephen M. Williams, Tom Foy, Jr., Foy, Foy & Jollensten, Silver City, for defendant-appellant.

Roy G. Hill, Smalley & Hill, Deming, for plaintiff-appellee.

OPINION

LOPEZ, Judge.

Candido Jasso III negligently damaged a power pole owned by the Public Service Company (PNM). PNM billed Jasso for $424.00 for replacement of the pole. Included in the bill were percentage charges for fringe benefits and other overhead costs, which amounted to $42.00. Jasso admitted liability and paid certain of the damages assessed against him for destruction of the pole, but refused to pay the two claims for particular damages which are the subject of this appeal. When Jasso refused to pay the $42.00, PNM sued him in magistrate court and was awarded a judgment. Jasso appealed to the district court, which granted a de novo hearing. The district court awarded PNM a judgment for the $42.00, and it denied Jasso an offset for depreciation on the pole.

Jasso appeals the judgment of the district court, raising two issues: (1) whether he is liable for fringe benefits and other overhead charges, and (2) whether he should be allowed an offset for depreciation on the old pole. These issues constitute a matter of first impression in New Mexico, involving what damages are properly recoverable against a tort feasor who has damaged property of a public utility. We reverse.

The disputed charges were listed as:

Pensions and Insurance, % of labor

Illness, Injury, etc., % of labor

Holiday

Administrative and General.

We will refer to the first three charges as fringe benefits. In this case, the fringe benefits charges were not based on a percentage of the labor costs for this repair, but were based on a percentage of PNM's total work force. The general and administrative charge was calculated from PNM's overall operating expenses.

There is case law from other jurisdictions which allows similar charges as part of the measure of actual costs, if they are determined on a reasonable basis. *Curt's Trucking Co. v. City of Anchorage*, 578 P.2d 975 (Alaska 1978); *Polk v. Oklahoma Gas and Electric Company*, 410 P.2d 547 (Okl.1966); *New York State Electric and Gas Corp. v. Goettsche*, 48 Misc.2d 786, 265 N.Y.S.2d 809 (1965).

Other cases have disallowed these kinds of charges as damages on the basis that there is no reasonable connection between

the negligence of the defendant and the damages charged, *U. S. v. Denver & Rio Grande Western R. Co.*, 547 F.2d 1101 (10th Cir. 1977), or that the damages do not proximately result from the defendant's negligence. *Central Illinois Light Company v. Stenzel*, 44 Ill.App.2d 388, 195 N.E.2d 207 (1963) (The court in this case did allow charges for fringe benefits calculated on percentage of labor costs for repair crew used in particular repair, only; administrative and general charges disallowed.)

These considerations would be pertinent to the issues in this case if we determined that the disputed charges constituted a loss to PNM. However, there was no proof that the fringe benefits and other overhead expenses were incurred by PNM as a result of Jasso's negligence. To the contrary, there was undisputed evidence presented at trial to show that these expenses are included by PNM in the charges to its customers, the rate-payers. Because they are paid by PNM's rate-payers, these expenses cannot be viewed as a loss to PNM. The theory of damages in New Mexico is to make an injured party whole, not to allow him a profit on damages. *Fredenburgh v. Allied Van Lines*, 79 N.M. 593, 446 P.2d 868 (1968); *Terrel v. Duke City Lumber Co.*, 86 N.M. 405, 524 P.2d 1021 (Ct.App. 1974); Committee Comment to N.M.U.J.I. Civ. 18.15, N.M.S.A. 1978 (1980 Repl. Pamph.). The fringe benefits and general and administrative charges are not appropriate elements of damages in this case, because they do not compensate PNM for any loss.

The same reasoning applies to the question of whether Jasso should be allowed an offset for depreciation on the pole he damaged. PNM installed the pole 27 years before Jasso damaged it. There was evidence at trial that PNM depreciated its poles over a 30-year period. PNM recovers the value of the pole by calculating depreciation into its rate base, paid by the rate-payers, and into its tax obligations.

By refusing Jasso an offset, the trial court allowed PNM to recover depreciation on the pole from both the rate-payers and from Jasso. Cases allowing depreciation include *New York State Electric and Gas Corp. v. Fischer*, 24 App.Div.2d 683, 261 N.Y.S.2d 310 (1965); *Central Illinois Light Company v. Stenzel. Contra, Polk v. Oklahoma Gas and Electric Company; Middle Tennessee Elect. Membership Corp. v. Barrett*, 56 Tenn.App. 660, 410 S.W.2d 914 (1966).

Jasso is entitled to an offset for depreciation on the pole he damaged, to be determined by computing the depreciation recovered by PNM over the 27 years since the pole was originally installed.

We reverse and remand to the district court for entry of judgment consistent with this opinion. Appeal costs are to be paid by PNM.

WALTERS and DONNELLY, JJ., concur.